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Property Relations: Ukrainian Real Estate Law

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This chapter examines the principal features and problems of Ukrainian real estate law. At the outset, it should be noted that Ukrainian law is still in the process of development, particularly concerning acquiring and leasing residential and office space in urban areas. Despite improvements there remain several significant but little-noticed problems, discussed below, that can make confirmation of title to premises difficult, if not impossible, and which have resulted in losses to unsuspecting purchasers. Most significantly, some title transfers and mortgages may not be reflected in the public registries. It is expected that these problems will be resolved in the near future, but for now they present legal as well as practical problems for many transactions.

During the past nine years, following the adoption of new legislation on real estate aimed at enabling Ukrainians to acquire their own dwellings by privatization, most residential apartments in the cities of Ukraine have been privatized by individuals. This legislation allows buildings, and the apartments and offices in them, to be owned privately by both Ukrainians and foreigners. An active real estate market in premises has resulted from this privatization.

In general, however, most land in urban areas is still owned by the state, although rights may be granted to permit long-term use by the owners of buildings to the land underneath. As discussed below, the new Land Code of 25 October 2001 provides that Ukrainians and foreigners may in certain instances purchase land in Ukraine, in particular under buildings and other structures that they own.

Transactions in buildings and other constructions

Privatization of residential apartments by Ukrainians

Ukrainian urban residents may privatize the apartments they rent from the State by purchasing them for a state-appraised value. This right arises from the 19 June 1992 Law 'On Privatization of the State Dwelling Fund'. This Law effectively credits each Ukrainian individual with certain assets, so that whether any payment above this amount is in fact due from the occupier depends on a valuation based on the location, type, condition and size of the premises and on the number of family members or other occupiers involved.

For example, in Kyiv, a family of three may ordinarily privatize an apartment of 73 m² or less for free. For a larger apartment an additional payment would usually need to be made for the extra space, based on a formula. Such an owner might therefore choose to continue to rent the premises rather than pay to privatize them. Once privatized, the owner may deal with the premises as he or she wishes, including selling, leasing, mortgaging or otherwise disposing of them.

Purchase and leasing of premises by foreigners – specially required permissions

Under Soviet law, until 1991 foreigners were prohibited from purchasing any real estate interests in Ukraine. Under the Law 'On Property' adopted in 1991 foreigners were permitted to purchase buildings, as well as offices and residential premises in them. However, in order to be valid, purchases of such real estate by foreign companies and other legal entities must apparently be authorized by a permit as required by the regulation 'On Changes and Amendments to the Resolution on the Procedure for Locating Diplomatic Representations, Consulate Offices of Foreign Countries, and Representations of International and Foreign Organizations' of the Cabinet of Ministers of Ukraine No. 670, of 28 June 1997).

The regulation is being used to prohibit any purchase or leasing of apartments, offices or other real estate by foreign companies except with the permission of a designated governmental body. Such an interpretation is questionable since the regulation only obliquely refers to 'foreign firms, etc' in its definition of what constitutes a 'representation of a foreign organization that is reached by its requirements'. (The regulation otherwise generally focuses on the diplomatic representations of countries and international organizations.)

However, the Ministry of Justice has expressed its opinion to the 1st Kyiv state notary and several other state notaries in Kyiv that the regulation applies to all foreign legal entities (notaries in Ukraine, as

under most other European civil law systems, are a type of lawyer with special statutory qualifications and powers to handle certain types of transactions, including in particular those involving the sale or mortgaging of real estate). In addition, the General Direction for Services to Representative Offices (known by its Ukrainian abbreviation, GDIP), which issues such permissions in Kyiv (elsewhere in Ukraine the appropriate *oblast* administrations and the city administration of Sevastopol grant such permissions), has implemented the regulation, apparently on the instructions of the Ministry of Justice, to require GDIP's approval for all purchases or leases of premises by foreign companies in Kyiv.

On this basis GDIP has refused to permit numerous proposed purchases by Western companies. GDIP takes the position that any purchase without its permission is void and subject to legal challenge. This position is, however, contrary to the literal wording of the regulation, which requires approval only if the premises are being purchased 'to locate a representation of a foreign organization', which should exclude purchases of premises for other purposes, for example, for further development with a view to sale or lease.

The requirement for the receipt of such permission is also provided for in the instruction of the State Construction Committee of 9 June 1998 'On the Procedure for the Registration of Title of Legal Entities and Individuals to Immoveable Property', which states that the Bureau of Technical Inventory (BTI – the agency for registration of title to real estate other than land) will register agreements for the purchase of real estate by foreign organizations only if the relevant permissions have been obtained. As a matter of practice, however, we understand that the BTI is still registering transfers for companies as well as diplomatic representations even if the permission required by the regulation has not been granted. (This has caused a problem for one embassy in Ukraine, which was subsequently obliged to give up premises because of the lack of GDIP permission.)

Procedure to purchase offices and apartments

To purchase an office or residential premises the first step for the buyer is to verify the seller's title by reviewing the title documents and checking these with the notary or exchange (auction) house (if one was used) responsible for the conveyance.

Traditionally, state notaries and the BTI would ordinarily only register a transfer of title based on the short-form types of contracts generally used in Ukraine, which in one or two pages (with annexes) documented only the bare conveyance of title with no guarantees or other protections. Typically such agreements merely state the names of the parties, the address of the premises with a brief description of the floor plan, the price and the current registration number for the premises allocated by the BTI. The agreement will show the signature of the parties and

the signature, seal and number of the notary, if one is used. The authorities have in the past usually resisted the typical Western-style longer, detailed contract as being unusual and unnecessary.

Full contract protections should be sought

However, the law of misrepresentation and fraud is not well developed in Ukraine, and thus there is only very limited recourse against sellers under the typical short-form contracts used in Ukraine. For protection under Ukrainian law it is advisable to have all agreements, guarantees and indemnities as fully documented contractually as possible in the purchase agreement. Fortunately attitudes are changing, and a number of state and private notaries and other state officials now accept contracts that contain covenants similar to those one would expect in the West. Increasingly more elaborate agreements, such as those common in the West, are being used for substantial transactions, especially where foreign buyers and their lawyers are involved and the Ukrainian seller has substantial assets and can be held accountable. Agreements guaranteeing, for example, absolute and unconditional title, the good physical condition of premises and the absence of any knowledge of adverse claims and defects may often be obtained by negotiation. The purchase contract that is registered with the BTI must contain a Ukrainian version, but the contract can be made in two or more languages.

Documents required of the seller

Turning to the title documents that should initially be presented by the seller, ordinarily this includes:

- a certificate of privatization, a purchase contract (which will usually be notarized showing the number and bearing the seal of the notary before whom it was executed), or evidence of inheritance or gift;
- a certificate from the appropriate office of the BTI stating that the seller is the owner and citing the BTI registration number;
- a certificate from the Unified Register of Prohibitions on Disposal of Immoveable Property on the absence of mortgages, arrest or other encumbrances (however, for the reasons discussed below, such a document will not necessarily provide conclusive proof that the property is in fact owned free of adverse claims).

An individual should also show his or her passport.

In addition, investigation should be made into any *propiskas* – the residency permits for individuals stating in which locality and where they live (the *propiska* is a Soviet-era requirement that the Ukrainian government has announced will be abolished in the near future). In particular, a buyer should confirm that all individuals who could have residential rights to the premises (including children through their

representatives) have relinquished their rights. Therefore a certificate from the local state dwelling management enterprise (known as ZHEK, discussed below) should also be obtained to confirm who is listed as residing at the premises as well as the status of payments for utilities.

A corporate seller will need to prove that it is a validly existing and registered entity and that its representatives are properly authorized to enter into the sale transaction, which is usually accomplished for a foreign company by providing a fully notarized and legalized (including by a Ukrainian consulate abroad) set of the following documents with certified translations into Ukrainian:

- resolutions on the appointment of the company's officials who have signatory authority or other documents that confirm the authority of the company's representatives;
- a copy of the certificate of incorporation of the company;
- a copy of the foundation documents (charter, memorandum and articles of association or similar document) of the company or extracts thereof confirming the authority of the company to sell real estate;
- a power of attorney from the company's officials authorizing any individual representing it to sign on its behalf, if applicable.

Documents required of the buyer

On the buyer's side, an individual needs to show his or her passport. A corporate buyer will need to prove that its representatives are authorized to enter into the purchase transaction, which is usually done with documents paralleling those indicated above for a corporate seller. In addition, a foreign company should have the permission (discussed above) for the purchase from GDIP, for Kyiv, or of the relevant *oblast* or Sevastopol city administration, as applicable. The notary will also require the submission of receipts confirming that the state duty and pension fee (each constituting 1 per cent of the amount of the transaction) have been paid.

Due diligence for purchases

Before a purchaser completes any acquisition of real estate in Ukraine, for many reasons (including those discussed further below on title and mortgage verification) a complete due diligence of title, starting with the original transfer from state ownership (if applicable), should be conducted. If a building or other construction was built by the owner, the necessary construction documentation (permission for construction, project approval documentation including the Governmental Act (discussed below), etc) should also be verified, since the absence of any of the required documents may lead subsequently to a prohibition of any use of the structure that was improperly constructed.

The importance of exhaustive due diligence for title transfers in Ukraine can not be overemphasized, especially for substantial transactions. The seller should not rely merely on the BTI and notarial documents of the seller, although typically Ukrainian sellers will not initially volunteer more documents than these, based on traditional practice. In addition to verifying the title legally, certain practical verifications should be made as to the complete chain of title.

These should include a physical site inspection and enquiries into past residents. For example, if a building was built initially, or was entirely rebuilt, without a right of land use first being obtained from the local council (beyond the right that automatically arises for owners of existing buildings, which would not apply for a rebuilding where the original building was destroyed, as discussed in the second section of this chapter, on land use rights), the purported owner would have illegally constructed premises on the state's land. The state could require that the premises be moved or destroyed, or possibly have them confiscated. Likewise, approvals must be granted for most modifications to premises, for example to subdivide a room or remove a dividing wall. A sale of premises with unapproved modifications is subject to fines, and this could be a basis for voiding the prior sale. Cases such as these have actually occurred, although usually such problems can be cured if timely and effectively handled with the relevant authorities.

The technical description of the property being purchased should correspond exactly to all official records, including the BTI certificate. In addition, the purchaser should inspect the technical passport for the property, a description of the property with drawings prepared by the BTI for each property. For a corporate party to a sale, it is also important to verify that the company's actions were properly authorized. In connection with this, its charter and foundation agreement (or equivalent documents), and documents on appointment of the person signing for such party, should be reviewed. In Ukraine, however, the charter and foundation agreement are not available for public inspection and verification, although in practice some solution is usually possible in this regard.

Lease-purchase option agreement to protect the purchaser pending completion

In the meantime, while due diligence proceeds, in order to protect the purchaser's right to acquire the property on the agreed terms, a long-term lease with a purchase option might be signed. Such a lease-purchase option document could give the purchaser the right to hold in escrow the prior purchase contract or other evidence of title, which could make a transfer to others more difficult, if for example a third party offers the seller a higher price before completion. While not required, it would

be preferable to have this lease–purchase option document executed before the notary (if one was used) who was responsible for the previous sale of the property, and who holds one of the original copies of the prior purchase contract.

A seller will often require a down payment before parting with its original copy of the prior purchase contract, usually in the amount of 1–5 per cent of the purchase price. Ordinarily such contracts provide that if the seller sells to a third party in violation of the down payment terms then the seller suffers a penalty, such as being obliged to pay double the amount of the down payment to the purchaser under the lease–purchase option.

Completion of the purchase

Once good title has been verified as far as possible through the due diligence process, and the price and other sale terms agreed, the purchase contract (usually called in Ukraine a ‘purchase–sale agreement’) is ordinarily executed before a notary, and the transaction is listed in the notary’s register of notarial acts. Usually two original copies of the purchase contract are prepared, with one copy for the buyer and one for the notarial records, and a notarized copy is provided to the seller.

The buyer should then apply for the transfer of the property to be registered at the appropriate BTI office and obtain a registration number and an appropriate certificate or stamp on the purchase contract. Once a BTI certificate and registration number exist the documentation formalities are completed, although in fact under current law the moment when title actually passes is established by the contract of purchase.

Risk from possible prior transfers by companies without notarization or registration

Unfortunately, there are some loopholes in the notarization and registration process described above. For example, as currently provided in provisions of the Ukrainian Civil Code adopted in 1963, as amended, it is literally possible for a company validly to sell premises to another company without using a notary and without further registration. Article 227 of the Civil Code of Ukraine provides that notarization of a purchase agreement for premises is only required if one party to the agreement is an individual, so there is no direct obligation for notarization of an agreement on the sale of premises between companies. While there is a legal obligation to register such sale at the BTI, there is no time limit for the completion of the registration and no penalties for failure to register. The lack of registration does not affect title to premises, and a delay in registration does not alter the date as of which title passes under the purchase contract.

Presumably companies were not required to use notaries when the 1963 Civil Code was adopted because they were all state owned, so there was thought to be no risk of fraud. The situation is now quite different since most companies are privately owned. This exception is not widely known, and to comply with the BTI's expectations for its registration and provide the best evidence of execution most purchase contracts between companies are notarized.

However, presently title to premises can still be secretly transferred between companies without there being any public record. This creates a risk of fraud from sellers selling the same premises twice as well as from back-dated documents, for example where a former general director signs a contract to sell his former company's property, with the contract back-dated earlier to when he had authority to sign, thereby undermining any sale subsequent to the date of such contract unless the fraud can be proved.

Defects in title affect all subsequent buyers

Such risks are usually dealt with as a practical matter, by an exhaustive examination of every transaction and document and every person and entity involved in the chain of title. Such a thorough examination is required for the complete title chain since, if there was for any reason a fraudulent conveyance earlier, then the present owner cannot convey good title because a seller cannot sell more than the seller previously received.

For example, in a recent case over a multimillion dollar development in Kyiv, it was proved that a director of the company that originally privatized the building in question had forged the signatures of most of the shareholders to authorize the privatization transaction. As a consequence the Western developer, who was the third private owner of the building, lost its title in a litigation brought by shareholders of the original private owner, even though the Western purchaser had paid fair value to acquire it without knowledge of the earlier problems with the privatization and had spent millions of US dollars to renovate it. The court found that the Western developer failed to conduct sufficient due diligence prior to its purchase and that, as the initial private sale was void, good title could not be passed on to the developer.

It is expected that most of these types of issues will be addressed by changes in the new Civil and Housing Codes presently under consideration. The changes in law needed to require all titles to be registered, and for priorities in title to depend upon the date of registration, are relatively minor. On this basis, with corresponding law revisions to require registration of all mortgages (discussed below) and the addition of a few other minor amendments, clean title opinions could be issued in Ukraine in all circumstances as in Western jurisdictions.

Mortgages and the risk from prior unregistered mortgages

Ukrainian legislation permits mortgages (*hypothecas*), but presently they may be of limited value because they do not need to be publicly registered. This results in a risk of undisclosed prior mortgages, which can be a problem for both subsequent title transfers as well as later mortgages.

In order to create a mortgage a mortgage document must be executed between the owner (mortgagor) and the creditor (mortgagee) before a notary. Once mortgaged, the owner cannot sell the property, except with the creditor's consent, until the mortgage is released.

Information on such mortgages may be officially reflected in the Unified Register of the Prohibitions on the Disposal of Immoveable Property (Register), administered by the State Enterprise 'Information Centre' of the Ministry of Justice of Ukraine. However, there is an inconsistency among Ukrainian laws as to whether a mortgage of a building or other premises is presently required under Ukrainian law to be so registered, unless the terms of the mortgage itself so require. Probably mortgages that do not provide for registration do not need to be registered. In fact, mortgages are often validly executed before notaries without being listed in the Register.

Although all mortgages must be notarized, and in theory all state notarial records could therefore be individually checked within the applicable administrative area to identify whether a property has been mortgaged, checking notarial records is in practice too difficult and time-consuming to be effective. For example, there are over 100 public and private notaries scattered throughout the city of Kyiv. To contact them all (which could not be reliably done by telephone) would take considerable time, and many, if not most, notaries will probably not co-operate with the conduct of such an unusual search.

However, other practical ways exist to try to limit such risks. For example, ordinarily for a mortgage to be granted the notary involved will require a BTI reference document on the property that was issued for the purpose of establishing the mortgage. It can usually be ascertained whether the BTI has ever issued such a document for a mortgage as well as to whom the document was issued (although the BTI is not presently required to provide any such information).

There are also currently ambiguities concerning the enforcement of mortgages. If the debtor defaults, then in principle the creditor has a right to possess the property. However, the law does not provide for any procedure for the disposal of property taken over through a real estate mortgage by foreclosure.

Since the mortgage instrument was introduced by the Law 'On Pledge', and the separate presidential decree 'On Mortgage' was voted

down by parliament, it is arguable that the procedure for the disposal of pledged property should be applied to the disposal of property foreclosed under a real estate mortgage. Such procedure permits a creditor, in the event of a default, to bring a lawsuit in order to have the property sold at a public auction, if no other disposition is provided for in the pledge agreement. Following a sale in such an auction the creditor receives what it is owed after the services of the auctioneer are paid for, and any balance remaining is paid to the debtor.

Special considerations for the acquisition of buildings – ZHEK and project approvals

Where a building is to be acquired, either by outright purchase or by purchasing all of the apartments, special considerations apply. For formerly state-owned buildings, the State typically retains ownership of the non-privatized apartments and the common parts, with title usually held by the executive committee of the appropriate local council, which in turn delegates management to the appropriate local state dwelling management enterprise (known by its Ukrainian abbreviation ZHEK). The owners of all the apartments are then required to enter into maintenance agreements with the ZHEK. Each apartment owner under such agreements will be obliged to pay ZHEK for its maintenance role, regardless of whether any services are actually provided, at rates that vary depending on the size of the apartment, the number of occupants and whether the apartment is for business or residential use.

It is, however, possible for the owners of all of the apartments and other premises in a building, following their complete acquisition by privatization, to form an association of owners (a condominium) to take over the ownership of the common parts and the responsibility for their maintenance. The condominium can then either retain ZHEK or independently contract for its building maintenance.

However, where one or more private owners take over ownership of all of the common parts as well as the apartments and other premises of a building, they will be required to obtain a right of use (likely only to be granted on a temporary basis) and then to pay either land tax or, if they enter into a lease under a temporary use, rent. Where the common parts of an apartment building remain owned by the State there is no charge under current law to any private owners of the apartments in the building for the land use for the building.

If the whole building is acquired by this condominium process, or is otherwise acquired outright (including by 'greenfield' new construction), then another consideration is to document the rights to the land under the building (or the construction site). In the past, for foreign purchasers, this meant that the rights to use of land by temporary use allocation or lease or permanent use allocation had to be confirmed or established.

Based on the new Land Code, foreign purchasers should soon be able to obtain ownership rights to land under buildings (either by purchasing land from the seller of the building or, if the seller only has land use rights, by having these rights relinquished and then purchasing the land from the state). The procedures for such transfers of land should be developed in the near future based on the recently adopted Land Code, as will be discussed in the next section of this chapter.

In addition, a governmental act on acceptance of the building into operation should be executed by the appropriate governmental commission to permit the use of most buildings and other constructions (especially if the premises were formerly part of an industrial enterprise or complex) as part of the project approval process. The governmental commissions that provide such governmental acts are normally supposed to be made up of specialists and governmental officials competent in a number of fields relevant to the proposed activities at the structure as well as in other areas that may be potentially affected by the contemplated use, such as the authorities responsible for health and safety, fire and labour protection.

One of the principal legal acts on such governmental commissions is the instruction 'On the Acceptance into Operation of the Completed Objects of Construction', adopted by the Cabinet of Ministers of the USSR on 23 January 1983 (Instruction), which remains in force (Soviet laws remain in effect in Ukraine to the extent they are not inconsistent with or replaced by Ukrainian law). The instruction creates a general procedure for the establishment of such commissions as well as the project approval process that must be followed for a commission to authorize the entry into operation of facilities or other constructions.

The instruction prohibits the start up of operations of any facility or construction without the execution of the governmental act by each of the representatives of the 'State supervision authorities' (clause 8, para. 3). This is interpreted as referring to the state health and safety, fire, labour protection and all other authorities on a commission. Most of the sanctions that may be imposed by these governmental authorities for non-compliance mirror each other. Thus, if health and safety, fire or labour protection authority approval is lacking, the owner of the building or other facility in question may be liable for penalties or the authority may close down the building or facility, either temporarily, until compliance with the order of the authority, or indefinitely.

Surprisingly, a significant number of buildings and facilities in Ukraine, including those of some major Ukrainian enterprises, have been found to lack the appropriate governmental act, especially those buildings that were built or renovated in the aftermath of the Second World War. Usually these sorts of problems can be readily corrected, especially if they arise while the building or facility is still owned by a state enterprise. However difficulties can ensue, particularly if such issues are not

appropriately handled before completion of a transaction. In general, requirements such as these underline the need for thorough due diligence before a purchase is made.

Leasing of premises

Leases of offices, residential dwellings and buildings may be validly granted, including to foreigners, as noted above. Unlike for leases of land, no restrictions currently exist to limit the duration of such leases (however permission from the appropriate state agency, in Kyiv from GDIP, is apparently required, as discussed above).

Typically a lease should define the rent, the term, and the extent and type of permitted refurbishments, and may provide for first refusal rights should the premises be offered to a third party purchaser. In general, the lease provisions can cover whatever else the landlord and tenant agree. Leases shall be in Ukrainian (but may also be in one or more other languages) and may, but need not, be executed before a notary. If the lessor conveys title to the leased premises to another person then, unless the lease provides otherwise, the transfer is subject to the lessee's continuing rights to the leased premises under the existing lease.

Transactions in land

New Land Code

The new Land Code, which was recently adopted and came into effect on 1 January 2002 (the Land Code), represents a fundamental change to Ukrainian real estate law. It introduces new rights to private land ownership and land use, as well as the principle that land can be freely bought and sold. Although private land ownership is permitted under the Ukrainian constitution of 1996, it is subject to further implementation 'as may be provided by the law', and previously the existing law was very restrictive. Under the prior Land Code of 1992 (the 1992 Land Code) only Ukrainian individuals were entitled to own land, and only in limited circumstances, such as for rural homes, garages, farms and gardens.

The Land Code greatly expands the list of permitted land purchases. It allows land intended for non-agricultural use to be purchased by Ukrainian and, in certain cases, foreign individuals and legal entities. However, for these fundamental changes to be implemented and applied in practice, a number of supplemental legal acts will have to be adopted on such issues as land valuation, the creation of the proposed Register of Land Plots and land surveys.

The Land Code establishes transitional periods (moratoriums) before certain land transactions can take effect. To begin with, prior to 1 January

2005, land plots that are owned by legal entities or individuals for agricultural purposes or by individuals cannot be sold or otherwise disposed of except by exchange or inheritance. The reference to the 'exchange' of land plots is ambiguous, and might provide a way around some restrictions depending upon the implementing legislation. Presumably 'exchange' means in exchange for other land plots, though the Land Code fails to specify this.

Only starting from 1 January 2005 may land be used as a contribution to the charter fund of a company. Until 1 January 2010 acquisitions of land for agricultural use are limited to 100 hectares. However, even upon completion of these transitional periods, the rights of land owners may still be limited. For example, under the Land Code land may only be mortgaged to secure bank loans, and land plots may only be contributed to the charter funds of those companies that are exclusively founded by Ukrainian individuals or entities (although apparently these Ukrainian entities can be owned by foreigners). In addition, the Land Code expressly provides that further limitations of land ownership rights may be provided by subsequent legislation.

Ownership of land

Owners of land

The new Land Code provides that the following persons may be owners of land in Ukraine:

- the State, which exercises this right through the Cabinet of Ministers of Ukraine, the Cabinet of Ministers of the Republic of Crimea, and the relevant *oblast*, Kyiv and Sevastopol city state administrations with respect to land in state ownership;
- municipalities, which exercise this right through local councils (local self-governing bodies) with respect to land in cities and villages;
- individuals and legal entities, with respect to land in private ownership.

In accordance with the Land Code municipal land may be allocated to a private person on the basis of an appropriate decision of a local council. In Kyiv, such authority was granted to the Kyiv City Council. Land owned by the State directly (rather than through municipalities) may be allocated on the basis of a decision of the local state administration where the land plot is located.

Prior presidential decrees

Prior to the adoption of the Land Code, with a view to encouraging entrepreneurship, a number of decrees were issued by the president of Ukraine to allow privatization of land by individuals and legal entities,

such as the decree of the President No. 608/95, 'On the Privatization and Leasing of Non-agricultural Land Plots for the Purpose of Entrepreneurial Activity' of 12 July 1995 (1995 Decree) and the Decree of the President No.32/99, 'On the Sale of Land Plots of Non-Agricultural Designation' of 19 January 1999 (the 1999 Decree). These decrees remain effective, and are likely to continue until the new implementing legislation for the Land Code is adopted.

The 1995 Decree provided for the privatization of land by means of sale to Ukrainian individuals and legal entities for the purpose of carrying out entrepreneurial activity. However, the validity of the 1995 Decree has been questioned by numerous commentators because it contradicted the then applicable 1992 Land Code, which should have prevailed.

We are aware that, nonetheless, in the past a number of land sales were conducted on the basis of the 1995 Decree and were later registered. Probably these transfers are invalid and cannot be the basis for a further transfer of good title. Apparently in recognition of this, the 1995 Decree was never implemented.

The 1999 Decree also provided for the sale of land owned by State and municipal authorities to Ukrainian individuals (including, in particular, those registered as entrepreneurs) and legal entities. This right to purchase land only arose under the 1999 Decree for land plots underlying buildings, constructions or unfinished constructions. Undeveloped 'greenfield' sites cannot be sold or otherwise privatized under the 1999 Decree.

The 1999 Decree created a right for a privately owned Ukrainian legal entity to purchase the land underneath an unfinished construction only if the unfinished construction was on a non-agricultural site and such unfinished construction had been previously privatized or purchased by it. The 1999 Decree should have applied to Ukrainian entities that were, in whole or in part, foreign owned, as no distinction was made in the 1999 Decree between Ukrainian companies that are Ukrainian, rather than foreign, controlled.

Initially, as was the case for the 1995 Decree, the 1999 Decree was not fully implemented in practice. Possibly this reflected some early doubts expressed as to its constitutionality. Most commentators now appear to accept that it was validly adopted (an issue that turns on whether the 1999 Decree lawfully filled in 'gaps' in legislation, or instead improperly addressed matters governed by the 1992 Land Code). As a consequence a number of acts and resolutions of local councils have recently been adopted to clarify the procedures for the sale of land pursuant to the 1999 Decree. For example, Kyiv City Council has confirmed that land plots and unfinished construction sites may be sold to appropriate real estate owners, including those Ukrainian entities that own the structure above the land plot or site.

The procedure for purchases under the new Land Code

Under the new Land Code most of the land within residential city areas and land intended for industrial use can be sold, except for land for streets, parks, beaches (some of which may be leased), cemeteries, other city areas that are in public use, railways, highways, pipelines, and the Chernobyl zone affected by radiation.

In cases where the land underneath a building was previously allocated for temporary or permanent use to a Ukrainian entity (including if foreign owned or controlled), the procedure for the entity to obtain ownership over such land plots is now rather simple. In order to obtain such land ownership an application must be submitted to a local council or local state administration, as appropriate, together with the current state act for permanent use of the land plot or a land lease agreement (certifying the temporary right of use) with the local council or state administration, a plan of the land plot, an expert valuation of the land plot and a copy of the Certificate of State Registration of the applicant.

The local council or state administration is supposed to review the application within a one-month period. The only permitted reasons for the refusal of such a land allocation, as expressly listed in the Land Code, are:

- the absence of any documents required for the allocation of the land plot;
- the discovery of false data in the documents that are submitted;
- the initiation of bankruptcy or liquidation proceedings against the applicant. This should leave no discretion for a council to refuse to act.

If a company wishes to purchase a land plot that was not allocated previously for its permanent or temporary use it should submit additional documents to constitute a 'project of land allocation'. In this case, the process of land allocation by the local council or state administration, as appropriate, may take a relatively longer time, because several state agencies are involved in drafting and providing consents on the project of land allocation.

For example, the local Department of Land Resources, the State Agency on Architecture, the local Sanitation-Epidemic Station, the State Department of Environmental Safety and the Department for the Protection of Historical Heritage must all issue required permissions. Several land surveying agencies must also prepare project estimates and allocate the borders of the land plots. Each of these agencies is allotted from 20 to 30 days to consider the application and accompanying documents and, therefore, the whole process could take up to four months. Each state inspection body named above requires the payment of certain fees for the issuance of the necessary documents.

An agreement on a purchase of the land plot must also be concluded between the company and local council or state administration, as appropriate, and it must be notarized. Land purchasers have to pay for the land, unless they qualify for so-called 'unpaid privatization' (which applies only to Ukrainian individuals). Payment to the local council for a land plot may be made in instalments. Following execution of the land purchase agreement and payment of the purchase price the land purchaser should be given a state act of ownership of the land to confirm ownership of the purchased land plot.

The land underneath a residential building (including under any adjoining constructions and territory that is considered an integral part of it) will initially be allocated to the organization that administers the building (such as ZHEK). However, if the building's ownership is privatized by a condominium (as discussed above), the apartment owners who form the condominium association can also privatize for free, or obtain use rights over, the land plot underneath.

As discussed above, until the new procedures for implementation of the Land Code are established, presumably the existing procedures for the sale of land that were established by the Cabinet of Ministers resolution No. 440 of 24 March 1999, pursuant to the 1999 Decree, will continue to apply.

Purchases by non-residents

Under the new Land Code, foreign individuals and companies are now able to purchase land plots underneath buildings and other constructions that they own, whether located in city areas or outside a city. In addition, they can purchase land plots for construction within city areas. The basis for obtaining ownership rights to such land plots are:

- private land purchase agreements (or certain other types of agreements) that are subject to notarization and should contain the specified mandatory clauses on the size of the land plot, amount of payment, purpose of use of the land plot, etc;
- inheritance; or
- purchase of the land plot from a local council or local state administration.

Non-residents are still not allowed to own land intended for agricultural use. However, the procedure for changing the intended use of land has been simplified by the Land Code as compared to the similar provisions contained in the 1992 Land Code. Thus the authority to decide on the intended use of a particular land plot is now reallocated from the Ukrainian parliament to the local councils and state administrations, which can decide on a change of intended use of a particular land plot when taking a decision on its allocation to a foreign person. The new Land

Code provides that a procedure for making such a change in intended land use will be established by the Cabinet of Ministers.

However, in order to purchase land underneath real estate, non-residents will have to register a branch office in Ukraine that will carry out business activity in Ukraine (a taxable 'permanent establishment'). A foreign person or entity that wishes to purchase a land plot which was previously leased to it would have to submit an application to the relevant state administration or council, as the case may be, with copies of the land lease agreement and the certificate of state registration of the branch office, and a confirmation that such office is 'operational' (the Land Code fails to state which documents should confirm that). In addition, the local council or state administration may only consider such an application if it has the approval of the Cabinet of Ministers, which apparently must be given for each transaction (as required by Article 129, sections 2, 5 and 6 of the Land Code). In practice, this may greatly increase the time required for non-residents to purchase land (and will possibly effectively prevent many transactions).

Land auctions

The new Land Code has introduced public land auctions amongst its new tools for land allocation. Land plots that are not privatized or sold in accordance with the procedures discussed above may be sold through such public land auctions. These auctions are expected to be held mainly to facilitate new construction.

In order to take part in such land auctions potential purchasers should pay a registration fee and guarantee payment of certain minimum amounts based on criteria that will be established in the future. The land auction can be initiated by the local council or state administration or by the State Enforcement Service to implement a court order. If the land for sale belongs to the State or a municipality, the local state or municipal authorities should prepare all the required documentation for the land allocation, in particular to determine the borders of the land plot and prepare its so-called 'technical passport'.

Information on a land auction with a detailed description of the land plot that is to be sold is required to be published in a local newspaper not later than 30 days prior to such auction, and a billboard with this information must be placed on the land plot. The land auction will only be valid if there is more than one potential purchaser and the proposed bids exceed the initially stated minimum bidding price.

Leasing of land

In addition to ownership of land (as discussed above) the new Land Code provides, as a second basis for use of a particular land plot, the leasing of land. (The Land Code also continues to permit permanent land use

rights for state lands to be granted to state or municipal entities by local councils and local state administrations for any purposes (in the old Code there were also temporary use rights, but these have been abolished.) In addition to the Land Code, land leasing is regulated by the Law of Ukraine 'On Land Leasing' of 6 October 1998, No. 161-XIV (the Lease Law), which is expected to be amended as part of the implementation of the Land Code.

Under the Land Code land can be leased from the State or a municipality as well as from private owners. Foreigners may lease land on the same basis as Ukrainians. The 1992 Land Code limited leases granted by individuals to a term of three years, which contradicted the relevant provisions of the Lease Law on terms of lease. This limitation has been eliminated in the new Land Code.

There are now short-term and long-term leases. A short-term lease may run for up to five years. A long-term lease may run for up to 50 years less one day, and arguably may be prolonged (including by an agreement at the outset on a right of renewal). The Law provides that the current lessee has a priority right to prolong a land lease, but only if it matches all other terms proposed by others, such as the rent that is offered.

To be valid, leases of land must contain terms on a number of matters, such as:

- the location and borders of the land plot;
- the duration of the lease;
- the lease rent (amount, indexation and payment procedure);
- the purpose and conditions for the use of the land plot, and maintenance of the quality of the land;
- conditions for returning the land plot to the lessor;
- possible limitations and burdens on the use of the land;
- the responsibilities of the parties under the lease.

The lease contract must be executed before a public notary in the jurisdiction where the land plot is located.

Thus if a Ukrainian or foreign entity would like to execute a lease agreement for the use of land under a building (or other construction) that it owns, the following steps must be taken in order to properly document such land lease, based on the example of an application in the city of Kiev for a lease of municipal land:

1. submission of a letter to the head of the Kyiv City Council with a request for conclusion of a lease agreement for the land underneath the building (for any period up to 50 years less one day);

2. obtaining a resolution from the Kyiv City Council confirming its agreement to allocate the land plot, which resolution should order the applicant to make a further application to the local Department of Land Resources of the Kyiv City State Administration within one month;
3. filing an application to this local Department of Land Resources, with the following documents:
 - (a) a notarized copy of the purchase agreement as proof of title to the building;
 - (b) copies of the building's registrations with the BTI and the Kyiv City State Administration, if applicable; and
 - (c) any other required technical information;
4. upon receipt of a favourable response from the Department of Land Resources, entering into a lease agreement with the local council for up to 50 years less one day for the land underneath the property.

The applicant may, if needed for reconstruction of the acquired property, request that an adjacent land plot be temporarily granted to it for such construction (for example, to site a crane or other equipment, for storage). Such leases of adjacent land can only be granted on a short-term basis of up to five years.

If the land is leased from a local council, then the lease would probably be based on the standard form of land lease agreement that was adopted by the resolution of the Cabinet of Ministers on 17 March 1993, No. 197. In principle, local authorities presently are usually reluctant to include any additional clauses or otherwise modify this form of lease agreement.

After the lease agreement is executed and notarized it should be registered with the relevant Department of Land Resources of the state administration. In Kyiv such registration is carried out by the Department of Land Resources of the Kyiv City State Administration in accordance with the regulation of the Cabinet of Ministers of Ukraine of 25 December 1998, # 2073. The following documents have to be submitted for such state registration of a lease contract:

- application for registration;
- lease agreement (the failure of the lease agreement to cover any of the substantive issues described above may constitute a basis for the state authorities to refuse such registration);
- plan of the land plot;
- a decision of the local council or state administration confirming its agreement to lease the land plot if the local council or state administration is the lessor, or a copy of the State act or results of a land auction confirming the land ownership rights of the lessor if it is a private entity or an individual.

Under the Land Code leased land can be sub-leased; however the Lease Law makes this conditional on the consent of the lessor. Such sub-lease agreements will also have to be registered with the relevant Department of Land Resources, but should not need to be notarized.

If the land plot beneath a building was initially leased by the owner of the building and the building is subsequently sold to a third party, ordinarily the land use rights will be granted to such third party subject to the terms of the land lease contract. It is recommended, however, that lessees obtain express clauses in their land lease agreement on their retention of land use rights under their lease if the building is sold.

Zoning

All Ukrainian real estate property, including premises and undeveloped land, is ordinarily subject to use zoning. Most urban offices and apartments in urban buildings will be zoned for either residential or non-residential use. Changes in zoning can be difficult to obtain, and therefore the zoning status should always be confirmed prior to any acquisition or renovation.

According to Article 6 of the Housing Code of Ukraine of 30 June 1983 (the 1983 Housing Code), residential premises may only be used for the accommodation of individuals. Therefore, if residential premises have been purchased and their status has not been changed to non-residential, their use for offices or other non-residential use will violate the 1983 Housing Code and make the parties to the lease subject to substantial penalties as well as court orders prohibiting further non-residential use. According to Article 8 of the 1983 Housing Code a change of use from residential to non-residential is prohibited save for exceptional cases. Therefore, where a non-permitted use is anticipated, the necessary change in zoning should always be carried out before the property acquisition is completed and payment is made.

Dispute resolution and enforcement against unlawful occupation

Normally legal proceedings over property disputes involving any individuals must be brought before the state common courts. Where only corporate entities or entrepreneurs (individuals registered as sole traders) are involved, then any legal proceedings must be initiated in the state commercial courts (until recently misleadingly called 'arbitration courts'). Alternatively, the parties to a transaction can provide for arbitration of their disputes by one of the existing institutional arbitration tribunals or by an ad hoc arbitration in Ukraine or abroad.

If an owner-occupier sells premises, but improperly refuses to vacate them, then the purchaser can bring proceedings for damages and to have the former owner evicted or, if provided by the contract, to have the transaction set aside. If a tenant stays on after its, his or her lease expires, or a third party improperly occupies the premises, a claim for damages may be brought as well as for eviction. Once an eviction order is obtained it can be enforced by the State Enforcement Service of the relevant regional department enforcement office, which acts pursuant to the Law 'On the State Enforcement Service' of 24 March 1998.

The new Civil and Commercial Codes and future legislation

It is anticipated that the new Ukrainian Civil and Commercial Codes (adopted on 28 November 2001, but effective only as of 1 January 2003) and the Housing Code (likely to be adopted in 2002) should resolve many but not all of the problems identified in this chapter. These Codes were developed with reference to the laws of other civil law countries, in particular the Netherlands and Germany, and generally provide for real estate laws along the lines of those in the civil law countries of the European Union.

The new Civil Code, for example, describes in much greater detail the rights and obligations of the sellers and purchasers of real estate and the creation of condominiums, as well as the use of mortgages and other encumbrances. It also provides for mandatory state registration of immovable property and any transactions with it, and makes information on such registrations and operations publicly available. However, this Code fails to provide time deadlines for such registration or for priorities in title based on when registration is made. There may still be multiple transfers of title to immovable property between legal entities before any registration of such title is made to give notice to third parties. It is anticipated that these remaining problems will be dealt with in the near future by amendments to the new Codes and further implementing legislation.

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