

Registration of Title to and Transactions with Real Estate: Changes Are Needed



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It is no secret that successful development of the real estate sector of any country depends on the ability to establish with certainty who has title to sell and pledge property. In the Ukraine, unfortunately, in most cases title ownership to real property cannot be established with certainty. The purpose of this article is to outline the recent discussion on these issues within the European Business Association (EBA) and involve as many as possible new participants in this discussion to hopefully have a posi-

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tive impact on Ukrainian lawmakers to solve current problems.

Beginning from 1 January 2004, the new *Civil Code* and the *Act of the Ukraine On Mortgage* (the *Mortgage Act*) will take effect. Both these Acts, although making a step forward in solving the above-mentioned problems, do not solve the title problem completely.

Registration of title

Problems with certainty title over real estate arise for several reasons. For example, according to the *Civil Code* of 1963, notarisation of a sale-purchase agreement for real estate is only obligatory if one of the parties to the agreement is an individual, so there is no requirement for the notarisation of a sale-purchase agreement concluded only between legal entities. Companies were probably not required to notarise their agreements because at the time when the 1963 *Civil Code* was adopted, almost all companies were state owned, so there was thought to be no risk of fraud in transactions between them. In a market economy, where purchasers need legal protection, this logic does not apply.

It should be noted that although there is an obligation to register a sale of real property at the appropriate Bureau of Technical Inventarization (the BTI), there is no time limit for such registration and no penalty for failure to register. In this situation, a fraudulent party may sell the same real estate to multiple purchasers, without any of the purchasers being aware of the other sales. The same thing may happen when one of the parties to a transaction is an individual – although a sale agreement must be notarised and registered, because of the time required to register an agreement and a title change, an unscrupulous seller may

still, using duplicate title documents, sell the same real estate to another buyer over a period of several days (or more, if registration is delayed) before the first sale appears publicly in the BTI Register.

This problem could be solved by the new *Civil Code* and the *State Registration of Titles to Real Estate Act*, which has been submitted as a draft Act to the Parliament of the Ukraine and hopefully will be adopted soon. According to Paragraph 2 of Article 184 of the *Civil Code*, state registration of title and transactions to real estate will be public, carried out by the appropriate state body. This state body will have an obligation to provide information on registrations and registered titles.

On this basis, the problem of the time required to process a filing for registration could be resolved by having the Register provide for an immediate, publicly accessible record of any filing for the registration of a transaction in real estate. Such a public record of filings for the registration would put third parties on public notice of the purchaser's apparent claim of title, without waiting to see if the sale is later registered. Applications for registration could thereby be processed in the order of their submission, so that a purchaser could be sure of its priority over others at the time of its filing for registration. However, none of these reforms matter if title to real property can be transferred, and affect third parties, without registration. There are several possible solutions to this problem, but the one most often proposed by leading Ukrainian real property specialists, and supported by the EBA, is to make title transfer depend on registration. On this basis, by checking the registry when paying for real property, a buyer could be sure that his seller has not effective-

ly sold the same property secretly to a third party. The buyer could then simultaneously with payment file at the BTI (or payment could be escrowed until completion of the BTI filing), with priority of claims to title by purchasers dependent upon the time of the filing of their title transfer papers.

Registration of pledges and mortgages

Another important problem which may affect the ownership and enjoyment of purchased real property is that there may be prior undisclosed pledges of real estate. Such undisclosed pledges may give one or even more third parties rights to all or part of the real estate.

Under the current *Pledge Act*, pledges of real estate do not have to be registered in the Unified Registry of the Prohibitions on the Disposal of Immovable Property (the Unified Registry) in order to be valid. Such registration is only necessary if required by the pledge agreement itself.

Unfortunately, the *Mortgage Act* which replaces the mortgage provi-

sions of the *Pledge Act* (including the above provision) does not solve this problem completely. It still leaves some uncertainty as to the acquired title to real estate. According to Article 4 of the *Mortgage Act*, encumbrance on real property by a mortgage must be registered by the state. If this condition is not fulfilled, the mortgage agreement is not invalid, but the mortgagee does not receive a priority right over the rights and claims of others to the mortgaged property.

It seems that this requirement of registration of a mortgage protects a mortgagee's right and interests rather than those of a purchaser under a sale-purchase agreement. In order to remedy the problem, a slightly vague provision of Article 4 should be supplemented by providing that not only shall the priority right arise upon registration, but also that the rights under a mortgage shall also arise only from the moment of its registration as provided by the *Mortgage Act*. Thus, by making the registration of mortgages mandatory, not only would a mortgagee protect his priority rights, but a purchaser of real property would also

be certain that the purchased real property is free of any possible undisclosed pledges, since without registration they would be invalid.

Conclusions

Solving the problems discussed above is in the mutual interest of the entire Ukrainian business community, as it is probably impossible to find a business that does not deal with real estate either directly or indirectly at the same point. No matter how much due diligence is presently carried out, usually a Ukrainian lawyer cannot, as a matter of law, provide a clear unconditional opinion on title and rights to real estate in the Ukraine. These problems are of a *technical nature* and can be easily solved by a rather simple but reasonable *technical decision* to make title and pledges depend upon publicly accessible registration. A system for such registration already exists – it merely needs to be made mandatory and publicly accessible to protect third parties from the risks of hidden fraud. Dear Lawmaker, it is time to take a decision... ■

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