Real Estate Law in Ukraine

BEITEN BURKHARDT

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Acquisition

Lease

Development

Taxation

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Foreword

Investment activity in Ukraine in general, and real estate investments in particular, have come to a halt in 2009. Over the last few years property prices have sky rocketed with a booming economy. With the financial crisis and the general economic downturn, financing has become unavailable and reliable rent forecasts impossible. This has led to a complete change in the property market: before the crisis investors were under pressure to find suitable properties for investment and the sellers were dictating prices. Now there are few investors who still have funds to invest in Ukraine. Although these investors find themselves in a very comfortable position, they cannot really dictate sale prices. To the surprise of many market participants there have been only a few distressed assets. Investors looking for cheap opportunities are still waiting, because sellers still believe that the downturn cannot be true. However, it seems that investors have not lost interest in Ukrainian properties, and there are still investors closely watching the market to find the right time to return.

With this informative brochure, we hope to provide interested investors with a good measure of insight into Ukrainian real estate laws. The purpose of it is to inspire questions, and to place you, the investor, in a position to form your own impression of the essential legal framework that you can build on.

Naturally, this brochure is not meant to take the place of consultation – every real estate project is highly individual and the accompanying legal details vary too much to be summarized in a report of this length.

The BEITEN BURKHARDT real estate team will be very happy to support you and accompany you in realizing your projects in Ukraine!

Kyiv, September 2009

Dr. Julian Ries
Partner

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Partner

1 Basic Provisions of Real Estate Legislation

1.1 Legal Basis

The Constitution of Ukraine guarantees the right of the individual to own land (Article 14). The constitutional provisions detailing land rights are more closely defined in the following legal acts:

- Land Code of Ukraine, October 25, 2001 (hereafter LCU)
- Civil Code of Ukraine, January 16, 2003 (hereafter CCU)
- The Law of Ukraine "On State Registration of Real Rights in Immovable Property and Restriction of these Rights", July 1, 2004
- The Law of Ukraine "On the Privatization of State Property", March 4, 1992
- The Law of Ukraine "On the Privatization of Small State-Owned Companies (Minor Privatization)", March 6, 1992
- The Law of Ukraine "On Mortgage", June 5, 2003 (hereafter MLU)
- The Law of Ukraine "On Land Lease", October 6, 1998
- The Law of Ukraine "On Lease of State and Municipal Property", April 10, 1992
- The Law of Ukraine "On Land Payments", July 3, 1992
- The Law of Ukraine "On Land Assessment", December 11, 2003
- The Law of Ukraine "On Finance and Credit Mechanisms and Property Management in Housing Construction and Real Estate Transactions", June 19, 2003

Real estate transactions in Ukraine are governed by a voluminous body of legislation, although volume should not necessarily be equated with utility. On the whole, much remains to be done towards creating an adequately functioning system of legal norms, given the present tendency for several norms to provide for contradictory application. Nevertheless, legal security as well as market security will be expected if the projects are carefully bedded in the jurisdiction.

1.2 Classification and Definitions of Real Estate

Under Ukrainian law, real estate is defined as a parcel of land or the buildings (structures) erected upon a parcel of land that cannot be removed without a loss of value or without altering their intended purpose (CCU, Art. 181, Par. 1). Buildings and other structures are thus a class of real estate in their own right, apart from the land upon which they are located.

Furthermore, unlike legal norms in most western countries, structures are not treated as essential elements of a parcel of land in Ukraine, and may be subject to different laws. The ownership of land and the ownership of buildings (or structures) thereon may be treated separately. However, circumstances do exist under which Ukrainian law does adhere more to the western model, with land and buildings considered collectively.

It is possible to separate the ownership of buildings and other structures from the ownership of the land under them in the following cases:

- by contract agreement (LCU, Art. 120, Par. 1)

- where the building was not erected by its owner (CCU, Art. 375, Par. 2) or where the builder was not the landowner (CCU, Art. 876)

- where the land was sold and a joint transfer of the building ownership was not foreseen by the contract

The legal definition of real estate also includes aircraft, ships and space objects. A company forming a single property complex is also treated as real estate under Ukrainian law (CCU, Art. 191, Par. 3).

1.3 Legal Parties to Real Estate Transactions

1.3.1 Classification of Legal Parties

The legal persons that can be parties to real estate transactions (CCU, Art. 318 and Art. 2) can be separated into two groups, namely private and public subjects.

Private legal parties may be:

- natural persons (citizens of Ukraine or other countries, as well as stateless persons),

- legal entities (of Ukraine or other countries).

Public legal parties may be:

- the Ukrainian nation as a whole,
- the Ukrainian State,
- the Autonomous Republic of Crimea,
- local municipalities,
- foreign states.

Article 80 of the CCU describes which legal parties may take part in land transactions:

- Legal and natural persons can acquire parcels of land as private property.
- Municipalities can acquire parcels of land as municipal property.
- The State, through its organs, holds parcels of land as state property.

1.3.2 Restriction of the Subjects Party to Land Transactions

In Ukraine, the free transfer of real estate is permitted, with the exception of a handful of restrictions, such as the permissibility to purchase agricultural land.

A "moratorium" (valid until the law on land cadastre and the law on the land market become effective) currently prohibits the sale of State or municipal agricultural land as well as agricultural land owned by legal entities or natural persons who acquired it through distribution within privatization (defined in the latter case as "Pais" land). In addition, during validity of the moratorium, it is neither permissible to change the designated purpose of "Pais" land nor can agricultural land for agrarian purposes be transferred into the capital stock of a company.

A further restriction introduced by the moratorium is the maximum area of agricultural land which may be privately owned, namely 100 ha.

Land listed as agricultural cannot, according to Ukrainian land law (LCU, Art. 22, Par. 4), become the property of foreign natural persons or legal entities. However, agricultural properties may be leased by natural persons and foreign legal entities for the purpose of agricultural activities over a period not exceeding fifty years (LCU, Art. 93).

Foreign legal entities can acquire property rights to non-agricultural land within city, town, or village limits, insofar as they acquire property rights to real estate objects on the land

(buildings, other structures, etc.) or wish to erect the same in order to conduct business activities in Ukraine. A particular and somewhat unclear legal situation exists for domestic legal entities held partially or entirely by foreign persons. Ultimately, better arguments support the possibilities for the latter's capacity to acquire land.

Land outside of city, town and village limits can be acquired by foreign legal entities only if they purchase realty erected on the land.

For foreign legal entities, the purchase of municipal or State property is only permissible if they are registered entities who possess the legal right to conduct commercial activities in Ukraine.

1.4 Real Estate Rights

1.4.1 Land Rights

There are the following rights permissible with regard to land:

- property ownership,
- lease,
- easement (so-called "servitudes"), i.e., a restricted right to use land remaining under other ownership,
- emphyteusis, i.e., the right to use land, which remains under other ownership, for agricultural purposes,
- surface rights (so-called "superficies"), which allow land development by a non-owner of land,
- mortgage.

There is also a so-called "permanent (unlimited) right of use" that survives Soviet law. This differs from the ownership right in that the person who has the right to use land is not permitted to sell it or make it available in any other way. Further, the permanent right of use can only be acquired by companies and organizations owned by the State or municipalities.

1.4.2 Rights with regard to Buildings

Natural and legal entities can exercise property rights over buildings in the form of:

- property ownership,
- apartment ownership,
- leasehold,
- mortgage,
- other rights of use with or without time limitations.

Apartment ownership covers the private apartment itself, as well as certain jointly-held common areas (CCU, Art. 382, Par. 1 and 2b). Separation of ownership of an apartment and ownership of the parcel of land that lies under the apartment building is possible in a similar way to that involved with building ownership.

1.5 State Registration of Rights in Real Estate

1.5.1 Basic Legislation

According to the CCU, ownership and other rights to immovable property, as well as their creation, restriction, transfer, and dissolution, must be registered with government authorities (CCU, Art. 182). Any mortgage thereon, as an encumbrance on the real rights, is not itself a real right under the CCU. It is understood as a legal obligation (right “in obligatio”) restricting real rights (right “in rem”). At the same time, mortgages are recorded in the Real Estate Registry as real rights (MLU, Art. 9).

The procedure for registering rights to real estate are prescribed in the law of Ukraine “On State Registration of Real Rights to Immovable Property and Restriction of these Rights” enacted on July 1, 2004 (hereafter RegRR).

The purpose of the RegRR is to establish a unified registry of rights to real estate and their restrictions. All previous registries will be amassed in this central registry, which will contain all information pertaining to land and buildings throughout the country. Although the RegRR become effective in 2005, the unified register has not yet been established. As result, different rights to real estate are introduced to separate registers kept with various authorities (more detailed information is included below in paragraphs 1.5.3. and 1.5.4).

1.5.2 Compulsory and Non-compulsory Registration of Rights and Legal Transactions

It is compulsory for the following rights and legal transactions involving real estate to be registered in the State Registry (RegRR, Art. 4):

- ownership of real estate,
- restricted easement,
- permanent (unlimited) right to use a parcel of land,
- right to use a parcel of land for agricultural purposes (emphyteusis),
- right to use a piece of real estate for a duration of time exceeding one year (e.g., lease right),
- restrictions to the real estate ownership (e.g., mortgage).

The registration of property is a procedure initiated upon application for it by an authorized party. Restrictions are registered upon application of the person claiming to benefit from them. These regulations, however, can also be modified by contract.

The following documents must be enclosed with the application:

- Legal identification papers for the applicant, as well as a power of attorney, if the application is presented by proxy; if the representative is acting on behalf of a foreign applicant, it must be documented with a notarized power of attorney.
- Documents verifying the legal transaction involving the real estate, or other documents to confirm the creation, the transfer, or dissolution of real rights to real estate property.
- Receipt for the payment of the administrative fee.

The registration of rights to real estate will be undertaken once the cadastral plan for the parcel of land and data from the Technical Inventory (BTI) are available.

At the relevant registration office, the application papers should be reviewed and evaluated for registration within fourteen days of submission of the application.

1.5.3 Registration Procedures until the Unified Registry of Real Estate is Established

As already mentioned, the Unified Real Estate Registry, in which all rights and restrictions concerning real estate are to be recorded, as required under RegRR, has not yet been established.

Registration remains in the hands of various government authorities acting under several provisional rulings. Thus, data concerning rights to real estate are recorded in the following state registries:

- Registry of Real Estate Ownership (but not land ownership),
- Land Cadastre (registry of land rights),
- Registry for Mortgages,
- Registry of Prohibitions on Real Estate Alienation,
- Registry of Legal Transactions.

Registration is only undertaken in cases where the applicant proves his legal acquisition of rights to a piece of real estate. The basis for appropriate acquisition of rights to a piece of real estate may be a contract, an administrative act, a legally binding court decision, or other acts.

A review of rights in real estate must verify the documents and properly evidence that the legal owner received and registered the specified rights to a piece of real estate. It is an unconditional legal requirement that the seller of property must present a registry abstract confirming ownership at the time that a contract is concluded.

1.5.4 State Registration Authorities

The government is presently in the process of establishing a state registry office. Until establishment of the unified system of registration authorities is complete, rights held in real estate are registered (under RegRR) with the authorities below.

The following authorities keep registries:

- Registry of Land Rights (Land Cadastre) – the State Land Committee of Ukraine,

- Registry of Real Estate Ownership (with the exception of land) – the Ministry of Justice,
- Registry of Instances where Sale of Real Estate is Prohibited – the Ministry of Justice
- Registry for Mortgages – the Ministry of Justice,
- Registry of Legal Transactions in Real Estate – the Ministry of Justice.

The following list shows the authorities and organs currently responsible for the procedure of registering the relevant rights and/or legal transactions:

- Land Cadastre of Ukraine (rights to parcels of land) – processed by local departments of the State Cadastre Center under the State Land Committee,
- Registry of Real Estate Ownership (all except land) – entries made at local offices of the BTI,
- Unified Registry of Prohibitions on Real Estate Alienation, and the State Registry for Mortgages – entries made by public or independent notaries,
- Registry of Legal Transactions – the notary who certifies the documents of a legal transaction then also makes this entry.

Under the RegRR, state registration authorities are foreseen as described below.

To be registered with the State according to RegRR, real estate rights should be entered into the Unified State Registry of Rights in real estate and Restrictions to these Rights. The State Land Committee is responsible for maintenance of the Registry.

The entries shall be made with:

- a regional office of the State Cadastre Center under the State Land Committee (in provincial capitals, in Kyiv, Sevastopol, and in the Autonomous Republic of Crimea); or
- the municipal (local) department of a regional office of the State Cadastre Center under the State Land Committee.

The location of the real estate or the largest part of it determines which department is the appropriate authority for submission of records to be entered in the registry.

1.5.5 Issues of Double Registration

As depicted here, not only are the rights recorded in the State Registry separately, but a number of the legal transactions over real estate are registered separately as well (entered into the Registry of Legal Transactions). In Ukraine, the registration of real estate transactions was introduced in the 1990s in order to fulfil the need for publishing the creation, transfer, as well as the dissolution of rights in real estate in the country. This requirement (registration of legal transactions concerning real estate) was also adopted in the CCU, although the registration of rights in real estate was already prescribed there (CCU, Art. 182, Par. 1).

The “registration of rights in real estate” parallel to the “registration of legal transactions” does lead to legal uncertainty, because it is not clear when exactly the rights to a piece of real estate are created, transferred, or dissolved. Current jurisprudence does not explicitly provide whether rights pass when the right itself is registered, or rather when the legal transaction is registered.

The RegRR determines that, with the registration of rights in real estate and restrictions of the same, the State recognizes and confirms the creation, transfer, or dissolution of rights to immovable property and restrictions on these rights (RegRR, Art. 2, Par. 2). The registration therefore does not establish legally enforceable rights, but rather legal recognition of rights in the property, a fact evidenced by the wording of the registration regulations. However RegRR, Art. 3, Par. 6, provides that real estate transactions can only be completed once ownership has been entered in the Registry of Real Estate. Thus, legal rights in property are recognized by registration.

The significance of the registration of rights in real estate is also contradictory in two of the CCU’s passages. According to the CCU, Art. 182, Par. 1, the creation, transfer, encumbrance and dissolution of rights in real estate must be registered with the State (with the government in the State Registry). Based on that regulation, it may be assumed that there is no creation or transfer of the relevant rights, as long as these moves are not registered with the State. According to the CCU, Art. 334, Par. 4, however, in legal transactions that involve compulsory registration, ownership transfers to the buyer upon entry into the Registry for Legal Transactions. Registration is compulsory for real estate sale contracts (CCU, Art. 657) and for leases of land (LCU, Art. 125). Therefore, according to CCU Art. 334, Par. 4, ownership of real estate passes to the buyer upon registration of the legal transaction rather than registration of the property ownership.

Looking at these statutes, it is difficult to discern with certainty what legal significance the registration of rights in real estate has compared to the registration of legal transactions over real estate with respect to establishing those rights. The question remains to be answered by Ukrainian jurisprudence or else with appropriate amendments to the legislation. This makes a thorough examination of the rights of the seller particularly important in real estate transactions.

Under the current legislation, the effects of recording rights in real estate in the Real Estate Registry can be seen as follows:

- The ownership of newly erected real estate (buildings and other structures) only begins after registration of this right (CCU, Art. 331, Par. 2).
- Recorded rights to immovable property and their restrictions always take priority over any unrecorded rights to the same property, i.e. real estate (RegRR, Art. 3, Par. 7).
- Registration may overcome a subsequent party who acquires a right in good faith, but fails to register. The registration authority is liable for any conflict of registered information with the registration documents that were submitted (RegRR, Art. 31, Par. 2). Any injury incurred by errors made on the part of the registration authorities in the Registry entries are settled through a guarantee fund. This is essentially a government guarantee.

1.6 Privatization of Real Estate Ownership

Privatization of real estate involves the transfer of government or municipal property into private ownership. The concept of "privatization" is not uniformly used in legal provisions or correspondence. According to the LCU provisions, privatization is always conducted without consideration. However, this type of privatization procedure is only available to certain legal parties, with foreign investors not belonging to that group.

Foreign investors can acquire land, and also State or municipal property, but only by purchase, and in this regard one can speak of privatization in a wider, more commercial sense, beyond the narrower concept described above. Hereinafter, privatization is understood in the wider sense.

1.6.1 Privatization of Land

The LCU is the only legislation legal act that regulates the privatization of land. The Law of Ukraine "On the Privatization of State Property" and The Law of Ukraine "On Privatization of Non-Major State-Owned Companies (Minor Privatization)" are inapplicable and irrelevant to land privatization.

Municipally- or State-owned land shall be sold by auction or tender procedures (LCU, Art. 127, 134). Recently adopted legislation (September 2008) provides for several exceptions when the municipally- or state-owned land is not subject to an auction. Such exceptions include:

- purchase of the land under a building by the person who owns the building,

- purchase of land for subsoil use and special water use by a person who has special licenses issued for the respective land,
- purchase of the land under religious buildings by religious organizations legalized in Ukraine,
- purchase of land for allocation of representative offices of international organizations according to international treaties of Ukraine,
- purchase of land for construction and maintenance of communications and utilities, lines of transport and energy infrastructure (roads, gas and water pipelines, transmission lines, airports, oil and gas terminals, power stations etc),
- purchase of land for complex reconstruction of quarters (micro-districts) of the obsolesce residential fund according to applicable legislation,
- purchase of land for construction of affordable housing, in the event that competition for such construction has already taken place,
- purchase of land for construction of objects in preparation for the European Football Championship in 2012, which are financed by State and local municipal budgets,
- purchase of land for construction of infrastructure for wholesale markets of agricultural production.

For foreign legal entities, the purchase of municipal or State land is only permissible according to the LCU, Art. 129, Par. 3, upon the establishment of a tax-registered representation in Ukraine. Moreover, the sale of municipal or State land to foreign legal entities, or to domestic legal entities in which foreign natural or legal entities own shares, is only permissible with the prior consent of the Cabinet of Ministers and/or the Ukrainian Parliament (Verkhovna Rada) (LCU, Art. 129, Part 1).

The price of land has to be determined via a land evaluation by an authorized land appraiser. The assessment procedure and methods are prescribed in resolutions issued by the Ukrainian Cabinet of Ministers. Contracts on sale of land must be formulated in writing, notarized, and then registered with the State authorities (LCU, Art. 132; CCU, Art. 657).

1.6.2 Privatization of Parcels of Land for Development Purposes

It is possible to acquire State or municipal land for the purpose of developing it. The acquisition takes place in the framework of an auction. Local administrative authorities or

self-governing bodies decide on a list of land plots, i.e. auction lots, which will be made available for purchase. In deciding on the list of lots available, the local authority shall take into consideration the approved town-planning and land-surveying documentation as well as local development norms. The land parcel can be auctioned only after it has been duly processed in the land cadastre, borders have been established, as well as the 'technical passport' of the land has been prepared. The technical passport shall contain all the essential data concerning that land parcel, i.e., its area, geographic location (address), value, description of its natural and economic characteristics, as well as the definition of its designated purpose (categorization), as well as town-planning conditions and development restrictions.

1.6.3 Privatization of a Parcel of Land by the Owner of a Building

Land that is State or municipal property, and on which a building has been erected, can be privatized upon application by the owner of the building.

Documents should be enclosed with the application documenting confirmation of the property rights over the building, as well as the right to use the land. The application shall contain the consent of the applicant to execute a contract for paying of advance payment for the land plot's purchase price. The amount of advance payment may not exceed 20% of the land's normative value (LCU, Art. 128, Par. 8).

Procedures for the sale of land have usually been prescribed in orders issued by local authorities entitled to sell State and community land. These legal orders sometimes request additional corporate documents, such as the investor's business registration certificate or resolution of shareholders to purchase land or building, etc.

Once the applicant has presented the required documents, the authorities have a period of one month to issue a decision on sale of the land to the applicant. The respective decision serves as a ground for conclusion of the land sale agreement (LCU, Art. 128, Par. 6). The recent amendments to the LCU (September 2008) provide for the possibility of payment of the land plot's price by installments, with a maximum duration of 5 years.

The documents that confirm payment of the land purchase price or first installment (in the event that the payments are agreed by installments) shall be the ground for issuance of the State Act on Ownership Right to Land (LCU, Art. 128, Par. 7).

1.6.4 Particularities of the Privatization of Unfinished Construction Objects

The procedure of privatization of unfinished construction objects is provided in the following laws:

- The Law “On Particularities of Privatization of Unfinished Construction Objects”,
- The Law “On Privatization of State Property”,
- The Law “On Privatization of Non-Major State-Owned Companies (Minor Privatization)”.

The following construction objects may be privatized:

- unfinished construction objects under State ownership,
- unfinished construction objects under municipal ownership,
- unfinished construction objects that are on the balance sheet of a company that cannot be privatized.

Any natural person or legal entity (except for legal entities in which the government holds more than 25 per cent or legal entities owned by a municipality), as well as employees of a State privatization body, can purchase construction objects through privatization. Information about the privatization of unfinished construction objects is published by the administration of the State Property Fund of Ukraine.

The following privatization procedures are possible:

- sale by auction,
- direct sale, where there is only one interested buyer,
- contribution of the unfinished construction object into the capital stock of a company by government participation,
- sale with the intention to demolish the unfinished construction object.

Ownership of an unfinished construction object begins from the moment the acceptance certificate is signed (within five days of payment of the purchase price, or upon payment of 50 per cent or 30 per cent of the purchase price if there is agreement on an installment plan).

Ownership of a land parcel on which the unfinished construction object is located begins after the State ownership certificate is issued and ownership of the land is registered.

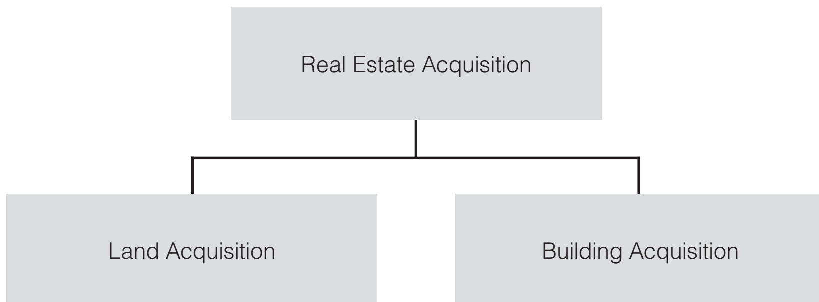
The basic conditions for privatization of an unfinished construction object (except when sold for the object to be demolished) are: determination of a binding date for completion of the construction works, prohibition of sale before construction is completed and the building is duly commissioned, and environmental protection requirements during the course of construction works.

Violation of the above-mentioned conditions renders the contract void. The buyer is then obliged to return the object to State ownership and to reimburse the treasury for any damages incurred due to non-fulfillment of the contract. The annulment of the above-mentioned contract would lead to termination of the land sales contract (or land lease).

Transactions that involve privatization of unfinished construction objects are not subject to taxation. The buyer of an unfinished construction object is exempt from tax on the land (or the lease payments) from the time of purchase until completion of construction work.

2. Real Estate Acquisition

Prior to engaging in a real estate transaction, one must always differentiate between regulations that are valid and applicable to land and those that are valid and applicable for buildings, similar to the above portrayal of real estate laws. The basic structure of real estate trade in Ukraine is illustrated in the following diagram:



2.1 Land Acquisition

2.1.1 Basic Principles of Land Law in Ukraine

The basic rules governing legal transactions involving the purchase of land are provided in the CCU as well as the LCU.

Ukrainian law specifies a land plot as "a parcel of the ground surface with fixed boundaries, a particular location, and pertinent rights in the land" (Article 79, Par. 1 of the LCU). The ownership to the land plot within its boundaries extends to its surface, water objects, forests and perennial plants located thereon (Article 79, Par. 2 of the LCU). The LCU further provides that the ownership right to the land plot encompasses "exclusively the ground surface (as deep and as high as necessary for the construction of an object)" according to (Article 79, Par. 3 of the LCU).

Article 19 of the LCU classifies all land in Ukraine according to its designated main purpose, with the following categories:

- agricultural land,
- residential land and land for social development
- land for nature reserves and other environmental protection,

- land for healthcare needs,
- land for recreation,
- land of historical and cultural significance,
- forest fund land,
- water fund land,
- land for industry, transport, communication, energy, defense and other purposes.

As land may only be used in accordance with its legally designated purpose, the classification of land in a particular category is decisive for the type and intensity of development to which it may be subjected. The category of land must be identified in the relevant documentation (i.e. title certificate, land sale or land lease contract, cadastre and registration documents).

2.1.1.1 Acquisition of Private Land

The transfer of land ownership takes place by way of purchase, exchange, donation and other contracts under civil law. These contracts must be in written form, authenticated by notarization and registered (CCU, Art. 182, 657, 716, 719, 729, 732, 745, 1304). The public notary handles the registration of the contract at the same time as notarization.

The transfer of ownership shall be recorded in the Unified Real Estate Registry, as prescribed by CCU, Art. 182, Par. 1 (however, until that registry becomes operational, the transfer shall be registered in the Land Cadastre of Ukraine). Paragraph 1.5.5 of this brochure outlines the legal effect of registering the transfer of ownership.

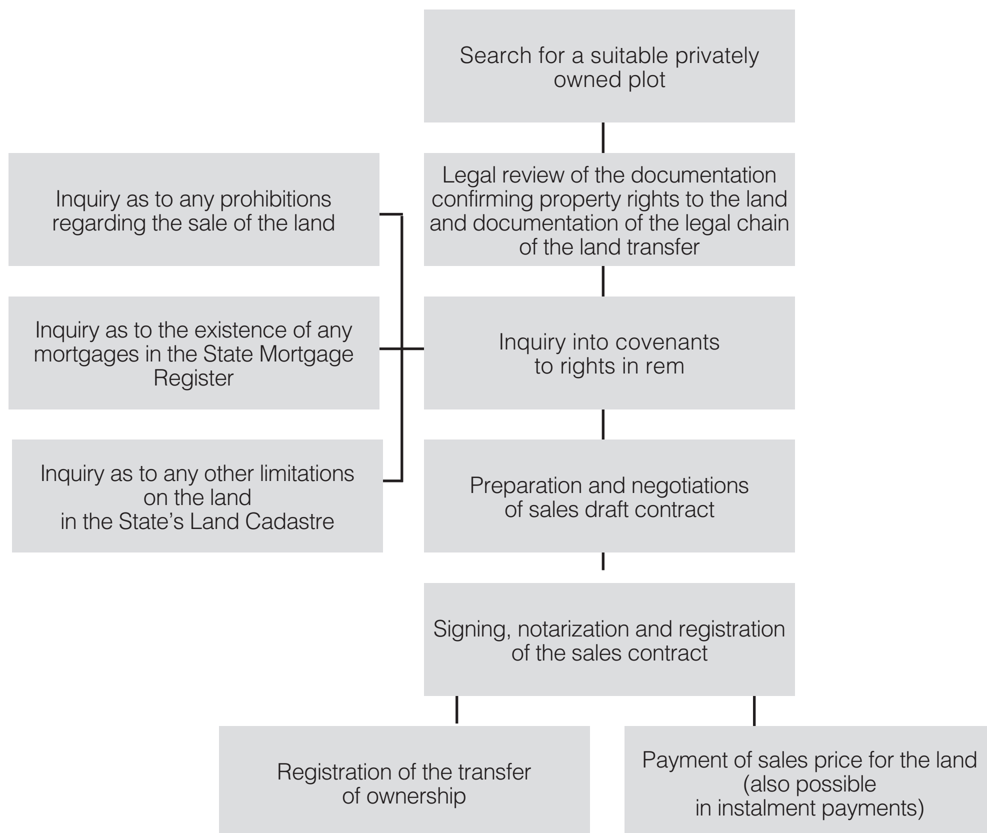
The seller is obliged to inform the buyer of any and all encumbrances on the land, as well as any restrictions that affect the use of the land (CCU, Art. 659). Any buyer who receives misleading information is entitled to claim a reduction in the purchase price or termination of the sale contract and compensation for the incurred injury, provided that the buyer did not know and could not have known about third parties' rights to the land.

The land sale contract must include the following provisions:

- information identifying the parties,
- a statement explaining the type of contract,
- the subject matter of the contract (including information about the location of the land, its area, designated purpose, legal status, etc.),

- a certificate confirming the property rights of the vendor (contracting party) over the land,
- confirmation that no ban exists regarding disposal of the land,
- information on the existence of restrictive covenants on the land,
- agreed consideration (purchase price),
- reciprocal obligations.

The steps that must be taken in order to acquire a title to a land plot are illustrated in this diagram:



2.1.1.2 Restriction of Land Rights

Ukrainian legislation prescribes a number of covenants or restrictions to land rights. They can regulate the property itself or individual land rights such as the right of use. The various restrictions may stem directly from the law or from conditions agreed upon in a contract.

Covenants restricting land rights must be recorded in the Unified Real Estate Registry, and are binding for the period stated. Thus, they also apply to those who acquire the rights to the land at a later date. In particular, the following covenants may be established in respect of the land rights:

- prohibition against alienation for a certain period of time,
- prohibition against transferring the land into lease or sublease,
- pre-emptive right to purchase the land,
- obligation to start and to complete construction work within a certain period of time,
- obligation to make site improvements within a certain period of time,
- specific use restrictions on land,
- ban on a change of the designated purpose of land, the landscape, or the facade of buildings,
- obligation to undertake road construction or restoration work,
- obligation to uphold the rules and regulations of nature conservation.

Infringement of any covenants imposed on land rights may have consequences under civil law (e.g., cancellation of the contract or compensation of injuries incurred by breach of contract) and lead to a revocation (including seizure of the property) based on public law (LCU, Art.143).

2.1.1.3 Risks in the Restrictions of Land Rights that are not Expressly Stated

Under Ukrainian law, restrictions most often resemble restrictive covenants, regardless of how they are defined contractually. Contracts with municipal authorities often contain particular restrictions on land that is sold or leased, listed under “Designated Purpose of the Land”. Even if these restrictions on the land rights are not expressly stated in writing, they remain binding –for the unaware buyer also. Infringement can trigger a cause of action under the LCU public law provisions for a revocation of rights or serve as ground for the counterparty to terminate the land sale/lease contract.

2.1.2 Change of the Land Designation

In order to alienate or to develop a piece of land, the designated purpose of such land, in practice, often needs to be changed. It must be noted that the designated purpose of (i) land for commercial agriculture and (ii) land designated for individual farming (OSG land), allocated in-kind (on site) to the owners of land shares ("Pais") during privatisation, as well as (iii) non-allocated in-kind shares ("Pais"), currently may not be changed due to a moratorium established by Article 15 of the Transitional Provisions of the LCU. The moratorium shall be in effect until laws on state land cadastre and land market are adopted (see 1.3.2 above).

LCU, Art. 20 provides for the possibility of changing (rezoning) the designated purpose of land. The procedure for the rezoning is governed by the Order of the Cabinet of Ministers "On the Procedure for Changing the Designated Purpose of Land Owned by Natural Persons or Legal Entities" dated 11 April 2002. In order to rezone a land plot the owner shall submit a respective application to the competent municipal council or, depending on the location of land, to the respective state administration. In addition to an application the following documents must be submitted by the land owner:

- a copy of the official land title certificate,
- for natural persons, a copy of the person's passport or identification papers; for legal entities, a copy of the company's charter and a copy of the legal certificate of registration as a legal entity,
- a document showing any current restrictions or existence of easement on the land,
- justification for the need to change the designated purpose of the land.

A change of the land plot's designated purpose is carried out through the elaboration of a Land Allotment Project and its adoption by the competent local council or state administration. The Allotment Project has to be approved by a number of state authorities (the local land recourses department, environmental protection department and architecture and city construction organ) and is subject to the State's land expertise. If the land is particularly valuable, the decision on changing its designation has to be made by the national government or parliament.

The decision on changing the designated purpose of land outside of the municipal limits typically involves the following government bodies:

- District ("Raion") state administration, if the rezoning is for the further use of the land for agricultural, water or forest management purposes, or development of public objects (such as schools, hospitals, stores),

- Regional ("Oblast") administrative authorities, if the land plot is to be rezoned to non-agricultural use. If the land is particularly valuable, the rezoning requires prior approval from parliament before the final decision is made by the government,

- The government (Cabinet of Ministers) has the final word in certain land designation cases that are described in the LCU.

At present, Ukrainian law defines rezoning of agricultural land as an injury to the agricultural economy of Ukraine. In such cases, the LCU requires compensation for agricultural and forestry production losses in the event of exploitation of such land for purposes other than conducting agricultural or forestry production activities. Certain exceptions do not call for compensation where agricultural and forestry lands are subsequently used for public and social purposes.

A special formula for the calculation of losses is provided in an executive order issued by the Cabinet of Ministers on November 17, 1997. The amount to be refunded for any loss depends among other parameters on the geographic location of the land..

The law does not set a fixed term for the procedure of changing the designated purpose of land. In practice, the rezoning process is time consuming and can take from three months to a year.

2.1.3 The Practical Details of Changing the Designated Purpose of Land

LCU, Art. 19 includes a classification of land (with dependence upon its main designated purpose) comprising nine categories (see 2.1.1 above). This is obviously a generalized list as it refers particularly to main designated purposes of land. Chapters 6-13 of the LCU further specify the purposes for which land of any given category may be used, for instance agricultural land may be used for individual farming, horticulture, market gardening, mowing and cattle grazing, for commercial agriculture, for experimental and educational purposes, for promoting practices in farming, and for subsidiary agriculture.

It should be noted that LCU, Art. 20 "Establishing and Changing the Designated Purpose of Land", regulates the competence of State and local authorities to assign land plots to any given category (Par. 1). At the same time, while defining the procedure for changing a designation (LCU, Art. 20, Par. 2-4, the Procedure for Changing the Designated Purpose of Land Owned by Citizens or Legal Entities, approved by Decree of the Cabinet of Ministers No. 502 dated April 11, 2002), the legislator already uses the term "designated purpose of a land plot". The Ukrainian Classifier of Designated Uses of Land, approved by Order of the State Committee for Land Resources of Ukraine dated April 24, 1998, No. 14-1-7-1205 provides its own land classification based on designated use of land, which in many respects is inconsistent with the LCU.

By analyzing the above-mentioned regulatory legal acts, it is impossible to form a precise idea of the designated purpose of land and, in particular a distinction between a land category and its designated purpose.

In most land lease or land sale agreements the designated purpose of a land plot is specified as construction of certain objects, e.g. “construction of a shopping and business center” or “construction of residential buildings”. In practice, it is often unclear whether objects not specified by such agreements may be built on such land plots. The State Committee for Land Resources of Ukraine opines (letter No. 14-17-7/9942 dated December 27, 2006) that if a land plot was provided for locating or using an object within a certain category pursuant to LCU, Art. 19 but after some time another object was located there or the land plot was used otherwise but within the same initial category, this does not constitute a non-designated use of land.

When analyzing issues of non-designated use of land it is worth considering the designated purpose of land not only in terms of a land category (LCU, Art. 19), but also in terms of its civil law (pursuant to the civil law provisions) and public legal (pursuant to the public provision of the land law) classifications. Despite the fact that in agreements the parties often define construction of a particular object as the designated purpose, pursuant to LCU, Art. 110 and 111 such provisions may be considered as restrictions, violation of which may give the grounds for termination of rights and seizure of the land plot. The argument supporting such classification is, for instance, an increasing number of provisions included in practice into agreements, which stipulate the term of development for the land plot (e.g. for three years). Although such provisions are usually included into the section “rights and obligations of the parties”, it is obvious that they have a restrictive nature in terms of Article 111 of the LCU. In the event of violation of such terms (as well as in the event of construction of an object which is not stipulated by the agreement) implications stipulated by LCU, Art. 141 and 143 may arise, i.e. withdrawal of the ownership right or the right of use of the land plot.

To summarise, the issue of whether a particular object can be constructed on the specifically zoned land has to be considered in each case separately. The land designation defined in the Land Cadastre, the functional designation included in the urban planning documentation as well as the local rules of the procedure of changing the functional designation are the key points thereby.

2.1.4 Particularities in the Acquisition of State or Municipal Land by a Foreign Legal Entity

As explained in section 1.6.1 of this brochure, foreign legal entities can only purchase State or municipal land upon attaining the consent of the Cabinet of Ministers and/or

Parliament. Furthermore, in order to purchase State or municipal land, the foreign legal entity has to register its permanent representative office with the right to carry out business activity in Ukraine (Article LCU, Art. 129, Par. 3).

Ukrainian law does not provide for a particular procedure for obtaining an approval by the Cabinet of Ministers or Parliament for the acquisition of land by a foreign entity. Should the foreign entity desire to purchase State or municipal land without having any real estate on the land, the law does not specify whether such approvals must be obtained after conducting the land auction (whereby the bidder can not be confident that he will obtain a respective approval), or prior to it (whereby one can not be sure that the required approvals will be obtained timely, i.e. before the auction takes place).

In practice therefore, purchase of State or municipal land is rarely structured through the representation office of the foreign legal entity in Ukraine. In order to avoid the need to obtain the approval of the Cabinet of Ministers, the vast majority of State or municipal land plots are purchased by Ukrainian legal entities in which the foreign legal entity participates on the second or third corporate level.

2.1.5 Land Assessment

A land value assessment is significant not only during acquisition of a piece of land, but in many other legal relations pertinent to land and ground ownership as well (see, especially, the differences in taxation of appraised land – 6.2.2 below).

The various types of ground assessment are:

- Appraisal of Soil Quality – Evaluation of the significant natural characteristics of ground quality relevant to soil fertility on the plot of land. Data given in the soil quality appraisal are components of the National Land Cadastre and serve as the foundation for assessing the economic value of the land,

- Economic Assessment of the Land – Evaluation of land as a natural resource and means of agriculture and forestry production. The land is assessed according to productivity, cost efficiency and plot profitability. The valuation of the land is based on an economic assessment,

- “Monetary” Assessment of Land – Depending on its purpose, this assessment of a plot of land can be either normative or expert.

The objectives of the normative monetary assessment are:

- to set the level of land tax – the government charges on a piece of land upon its exchange, inheritance, or donation,

- to determine the rent for State or municipal land,

- to determine the loss incurred in agriculture and/or forestry

- to find the value and mechanisms for economic support in favor of rational use and protection of the ground.

The purpose of expert monetary assessment is to provide a conclusion as to the land's value. Information on the land's value is needed at the conclusion of legal transactions under civil law.

An expert evaluation is obligatory in the following cases:

- sale or insurance of State or municipal land,

- pledging a piece of land as collateral (mortgage),

- determining the share of a financial investment in the implementation of a land improvement project,

- declaring the value of land that is State or municipal property when it is contributed as in the company's statutory capital,

- declaring the value of a piece of land in the reorganization, disbandment, or insolvency procedures of a corporation in which a share is State or municipal property,

- determining or excluding the State or municipal share in land that is jointly owned,

- stating land value in the accounting books,

- declaring a loss incurred by a landowner or lessee in cases prescribed either by law or in a contract,

- following a court decision.

The valuation expert must be a legal entity or natural person licensed to conduct this type of appraisal.

Licensed experts are appointed to perform the appraisal of soil quality, the economic assessment, and the normative monetary assessment of land based on a decision taken

by the local self-governing administrative authorities or an executive organ.

An appraisal of soil quality is conducted once every seven years.

The economic assessment and the normative monetary assessment of farming land are conducted every five to seven years, and the normative monetary assessment of non-agrarian land is done every seven to ten years.

2.2 Building Acquisition

2.2.1 General Principles

The basic rules for legal transactions concerning buildings and miscellaneous structures are provided in the CCU.

The term “buildings” encompasses real estate objects that form an enclosed space either above or under ground level and that is intended either to be a domicile or a place of temporary residence for humans, or intended for the storage of tools, animals, plants, and other objects. “Buildings” may be residential buildings, hotels, restaurants, commercial buildings, train stations, or facilities for public events.

Miscellaneous structures are real estate objects that are connected to the ground. They may consist of regular construction materials and be equipped in various ways, and may be used during construction.

These miscellaneous structures include those used for various kinds of manufacturing processes, for the temporary storage of tools and materials, for the transport of passengers or merchandise, or for liquid and gaseous materials. The rules that apply to buildings are also pertinent for these structures.

According to CCU, Art. 180, Par. 1, Buildings are considered in the legal sense as real estate independent from land and not as component parts of land as is the case in the legal systems of most economically developed countries. As a consequence, there are always two separate titles: one for the land and one for the building. The sale of a piece of land does not necessarily mean the alienation of buildings located thereon.

2.2.2 Acquisition of Buildings

Similar to the transfer of land titles, ownership of a building is transferred by way of purchase, exchange, donation, and other contracts under civil law. These contracts must be in written form, properly notarized, and recorded in the State Registry (CCU, Art. 182, 657, 716, 719, 729, 732, 745, 1304). The notary handles the registration of the relevant contract at the time of notarization.

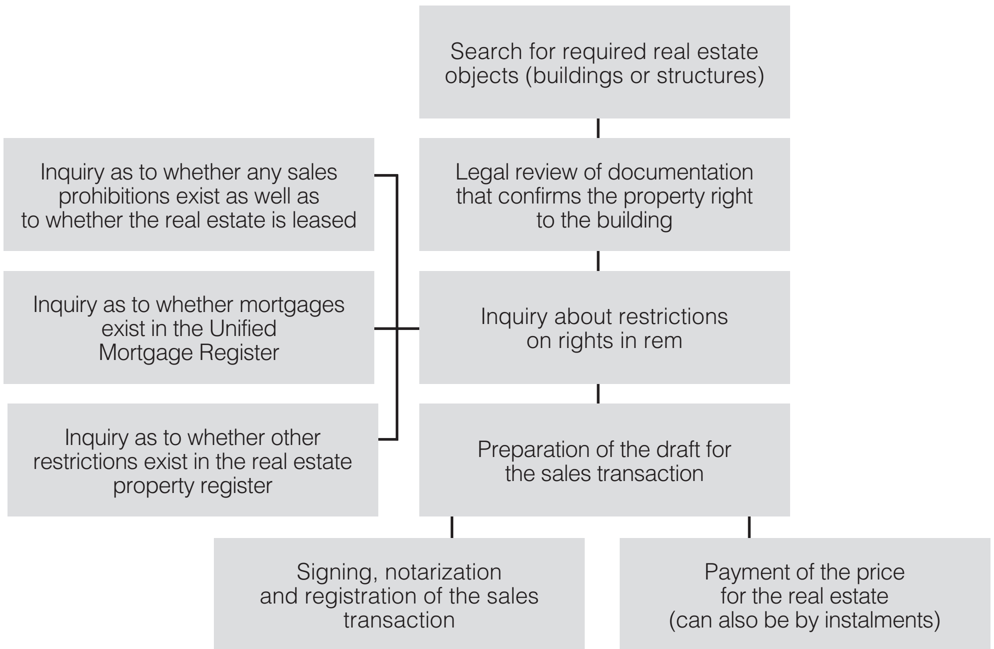
The transfer of ownership must be recorded in the Unified Real Estate Registry, as prescribed by CCU, Art. 182. However, as long as the Unified Real Estate Registry remains incomplete, the transfer is still entered in the Registry of Real Estate Ownership kept with the BTI. For the legal effect of registering the transfer of ownership, see 1.5.5 above.

Due to the lingering influence of the previous Soviet legal system, buildings are still given more significance than land itself in the revised CCU. Land is rather treated like components of a building.. That is why ownership of the parcel of land on which a building is located transfers to the purchaser of the building, when the seller has ownership of both the land and the building (CCU, Art. 377 Par. 1, p. 1; LCU, Art. 120, Par.1, p. 1). If the area of the land transferred to the purchaser of a building is not specifically agreed upon in the sale contract, the buyer also acquires ownership of the area of land on which the real estate is located, as well as those parts that are essential to the building's maintenance (CCU, Art. 377, Par. 1, p. 2; LCU, Art. 120, Par. 1 p. 2). With the acquisition of building ownership, a purchaser of a building located on the land of another owner can only acquire a right of use on the part of the land on which the building is located and is needed in order to make use of the building (CCU, Art. 378, Par. 2; LCU, Art. 120, Par. 2).

As with the purchase of buildings, the records must be reviewed for possible existence of encumbrances affecting the building in question. The most common encumbrances are mortgages, statutory tax liens and prohibitions of alienation. On reviewing the mortgage status of a building up for sale, attention should be given not only to the building, but also to the parcel of land on which the building is located. Any encumbrance of that land by mortgage also encumbers any building erected on the property of the landowner who entered into the mortgage.

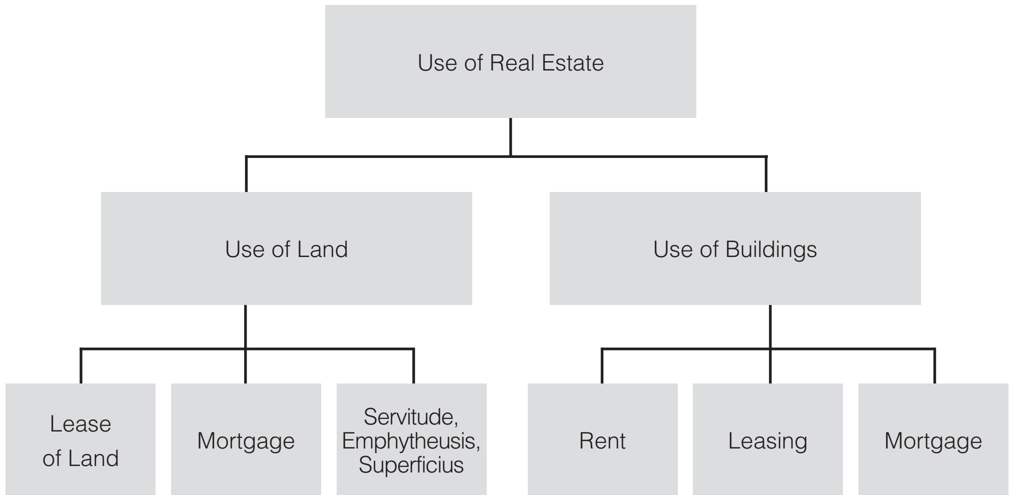
Another important issue regarding the purchase of a building in Ukraine must be clarified, namely whether the building in question is leased. According to CCU, Art. 777, Par. 2, the lessee has the right of first refusal in the event that the lessor sells the leased object. Should the lessor sell the leased building without giving the lessee a purchase offer, court practice usually acknowledges the right of the lessee to purchase the building under the same sale conditions and assigns rights and obligations under the sale contract to the lessee.

The purchase of buildings is outlined here:



3. Use of Real Estate

The table below shows the rights of use with ownership of real estate in Ukraine:



3.1 Use of Land

3.1.1 Lease of Land

According to the recent changes in Ukrainian legislation (September 2008), the land lease right was actually transferred from the “Law on Obligations” to the “Law on Property (right in rem)”, i.e. the land lease has become close to the superficius (for an explanation of heritable building rights, see 3.1.5 below). Now, similar to a superficius, the land lease right may be alienated, mortgaged, contributed into the company’s statutory capital as well as bequeathed (LCU, Art. 93, Par. 4). The main difference to the superficius is that the lease right to the private land may be established for a maximum for 50 years, whereby the superficius of private land can be unlimited.

Fundamental rules that apply to the lease of land are contained in the Law of Ukraine “On Land Lease”. It describes a lease of land as the right to possess and use a piece of land under contract for a limited time supported by consideration provided by the lessee, who obtains the land for the purpose of business or other activities.

Unlike the ownership of land, the eligibility for use of leased land is not legally restricted. Therefore, the following parties are entitled to this type of land use:

- citizens of Ukraine and legal entities of Ukraine,
- citizens of other countries as well as stateless persons,
- legal entities of other countries, international organizations and associations,
- foreign states.

Land can be leased from natural persons or legal entities (referring to privately owned land), local municipal councils (referring to land that is municipal property), local offices of the national administrative authorities or Council of Ministers of the Autonomous Republic of Crimea or the Cabinet of Ministers of Ukraine (referring to land that is State property) for a maximum duration of 50 years.

3.1.1.1 The Land Lease Contract

An agreement conveying a right to possess and use the land must be finalized in a lease contract. The lease contract must be in writing and subsequently recorded in the State Registry. The contract does not become effective until it is recorded in the State Registry (Art. 20 of the Law "On Land Lease"). Any use of land is prohibited prior to completion of the registration process. Ukrainian law contradicts itself as to whether a land lease contract has to be notarized or not. According to Art. 14 of the Law "On Land Lease", the notarization of the land lease contract is up to the parties. According to Art. 290 of Commercial Code of Ukraine, the land lease contract must be notarized. The Law on Land Lease is a specific law regarding land lease issues and should therefore prevail. To avoid any divergent interpretation arising from the said discrepancies, it is recommended to notarize the land lease contract. The legal fee for notarization amounts to 0.01 percent of the monetary assessment of the land plot. Where a monetary assessment is not conducted, the fee increases to one percent of the contract value, but it may not be less than the tax-exempt minimum of a citizen's revenue (approx. EUR 1.5).

The lease contract must address several essential provisions, including:

- identification of the lease object (with information on the location and size of the land),
- duration of the contract,
- lease payments (information on the amount to be paid, when payment is due and in what form, index binding, methods of payment, procedure of payment review, and provisions of liability for failure to make the agreed payments),

- conditions and designated purposes allowed for use of land,
- conditions regarding maintenance of the leased object,
- terms and conditions for transfer of the leased object to the lessee,
- conditions for returning the leased object to the land lessor,
- information concerning the effective limitations (encumbrances) in respect of use of land,
- liability agreement for unintentional damage or destruction of the lease object (where there is doubt, the lessor bears the risk of loss,)
- liability of parties to the contract,
- conditions regarding the possibility to mortgage the land's lease right and to transfer it into a company's statutory capital.

Failure to observe the aforementioned essential provisions in the lease contract may lead to a refusal to register and/or to annul the said contract.

The following documents must be attached to the lease contract:

- a plan or scheme of the leased land,
- a cadastral plan showing the restrictions (encumbrances) listed for the land and easements placed on the land,
- a survey certificate showing the land boundaries,
- a protocol of acceptance of the transfer of land into lease,
- the land allocation project (only if it should have been developed by law).

Unlike the legal systems of most developed countries, mortgaged land in Ukraine may be leased only upon the written consent of the creditor (MLU, Art. 9). The future lessee has to check, therefore, whether the land to be leased is encumbered with a mortgage. Written consent is not necessary if the creditor declares his approval for the lease in the mortgage contract.

Subleasing is allowed under Ukrainian law upon the written consent of the lessor or if it is allowed under the terms and conditions of the lease contract.

3.1.1.2 Particularities Involved in the Lease of State or Municipal Land

Leasing State or municipal land has been widely practiced in Ukraine, and is commonly practiced by construction outfits where the lease provides a right to develop the leased land. Until 2008 the lease right to State and municipal land could be obtained without auction. Ukrainian developers initially leased the land for construction purposes and after completion of the building privatized it (see 1.6.3 above). The land lease for construction purposes was used, therefore, to evade the land law restriction on purchasing State or municipal land only through an auction.

According to new land lease provisions (September 2008), it is prohibited to alienate, mortgage or to contribute into the company's statutory capital the lease right to a municipal or state land. Taking into account the introduced requirements for attaining the lease right to State or municipal land by auction only and the prohibition to market it, it is expected that the land lease right for construction will become very rare in the future. For the cases in which the lease of State or municipal land may be acquired without auction, see 1.6.1 above.

Leasing State or municipal land mandates observation of certain specific regulations with respect to the lease payments. For agricultural land, the rent can not be less than the amount of the land tax, and for the other land categories – triple the amount of the land tax. As a matter of principle, the amount of rent is calculated according to the designated purpose of land, the normative monetary assessment of the land (see 2.1.5 above) and the rate of adjustment on its assessment. The adjustment rate is determined each year on the first day of January. Procedures handed down by the Cabinet of Ministers are used to calculate the applicable rent payment. The maximum amount of rent (included the adjusted one) for State or municipal land may not exceed 12% of the normative monetary assessment. This does not apply if a higher rent was set in the course of the auction for the land lease.

Rent on State or municipal land is payable each tax period (every month) together with the tax obligations.

3.1.2 Mortgage

Mortgage can be created over land as well as over land rights (MCU, Art. 5, Par. 7; LCU, Art.133), such as land lease right, heritable land use right for agriculture purposes ("emphyteusis"), and heritable land use right for construction purposes ("superficies"). The encumbrance of land by mortgage is treated comprehensively in the MLU.

According to the MLU, if there is a building or unfinished construction objects on the land, the land can only be mortgaged with a simultaneous encumbrance of buildings or unfinished

construction objects on the land that is property of the mortgagor. Where buildings on the mortgaged land are not owned by the mortgagor and a creditor forecloses on the mortgage, the new landowner shall grant to the new owner of the buildings the same conditions of use of land as the mortgagor used to have. Where the land under the building is not owned by the mortgagor and a creditor forecloses on the mortgage, the new owner of the building acquires the rights and obligations that the mortgagor had according to the land lease agreement.

For agricultural land, additionally to the restrictions prescribed in the LCU (see above 1.3.2), it must be observed that the mortgagee may be a bank only.

The land can be mortgaged when the following conditions have been met (MLU, Art. 5):

- the mortgagor must own the land. The mortgagor can also be someone who has a right to acquire ownership of the land in future, if evidenced by the records,
- there must be nothing to prevent enforcement of a foreclosure (if the foreclosure or alienation are prohibited),
- the land ownership must be registered beforehand into the ownership of a separate real estate object (i.e. a part of a real estate can be mortgaged only after it is separated and registered).

The mortgage contract must include the following provisions:

- information about the mortgagor and the mortgagee creditor,
- a description and the amount of the secured claim, the term and order of its execution and/or reference to the agreement which contains the secured claim,
- an adequate description of the key characteristics of the land and/or its registration data; the designated purpose of the land,
- details regarding issuance of the mortgage deed.

The mortgage contract must be certified by a notary, and the mortgage must be recorded in the State Registry. If the mortgage is not entered into the Registry, the mortgage contract remains effective, but the claim of the mortgagee/creditor will not have priority against claims by other persons recorded their interests in the State Registry on the particular land.

Unlike the legal systems of most European countries, under Ukrainian law a mortgage at maturity can also be agreed upon, with the result that the mortgage object can fall to the mortgagee/

creditor on expiration, or that the mortgagee/creditor may sell the mortgage object privately. A contract agreement on a mortgage at maturity, or for private sale, can be arranged in the interim until there is a court decision to enforce foreclosure rights on the land.

3.1.2.1 Mortgage on Unfinished Buildings

Because Ukrainian law allows for separate ownership of land and buildings, it often occurs in practice (especially in residential construction) that the developer is not the same person as the one who owns the land intended for development. This situation often occurs in residential construction. Most residential developers lease State or municipal land. The lease is more favorable to them than purchase, since it is cheaper and there is no need to purchase the land after completion because apartment owners have the right to free privatisation of land under an apartment building. In order to enable the use of the leased land as a security for construction financing by such developers, MLU, Art. 16 provides for the possibility to mortgage unfinished buildings – so-called "unfinished construction objects". According to the latest changes to the MLU an unfinished construction object is an object for which a construction permit is obtained. Some expenses for construction are borne and the object is not yet commissioned. After completion of the unfinished object, the newly erected and registered building remains encumbered with the mortgage.

The latest changes to the MLU are not completely understandable. As stated above, the possibility to mortgage an unfinished construction object was indented for the cases where a developer leases municipal or State land. Mortgaging of an unfinished construction object occurs according to MLU, Art. 16, Par. 2 through the encumbrance of rights to it as well as rights to the land upon which the object is located (e.g. land lease right or superficies). Developers can mortgage, therefore, an unfinished construction object only if they can mortgage the land lease right. With the same changes as to the MLU the legislator has introduced changes to the Law "On Land Lease", according to which it is prohibited to mortgage a lease right of State or municipal land. An unfinished construction object which is erected on the State or municipal land may therefore not be mortgaged at all, though the legal structure for its mortgage was primarily developed for these cases. Hence, taking into account the new legislation, it is to be expected that the mortgage on unfinished construction objects will have less practical use.

3.1.3 Servitudes

Under Ukrainian law, a servitude is a non-possessory right to use land owned by another. A parcel of land may be encumbered by a servitude in favor of the owner (restrictive easement whereby the landowner restricts uses of land) or the user (easement appurtenant or in gross) of neighboring land, or other persons (CCU, Art. 401, Par. 2).

A prerequisite of granting a servitude is an express agreement between the person demanding the servitude and the owner of the land to be encumbered. They must agree on the property to be encumbered, as well as the scope of the servitude. If they cannot reach an agreement, a court may grant an encumbrance of the land with the servitude. A contract granting a servitude must be registered under the same procedures that have been laid down for the registration of rights to real estate objects.

An owner of land encumbered with a servitude may claim reasonable compensation from the beneficiary of this easement. Servitudes cannot be transferred to others (CCU, Art. 403, Par. 4).

3.1.4 Emphyteusis

Emphyteusis is the right to use land for agricultural purposes whereby it remains under the ownership of another. Emphyteusis is agreed upon by an express contract between the owner of the land and the person wishing to use the land (CCU, Art. 407, Par. 1). An emphyteusis has to be registered under the same procedures that have been laid down for the registration of real estate ownership.

An emphyteusis is freely transferable and inheritable, except for the emphyteusis of State and municipal land that may not be alienated, contributed to a company's statutory capital or mortgaged (LCU, Art. 102-1, Par. 3).

Upon the transfer of an emphyteusis, the landowner must receive a purchase option to acquire the emphyteusis. If the owner does not communicate its intention to make use of the purchase option on the emphyteusis within one month of being notified in writing of the planned transfer, the transfer to a third person may proceed. If the emphyteusis is sold to a person other than the landowner, the landowner may claim a percentage share in the purchase price. The rate must be stated in the emphyteusis contract.

An emphyteusis to private land may be agreed without any time limitation, to State or municipal land - however, it may not exceed 50 years and may be granted only by an auction.

3.1.5 Superficies

Superficies under Ukrainian law is a heritable and alienable right to develop land that remains under ownership of another. An agreement on superficies is reached between the owner of the land and the person who wants to erect a building on it. This right has to be registered under the same procedures that have been laid down for the registration of real estate ownership.

Superficies can be transferred by inheritance or alienation with no obligation to inform the landowner, except for the superficies to State and municipal land that may not be alienated, contributed to a company's statutory capital or mortgaged (LCU, Art. 102-1, Par. 3) at any time. The development of land must begin no later than three years after acquisition of the superficies. If development does not commence within this period, the superficies expires. After expiration of the period specified in the contract, further relations between the building's owner and the landowner must be renegotiated according to CCU, Art. 417. If both parties do not come to/ do not have an agreement on their future relations, the landowner can demand from the superficiarius abolishment of the building. In particular cases determination may be sought via a court order. In such case, the court may decide either to oblige the landowner to purchase the building or to oblige the superficiarius to purchase the land.

A superficies to private land may be agreed without any time limitation. Similar to emphyteusis or lease right, a superficies to State or municipal land may not exceed 50 years and may be granted only by an auction.

3.2 Use of Buildings

3.2.1 Rental Rights in Buildings

Buildings or parts of buildings can be rented out by contract. The rules for renting buildings are contained in the CCU. The CCU contains specific regulations (CCU, Art. 810–826) that apply to the rental relationships that concern housing, i.e., residential premises.

All buildings under private ownership can be rented out to natural persons or legal entities without limitations. Each time a building is transferred, a handover/acceptance protocol must be drawn up. The rental contract for the building must be notarized and subsequently registered, if the duration of the rental relationship is three or more years. The rental right itself must be entered into the Real Estate Registry (currently being established) if there is an agreement on a rental relationship exceeding one year. For the important details regarding the Real Estate Registry, see 1.5.5 above.

With the acquisition of a rental right to a building, the lessee simultaneously acquires a use right to the land, to the extent necessary to fulfil the purposes of renting the building. If the use right on the land is not regulated specifically in a rental contract, the lessee has the right to use the whole parcel of land that the lessor used (CCU, Art. 796, Par. 2). According to the CCU, Art. 797, the rent payment for use of a building consists of a rent for use of the building itself and for use of the land. Should the contract define only the rent for the building, the owner could claim that the rent for use of land has to be paid additionally.

In the past, it was often attempted to provide for shortened rental periods in a contract (less than one year) in order to avoid notarization and the associated notary's fee. In practice, it caused considerable difficulty when extension clauses were built into those contracts, because from the standpoint of the notary, it was not possible to determine the contract's value. Legislation changed in January 2007; since then notarization has been necessary only for rental contracts for buildings where the contract period exceeds three years – as opposed to the one year period previously mandated. The amount to be paid for the notarization of a rental contract also changed, and now constitutes 0.01% of the contract value (for details on notarization fees, see 6.5.2 below).

Just as it was before 2007, it is advisable in all cases to abstain from ambiguous contract constructions that aim to conceal an intended lease period of over three years. Legal protection cannot be afforded where the parties directly aim to conclude invalid contract agreements. In such cases, there is also a risk that payments made on invalid contracts will not be recognized as deductible business expenses. Ultimately, that could place the company's whole balance sheet in jeopardy.

When closing a rental contract, it is advisable to check whether the building up for rent is encumbered by any third-party claims. As already stated above, unlike most legal systems, in this one, it is possible to declare a rental contract void if the building rented out is encumbered by a mortgage, and the consent of the mortgagee creditor was not attained prior to concluding the rental contract (MLU, Art. 9, Par. 3).

The rules governing the lease of buildings located on State or municipal land are given in the Law of Ukraine "On the Lease of State or Municipal Property". In any lease of State or municipal housing, regulations in the Housing Code (HCU) of June 30, 1983, must be taken into consideration along with the CCU.

All State-owned buildings can be rented out by local authorities of the Ukrainian State Property Fund. All buildings in municipal ownership can be rented out through the relevant organs authorized by municipal councils. Buildings with an area of up to 200 m^2 (roughly 2,150 square feet) can also be rented out by the State or municipal owned companies independently.

Before a contract is concluded for the lease of State or municipal buildings, there should be an assessment of the value of the building, employing the calculation methods laid out by Ukraine's Cabinet of Ministers.

3.2.2 Leasing of Buildings

3.2.2.1 General Provisions

The difference between renting and leasing a building is not provided for under Ukrainian civil law. Financial leasing has been legally formalized in its own Financial Leasing Law, with the law conforming for the most part to norms regulating rental practices in the CCU. The difference between renting and leasing a building becomes apparent in certain legal provisions applicable to taxation. To be exact, leasing payments, in both the financial leasing business and cross-border leasing transactions in which the payments go to a foreign lessor, are taxable according to special regulations.

With regard to the types of leasing, the Commercial Code speaks of “Operating Leasing” and “Financial Leasing” (Commercial Code, Art. 292, Par. 2), but a civil law definition is only given for the financial leasing.

Art. 1 of the Financial Leasing Law provides that the financial leasing agreement is a contract in which the lessor promises to acquire the realty from the vendor (lessor) under the conditions named by the lessee and according to the inventory list, as well as to transfer the realty to the lessee against the regular payment of the leasing sum for a period of time exceeding one year. Art. 1, Item 1.18.2, of the Law “On the Taxation of Corporate Earnings” (hereinafter - CEL) lists the criteria on which a financial leasing contract is based. In that sense, it is a financial leasing contract when a leased object is handed over to a lessee for a period of time in which 75 per cent of its value is amortized, and the lessee has a commitment to acquire the leased object either within the contract period or at the moment the contract period ends, for the price that is named in the leasing contract. It is also a financial leasing contract if the sum of all leasing payments corresponds with the value of the leased object or higher.

A definition of an operating lease is only found in tax law, which speaks of an operating leasing when the leased object is handed over to the lessee under conditions other than those of financial leasing.

All leasing contracts that stipulate the rent for buildings in a contract period of three years or more must be certified by a notary (CCU, Art. 793, Par. 2) and recorded in the State Registry (CCU, Art. 794). The Law on Registration of Real Rights (RegRR) does not say whether leasing rights have to be entered in that registry. It can be assumed that, once the Real Estate Registry is established, it will become obligatory to register leasing rights analogous to rental rights where the contract runs for more than one year.

A leasing contract is considered to be an agreement between a lessee and a lessor prescribing all essential terms of the transaction. The standardized items of an operating leasing contract are comparable to the general provisions of the rental contract, including transfer of use of the leased object pursuant to payment for a certain period of time. The most important components of the leasing contract are thus the price (amount of the leasing payment), lease term, and the method of payment.

According to Art. 6 of the Financial Leasing Law, the contract must describe these minimal essential elements:

- the leased object,
- the validity of the leasing contract (period of time for which the lessee acquires user rights on the leased object; the period may not be less than one year),
- the amount of the leasing payment.

3.2.2.2 Sale and Lease Back of Real Estate

While the operational leasing does not really differ from the rent, the finance leasing (sale and lease back) offers an additional instrument in real estate financing. Compared to loan financing, the main advantage of the sale and lease back financing is in the level of securitization. With sale and lease back the creditor owns the real estate and in the event of default has only to terminate the finance lease agreement, whereas by loan financing the creditor usually has the mortgage on real estate, which has to be foreclosed in case of default. The further advantage of sale and lease back is that the creditor has the whole picture of the businesses operating in the building as well as its profitability and has often contract mechanisms to influence it.

Unlike in other legal systems the long-term finance leasing contract can not be concluded alongside the purchase contract of real estate, since the purchaser does not obtain the ownership to the real estate simultaneously with execution of the sale agreement and has to register it by the respective BTI (see 1.5.5 above). In order to lease back purchased real estate the creditor has to first obtain the register excerpt. To secure the gap in time between the purchase of the real estate and its lease to the original owner a preliminary finance lease agreement can be executed. A conditional precedent for the moment of registration of purchased real estate is often impossible in practice, since Ukrainian notaries refuse to notarize lease agreements under conditional precedents regarding future title transfer.

Similar to the credit arising from a loan agreement, the credit under a finance lease agreement can additionally be secured by collaterals, e.g. a mortgage contract, surety contract, guarantee contract or other types of contract.

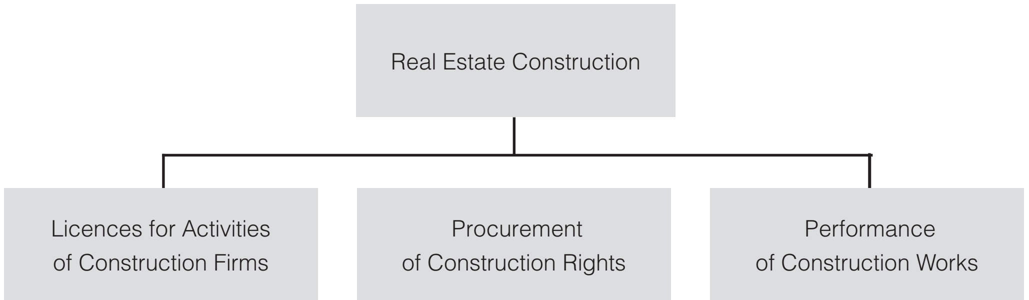
In sale and lease back transactions the parties often agree that ownership of the leased real estate transfers to the lessee upon payment of the agreed price as stated in the leasing contract. However, in this case, a formal sale contract must be concluded, and transfer of ownership has to take place upon registration by the respective BTI.

3.2.3 Mortgage on Buildings

Under Ukraine law, buildings can be encumbered with a mortgage similar to land. In this case, the mortgage liability covers not only the building but also the land on which it is located and owned by the mortgagor. Further, the same regulations applicable to the encumbrance of land under MLU (see 3.1.2 above) are also applicable to the encumbrance of buildings with a mortgage.

4. Construction of Real Estate

Real estate construction is regulated both by private law provisions (governing legal relations between the construction company and the customer) and by public law provisions (regulating relationships between the government and the construction company, and between the government and the customer). The field of real estate construction law in Ukraine is provided in the chart below:



4.1 Requirements for the Construction Licence

4.1.1 Licence to Perform Construction Work

According to Art. 17 of the Law “On Architectural Activity”, commercial activity concerning the construction of architectural objects must be licensed according to law. On the legal level, however, there are no particular types of construction activity defined for licensing. At the same time, there is a by-law listing particular activities in the field of construction that are subject to licensing, namely “The List of Works of Commercial Construction Activity Concerning Creation of Architectural Objects (the “List”), approved by Order of the Ministry of Regional Development and Construction No. 47 dated January 27, 2009.

According to the List, construction activity includes not only immediate construction works, but also design and project development work, as well as installation of equipment and assembly of engineering and transportation networks.

Failure to obtain a licence for construction activity may result in invalidation of the agreement on performance of construction works (CCU, Art. 227), imposition of penalties on company officials of the contractor and/or principal as well as suspension of the construction works.

4.1.2 Procedure for Granting Licences

The procedure for licensing construction activity is regulated by Resolution No. 1396 of the Cabinet of Ministers, approved on December 5, 2007 (the "Licensing Procedure").

Licences for the performance of construction activities are granted by the State Architectural-Construction Inspection and its local branches. The Inspection examines the application for attaining a licence within a 10-day period and passes the application to the licensing committee. The committee considers the documents and prepares the conclusion within another 10-day period from its receipt of the application. Upon obtainment of the conclusion from the licensing committee, the Inspection shall make a decision within seven days and issue the licence.

The general period of validity of a construction licence is limited to five years. If the person is obtaining a licence for the first time, the term of validity is three years.

Art. 2 of the International Agreement "On Mutual Recognition of Licences for the Performance of Construction Works Granted in CIS Countries" dated March 27, 1997, states that any holder of an appropriate licence granted in another CIS country is authorized to perform construction activities in Ukraine. The validity period of such licences is limited to five years.

Ukrainian law does not provide for any prohibitions on foreign legal entities obtaining a construction licence. The procedure requires, however, that the applicant for a construction licence has to submit documents evidencing its registration in Ukraine and entry in the Unified Register of Entities and Organizations of Ukraine. Based on the said registration requirements the State Committee for Regulatory Policy and Entrepreneurship explained in its Letter No. 3-451-1468/4349 of August 8, 2002 that a foreign legal entity may obtain a construction licence only via an established Ukrainian subsidiary/representative office. The Architectural Inspection as a body of the Ministry of Regional Development and Construction does not share the opinion of the said Committee and in practice issues construction licences to foreign legal entities not registered in Ukraine that do not even have representative offices there.

Taking into account the ambiguity in law as well as tax complications arising from the business activity carried out directly by a non-resident in Ukraine, it is necessary to decide whether the obtaining of a construction licence directly by a foreign entity is reasonable and necessary in each particular case.

4.1.3 Qualification Testing

In compliance with the Law "On Architectural Activity", certain executives in charge of construction works shall undergo qualification testing. Currently, the list of the works

subject to qualification testing - approved by Resolution of the Cabinet of Ministers of Ukraine No. 451 dated April 6, 1998 - includes engineering surveys, design works, construction and assembling works and construction engineering works and services.

The Procedures for the Carrying out of Professional Testing for Executives in Charge of Particular Types of Works concerning Construction of Architectural Objects (the "Testing Procedures") are approved by Resolution of the Cabinet of Ministers of Ukraine No. 79 dated February 11, 2009 (effective as of September 16, 2009). In compliance with the Testing Procedures a responsible executor shall be either a person with a higher architectural education and at least three years experience in the field of architecture or a person without such education but with experience of no less than ten years in the area of urban development.

The qualification testing includes consideration by the Qualification Commission (a special body formed by the Ministry of Regional Development and Construction) of the documents submitted by an applicant, as well as an interview or exam, if required by the Commission. Upon successful results of the testing, the Commission issues the Architect Certificate with a validity period of five years and enters this into the Register of Certified Specialists.

Certificated specialists may carry out particular activities relating to the construction of architectural objects without a licence.

4.1.4 Peculiarities of Engaging Foreign Architects

Developers often wish to implement real estate projects designed by foreign architects. To construct real estate based on such projects private and public regulations have to be considered.

Pursuant to the Law "On Architectural Activity", foreign individuals and stateless persons enjoy the same rights and bear the same obligations in the area of architectural activity as those of Ukrainian citizens, unless otherwise provided by laws or international agreements of Ukraine. If foreign individuals or stateless person do not hold an appropriate qualification certificate, they can perform architectural works on the territory of Ukraine only on the basis of an agreement with legal entities or entrepreneurs that hold the respective licence or that engage duly certified architects.

The necessity for cooperation with Ukrainian architects or licensed entities usually leads to establishment of an intellectual co-ownership of the design projects. Particularities in the relationship between the co-owners can be regulated by an agreement governed by civil law.

4.1.5 Licensing of the General Contractor's Activity

Lately, the question of licensing the services of general contractors has often been the subject of legal regulation. Until 2008, the general contractor that did not perform immediate construction works could provide its services without a construction licence. According to changes introduced to the Law "On Planning and Development of Terrains" on September 16, 2008 (that entered into force on April 15, 2009) one of the documents to be provided by the principal in order to obtain a construction permit is a copy of the licence issued on carrying out the activity of a general contractor.

Pursuant to the Licence Terms for Commercial Activity in Construction Concerning Creation of Architectural Objects approved by Order of the Ministry of Regional Development and Construction No. 47 dated January 27, 2009, (see 4.1.1 above), the general contractor's activity is subject to licensing. Following on from the letter of the State Architectural-Construction Inspection No. 22/10-875 dated April 10, 2008, a general contractor is obliged to obtain a licence, even if immediate construction works are to be performed by another (licensed) contractor, rather than the general contractor.

4.2 New Law on Construction Permits

From April 15, 2009, the construction permit process has been regulated by the Law "On Amendments to the Legislation of Ukraine with regard to Construction Facilitation" No. 509-VI adopted on September 16, 2008 (the "Construction Facilitation Law"). This law envisages amendments to a number of the basic legal acts that govern the construction process as well as to the procedure of obtaining construction-related permits.

According to transitional provisions of the Construction Facilitation Law, construction documentation obtained under the old procedure prior to April 15, 2009 is still valid until October 14, 2010. In terms of those facilities in which construction works have already begun, construction permit documentation remains valid until completion of the construction. There are three basic laws regulating the procedure of obtaining construction rights: the Law "On Fundamentals of Urban Development", the Law "On Planning and Development of Terrains" and the Law "On Architectural Activity".

4.2.1 Overview of Construction Permits

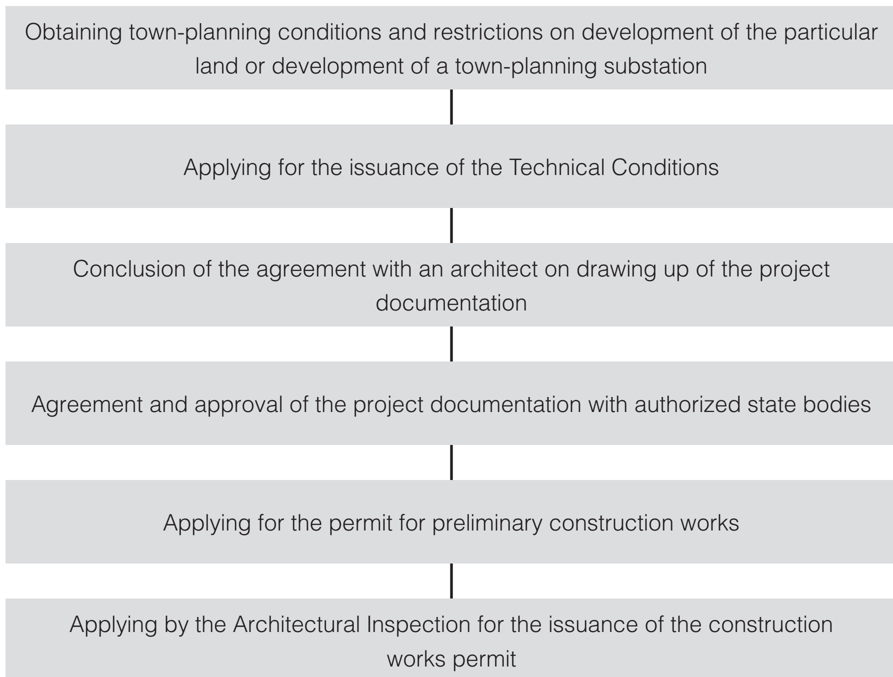
Although the Construction Facilitation Law has generally simplified the procedure for acquiring a permit, there is still a great number of documents and approvals required in order to commence construction. Prior to development of a design project the principal needs to ascertain what the applicable town development specifications and

restrictions are. Such ascertainment replaced the obtainment of a planning permit as well as architectural planning assignment (so-called “APZ”) under the old law. If the object is to be developed beyond the city borders, or in the event of a lack of approved local construction rules, so-called town-planning substantiation has to be ordered by the respective state architecture institution.

Furthermore, the principal needs technical specifications for the building’s use (literally called “specifications of technical maintenance of the facility”). Technical specifications (“TU”) shall be provided by respective utility providers (e.g., water and gas supply, electricity and heating communications, etc.).

Based on town development specifications and restrictions as well as technical specifications a licensed architects’ office can start elaboration of the design project documentation. The relationship between the principal (customer) and the architect office is to be regulated by a civil law contract. After approval of the project documentation and its State expertise, the developer may apply for the permit to perform construction works (the “Construction Permit”) – a document authorizing the commencement of the building’s construction.

The main stages of the construction permit process are illustrated below:



4.2.2 Construction Permit Procedure

According to Art. 24 of the Law “On Planning and Development of Terrains”, a landowner or user may develop land only in accordance with its zoning and town development specifications and restrictions.

Prior to receiving benchmark data for designing (town development specifications, technical specifications as well as an assignment given by the principal to the architect), the principal must file with the respective local State or municipal authority the application, in which he indicates the purpose of use of the future construction facility and its approximate characteristics.

Based on the application the local authority checks the compliance of the proposed development with the development documentation (local construction rules and town development specifications). If the proposed development corresponds to it, the local council shall provide the principal with its development specifications within two weeks from the application’s registration.

If the proposed development does not correspond to the requirements of the specifications and restrictions, the local council shall issue a respective conclusion and recommendations on necessary changes to the desired development. Alternatively, the principal can substantiate its original intention to the desired development and ask the local authority to introduce changes to the town development documentation. Decisions on the desired changes must be taken within two weeks.

If there are no local construction rules or when the land to be developed is located outside of the city/village borders, a town planning substantiation must be ordered. It can be prepared by a licensed architectural office and has to be approved by a number of State authorities, which are obliged to make their decision within a one-month term. The town planning substantiation includes town development specifications, based on which the design project documentation has to be prepared.

4.2.3 Public Hearings

Before any town development documentation can be adopted by the respective city council, it has to undergo the procedure of public hearings. New provisions to the Law on Planning and Development of Terrains, introduced by the Construction Facilitation Law, prescribe for a detailed and complicated procedure and prerequisites for public hearings.

A positive factor in the new regulations is the clear distinction of obligations between the local council and the principal. According to Art. 30-3 of the Law “On Planning

and Development of Terrains", organization and execution of public hearings is the obligation of the respective local council, whereby financing is the obligation of the customer that ordered preparation of the respective town development documentation.

Another positive feature of the new regulations is an attempt to define the subject to compulsory public hearings. According to Art. 30-2 of the Law "On Planning and Development of Terrains", no public hearings are required in respect to the individual building projects, and only the town development documentation must undergo them. At the same time, Art. 5 of the Law "On Principles of Urban Development" includes provisions according to which individual building projects are still subject to public hearings. From a legal point of view, the noted discrepancies should be resolved to favor of the most recent legislation, which is the changes to the Law "On Planning and Development of Terrains". According to it, the following town development documentation is subject to public hearings:

- Urban Planning Schemes or their parts (city, village etc.),

- General Plans of Settlements,

- Detailed Plans,

- Construction Plans of Territories,

- Town Planning Substantiation.

The procedure for public hearings includes the following stages:

- Publication of the local council's decision about preparation of town development documentation. This decision shall be circulated in the local press and placed on the website of the respective local authority (if available) within two weeks of its issuance,

- Publication of the draft of town development documentation, approved by the competent authorities. The draft has to be circulated in the local press and on websites (if applicable) within one month of the date of its submission to the local authority. The draft shall be distributed as a hard copy, as a briefing pack or a brochure,

- Suggestions/remarks regarding the draft can be submitted starting with the publication about the appointment of public hearings before their commencement. An important issue regarding the new regulations is that suggestions/remarks made by the public during the hearings must be well-grounded and refer to law or relevant regulations,

- New provisions also define the group of people who are entitled to attend public hearings, the duties of the chairperson (registration of participants, announcing the agenda, holding discussions, counting voting results, etc.). Public hearings shall be duly recorded. Any grounded disputes, suggestions or remarks must be reflected in a minutes and further considered by the conciliation commission,

- The conciliation commission is to be arranged by representatives of the public, elected on the basis of public hearings, as well as respective local architects, scientists etc. This commission shall consider open issues, raised by public hearings within two weeks from its establishment. If the conciliation commission fails to resolve these open issues, the final decision shall be taken by the respective local council,

- Issues adjudicated on by the conciliation commission and decisions issued by the respective local council serve as ground for amending the draft,

- The draft has to be amended according to the results of public hearings (if necessary) and undergo State expertise (if applicable) at the expense of the customer,

- Finally, the local council approves the draft and publishes its decision.

New provisions regarding public hearings stipulate that their results must be reflected in the town development documentation and constitute an integral part of it. The participant of the public hearings, if it does not agree with their results, has the right to file a claim in court.

4.2.4 Infrastructure Development Fee

Developers intending to construct a building are obliged to participate in the establishment and development of the transport and social infrastructure of the city/village where the construction takes place (Art. 27-1 of the Law on Planning and Development of Terrains). Developers shall pay an infrastructure development fee. This fee does not need to be paid: when the customers are State or municipal authorities; before construction of communal and affordable housing; complex development of territories on a competitive basis; construction of objects with the purpose of replacing buildings that have been destroyed or damaged by natural or unnatural disasters.

The amount of the development fee payable by developers shall be specified in the respective agreement to be executed with the local council.

The Construction Facilitation Law significantly reduced the maximum amount of the development fee to be determined by the local council, from 20% to 10% of total construction costs estimated for non-residential facilities and to 4% for residential buildings as well as culture, educational, medical and recreational institutions.

The development fee can be paid in one or several instalments according to a payment schedule provided in the contract. According to the Law on Planning and Development of Terrains, the final term for the development fee payment may not exceed one month after the building's commissioning.

4.2.5 Benchmark Data. Design Project Documentation

Benchmark data is information in accordance to which the construction project documentation shall be prepared. As already mentioned, the data consists of the town development restrictions and technical specifications (see 4.2.2 above).

Technical specifications have to be provided by the enterprise that is in charge of the engineering infrastructure (water and gas, sewage, electricity and heating networks, connections to the electricity and water sewer system, external lighting networks, fire safety, energy supply during construction etc.). The respective entity must provide the technical specifications within fifteen days of the developer filing an application. The list of necessary technical specifications is defined in the town development restrictions. The benchmark data is valid until the completion of construction and for not less than two years - and not more than five years from the date on which it is obtained from the respective entity.

4.2.6 Architectural and Town-Planning Council

Prior to the amendments being introduced, design project documentation must be approved by an 'Architectural and Town Planning Council' at different stages. This is one of the major reasons for unjustified bureaucracy during the construction process.

According to the new provisions, Architectural Councils shall act on a voluntary basis as an advisory body. The Council has to consider design projects and provide their conclusions only at the request of community, public associations, and authors of the projects and developers as well as in cases when projects deviate from approved town planning documentation. Such conclusions are recommendations only and are not binding. Compulsory involvement by the Architectural Council is only necessary if the construction is planned in a historically significant area of the city, at highways, within main urban squares and during the construction of high rise buildings. The Law on Planning and Development of Terrains explicitly states that the services provided by the Architectural Council are free and shall not be paid by developers.

4.2.7 Permit for Preparation Works

Developers, in order to organize the construction site for development, can apply for a permit for construction preparation works (Art. 28-1 of the Law on Planning and Development of Terrains). This permit does not allow construction works to commence,

but authorizes the developer to prepare the construction site for construction, in particular, to install a fence around the construction site, to erect provisional industrial buildings and structures necessary for organization and maintenance of the construction, utilities connected for construction purposes, etc. The permit for preparation works is to be issued based on prepared and approved project on preparation works by the respective Architectural Inspection. The decision on granting such permit shall be taken within 10 days of the filing of the application.

4.2.8 Construction Permit

New provisions to the Law on Planning and Development have significantly simplified the construction permit process through eliminating the requirements on approving the design project by a number of State and municipal authorities as well as by organs for the protection of historical assets, nature conservation and health. According to Art. 7 of the Law on Architectural Activity, design project documentation prepared according to the provided town development specifications is not subject to any approval by State or municipal authorities. The design project documentation is not subject to any approval by the utility enterprises which provided technical specifications for the project preparation. Developers are obliged to take an approval by the respective utility enterprise only if the technical specification provided by it cannot be incorporated in the design project.

Once the design project is prepared and has passed the State expertise on its correspondence with the State construction norms, the developer can apply for a permit authorizing it to perform construction works and realize the design project (the “Construction Permit”). Construction works may begin only after attaining the Construction Permit..

In order to obtain the Construction Permit, the developer and the contractor must pass documents with the respective Architectural Inspection.

The Developer shall file the following documents:

- documents confirming rights to the land, i.e. land ownership, land use or superficies,
- duly agreed and approved construction project documentation,
- information about technical and architectural supervision over the construction,
- a financial report and the licence for financial operations (applicable only if the construction is to be financed with the debt capital of natural persons).

The Contractor shall file the following documents:

- copies of charter documents and certificate on the legal entity's registration,
- a copy of the construction licence authorizing it to commence general contractor activities,
- the general contract for the construction work,
- documents on appointment of the persons responsible for performance of works,
- information on the qualification and experience of the involved specialists,
- proposals regarding involvement of subcontractors.

The Construction Permit is to be issued to the developer by the Architectural Inspection within a month of the date upon which the required documents were filed. The permit is valid for the period set for the respective design project or for the period of the general contractor agreement. The Construction Permit can be extended by a maximum of one year.

4.3 Building's Construction

4.3.1 General Contractor Agreement

Real estate construction is carried out based on a general contractor agreement concluded between the customer and the construction company.

The framework of the general contractor agreement is provided by CCU, Art. 875–886. Additionally, where the parties to the contract are commercial subjects, the provisions of the Commercial Code must be observed (Commercial Code, Art. 317–323). Several administrative acts of the Cabinet of Ministers of Ukraine must be adhered to when concluding a general contractor agreement, in particular, the Decree "On the General Conditions of Executing and Fulfilling of Contractor Agreements in the Capital Construction" dated August 1, 2005 (the "Decree"). The Decree provides for general content and essential conditions to be included in a general contractor agreement, regardless of the source of the construction's financing and the legal form of the customer or the construction company.

4.3.2 Contractor Agreements with Foreign Developers

If the party to the general contractor agreement is a foreign developer, provisions of the Law "On External Economic Activity" dated April 16, 1991 must be observed, with foreign

developers who have their primary residence (for natural persons) or primary place of business (for legal entities) located outside of Ukraine.

In general, since January 1, 2005 gross border contracts, including international general contract agreements, do not require entry in State registers. Only a small number of foreign trade contracts, expressly specified by law, are subject to State registration. This refers in particular to credit contracts, as well as tolling agreements which are subject to State registration.

Nevertheless, the Ukrainian government is always authorized (in accordance with the Commercial Code, Art. 383, Par. 1) to record certain cross-border contracts in the State registry, meaning that the number of such contracts subject to State registration fluctuates greatly.

The Decree must also be followed when foreign developers are involved in general contractor agreements. Parties to those agreements have a right to freely choose the applicable legal systems when executing an international general contractor agreement (Commercial Code, Art. 382, Par. 5; International Private Law, Art. 5, Par. 1; 32, Par. 1). However, if the parties to the general contractor agreement cannot agree on applicable law, the law of the country in which the contractor is located shall apply (International Private Law, Art. 44, Par. 1). The Ukrainian courts are then obliged (in accordance with the Commercial Procedural Code, Art. 4) to apply the laws determined in the international general contractor agreement when settling disputes.

4.3.3 Essential Terms and Conditions of the General Contractor Agreement

According to the general contractor agreement, a contractor (construction company) shall construct an object within a certain period of time in accordance with the design project documentation or perform other construction works and the customer (developer) is obliged to provide the contractor with the respective construction site and design project documentation (unless the construction company is responsible for that), to take over the object and other construction works and to pay for the construction works provided (CCU, Art. 875).

The general contractor agreement is most often used for new construction, restoration, and technical rearrangements for companies, buildings, fixtures, as well as equipment and assembly of engineering and transport networks, among others.

The contractor agreement shall provide the following essential terms and conditions (Commercial Code, Art. 318, and Decree, Item 5):

- the names of the parties to the contract,

- the date and place of execution of the contract,
- the subject of the contract,
- the contract's price,
- the dates for commencement and completion of the construction,
- the rights and obligations of the parties,
- the security of obligations,
- the terms and conditions of insurance against accidental destruction or damage of the construction object,
- the terms and conditions for the delivery of construction materials and of the provision of the design project documentation,
- the procedures of engaging the subcontractors,
- the requirements as to the organization of the construction work,
- the procedure for performance of quality control by the customer of the construction work,
- the sources of project financing and their priority ranking,
- the invoicing order,
- the procedure for handover of the completed works (construction object),
- the warranty periods for the completed construction work and procedure for elimination of defects,
- the liability of the parties,
- dispute settlement procedures,
- procedures for contract amendment and termination.

Terms and conditions of payment may be defined in the general contractor agreement in a very liberal way. The parties can effectively include clauses that foresee advance payment to the construction companies (Commercial Code, Art. 321, Par. 6, and Decree, Item 98).

4.3.4 Takeover of Completed Buildings. Commissioning

The customer (developer) is obliged to inspect the completed construction work, as soon as the construction company reports on availability of the object. The inspection of construction work can be done at certain stages of the construction project, if so agreed in the general contractor agreement.

The commissioning procedure for the newly erected buildings was amended by the Construction Facilitation Law as well as by new Resolution of the Cabinet of Ministers No. 923 approved on October 8, 2008, “On the Procedure for Commissioning Objects Completed by Construction (the “Commissioning Procedure”).

The Construction Facilitation Law was intended to simplify and speed up the commissioning procedure; the new Commissioning Procedure has the same aims but acts in vain.

According to the newly introduced Art. 30-1 of the Law on Planning and Development of Terrains, commissioning of erected buildings occurs through the issuance of a compliance certificate (the “Compliance Certificate”) by the Architectural Inspection which issued the Construction Permit for the concerning building. According to the same Article, the following documents have to be filed with the application for issuance of the Compliance Certificate:

- Approved design project documentation, and
- Document (literally “Act”) on readiness of the building for the commissioning signed by the architects’ bureau, general contactor, subcontractors, customer (developer) and the insurance company (if the building is insured).

The acceptance of the buildings into operation is carried out by an acceptance committee which is formed by the Architectural Inspection upon the customer’s (developer’s) request.

The Acceptance Committee shall include inter alia representatives of the customer, general designer and insurance company (one of those shall be head of the committee), Architectural Inspection, representatives of the local authorities and exploitation organizations upon their consent (Commissioning Procedure, Item 5).

The procedure for putting a finished construction object into operation includes confirmation by the acceptance committee of the correspondence of such objects with the project documentation, State standards, construction norms and rules, technical conditions, requirements of the normative documentation, etc.

The inspection of the construction object shall be carried out by the acceptance committee within 10 days of the moment of its establishment. The results of the committee's work must be recorded in the Act of Readiness of the Object for Operation which is to be signed by all committee members.

Based on this Act, the Architectural Committee shall issue to the customer the Compliance Certificate of the Constructed Object with the State Construction Norms (the "Compliance Certificate"). The Compliance Certificate must be further registered with the Architectural Inspection. The date of the object's commissioning shall be the date of issuance to the customer of duly registered Compliance Certificate. The Compliance Certificate serves as a ground for conclusion of the agreements on supply of gas, water, heat, electricity for the construction objects. In addition, the Compliance Certificate shall be one of the essential documents required for the issuance of the title document for the constructed object.

4.3.5 Warranties of Works. Limitation Periods

Upon completion of the inspection and executing of the acceptance protocol, the customer bears the risk of accidental damage to the accepted work, with the warranty period for the construction work beginning at the same time, unless otherwise provided in the contractor agreement (CCU, Art. 860).

The contractor shall be liable for the construction object's correspondence with data and characteristics provided in the project documentation and the possibility to operate the building according to the contractor agreement within the warranty period, unless otherwise specified in the contractor agreement. According to the CCU, Art. 884 such warranty period constitutes ten years from the moment when the construction object is accepted by the customer, unless a longer warranty period is provided in the agreement or law. By law, the warranty may be extended by a contract, although it may by no means be shortened.

The statute of limitation for claims connected with the contractor agreements starts from the moment of acceptance of construction works by the customer unless otherwise provided in the contractor agreement. Claims arising as a result of inferior quality of works performed under the contractor agreement may be submitted within one year of their completion. For buildings and structures this period is three years (CCU, Art. 863).

5. Particularities of the Real Estate Business in Kyiv

5.1 General Framework for Acquiring Land from Municipality

Municipal land shall generally be leased and sold by auction, except for some cases explicitly provided by law (LCU, Art. 124, 134). According to the LCU, the auction must be conducted in accordance with a procedure defined by law (LCU, Art. 137, Item 5). However, there is currently no law-established auction procedure.

In practice, local councils, including Kyiv City Council, adopt their own local provisional procedures to regulate land auctions. In Kyiv the procedure for conducting land auctions is determined by the Temporary Order on Acquisition of Rights to the Land on Competitive Basis in the City of Kyiv approved by the resolution of Kyiv Council No. 810/3385 dated July 19, 2005 (the "Temporary Auction Procedure").

The procedure for purchase of municipal land (buy out of land through direct purchase, i.e. without holding an auction) is stipulated by the Temporary Order of Selling of Land Plots in Kyiv City approved by the Resolution of Kyiv Council No. 304/1738 dated March 14, 2002 (the "Temporary Selling Order"). In addition, the procedure for granting the municipal land into lease is governed by the Resolution of Kyiv Council No. 457/1867 dated July 15, 2004 "On Regulation of the Procedure of Transfer of the Land Plots into Use in the City of Kyiv" (the "Land Use Transfer Procedure").

Some local regulations contain provisions that contradict the LCU and even one another. In particular, according to the Temporary Selling Order the land may be inter alia sold without an auction when such land is leased by the applicant (Item 1.2). Leasing of land by the applicant as a ground when land may be acquired through direct purchase is provided neither by the LCU nor by the Temporary Auction Procedure. Thus, the mentioned local practice of land purchase cannot be recognized as legitimate.

5.2 Buy Out (Direct Purchase)

According to the Temporary Selling Order, those who are interested in acquiring a piece of land (and according to the LCU, Art. 134, Part 2 are entitled to purchase land without an auction) have to submit a request to the administrative office of Kyiv Council. The following documents must be enclosed with the request:

- a document evidencing user rights to the land,
- a cadastral plan of the land,
- a document evidencing proper registration of the ownership of the building located on the land plot,
- for foreign investors: a certified copy of the applicant's registration certificate as a permanent establishment for tax purposes,
- for Ukrainian companies: a certificate of registration, notarized copies of the company's charter, partnership agreement if any, and the certificate of registration in the Unified Register of Companies and Organizations of Ukraine.

If the applicant is a foreign legal entity or a Ukrainian legal entity with foreign shareholders, the request will only be reviewed if it has the consent of the Cabinet of Ministers of Ukraine (compare with 1.6.1).

The Main Land Department of Kyiv City Administration (the "Land Department") shall consider documents submitted by the applicant, organize expert valuation of the land plot, draw up technical documentation and prepare a draft decision on the sale of the land to the applicant. After that, the Land Department passes a draft resolution on sale of the land along with an expert valuation report and the land plot's allocation project (if there is one) to the Permanent Town Planning and Land Use Committee of Kyiv Council (the "Town Planning and Land Use Committee"). The Committee shall consider the documents made available and transfer them within one month to Kyiv Council. The Council's Resolution shall serve as the basis for execution of the land sale contract. The land sale contract shall be further notarized and registered with the Land Cadastre.

5.3 Auction procedure

The Temporary Auction Procedure applies both to the selling and leasing of the municipal land. The list of land plots subject to auction shall be approved by Kyiv City Council based on the proposals submitted by the Land Department. When legal entities or individuals are interested in purchase / leasing of the particular land plot, they shall file an application with the Land Department. If the Land Department considers that selling / leasing the land plot by auction is possible, the land is included into the list of land subject to auction.

An allocation project has to be prepared for the object of an auction. The project shall be elaborated by a licensed company at the request and expense of the Land Department. The project is approved by a number of authorized bodies, including the land authorities,

environmental and cultural heritage protection authorities, including final positive approval of the State expertise. After the State expertise is obtained, the project shall be further approved by the Kyiv Council which shall pass a decision on selling / leasing of land.

The Land Department shall then prepare the technical passport of the land plot, containing data on the land's location, cadastre number, designated purpose, expert valuation etc. The notification on the auction must be published not less than 30 days prior to the date of the auction. To participate in the auction one must pay a deposit of 15% of the expert valuation of the land. As a general rule, the starting price of the lease payment shall not exceed 30% of the land's expert valuation.

The auction is conducted by the Land Department provided that there are at least two applicants willing to purchase / lease the land plot. The participant that offered the highest bid wins the auction. The results of the auction are drawn up in an act, which has to be signed by Kyiv City Council. This act together with a decision on selling / leasing of land serves as legal ground for executing the respective sale / lease contract. The land's purchase price shall be paid by the winner of the auction within 10 days from the moment of execution of the sale contract. The deposit is subtracted from the purchase price (or refunded within ten days if the applicant's bid was not successful).

5.4 Particularities of Direct Land Lease

The procedure for granting lease rights to municipal land in cases when the land may be leased without auction, i.e. based on a Kyiv City Council resolution is prescribed in the Land Use Transfer Procedure. The municipal land shall further be leased without auction, i.e. based on the Land Use Transfer Procedure when a decision of Kyiv Council on approval of the location of the object or on permission to start elaboration of the land allocation project, required for transfer of land into lease was adopted before January 1, 2008 (LCU, Transactional Provisions, Art. 1, Part 3). However, the mentioned exemption is valid until October 15, 2009. After that time, communal lands shall be leased solely through an auction, even when permission to elaborate a land allotment project was granted to the applicant before January 1, 2008 (Construction Facilitation Law, Final Provisions, Art. 2).

The following documents must be enclosed with the application for a direct lease:

- Image of the land photocopied from a realty map,
- Land plan defining the expected boundaries (if not already definitively determined),
- Information about the desired designated purpose of the land,

- Information about the main purpose of the construction object and its most essential technical and economic data,
- Information on the legal status of buildings that are located on the land,
- Copies of the title documents to the land plot (if any) or administrative documents on granting of land (when title documents are not available). If neither of the mentioned documents are available, a certificate from the Main Architectural and Town Planning Department of Kyiv Council is necessary to prove that there are no documents,
- Preliminary design suggestions: The local construction ordinances in Kyiv provide for elaboration of the preliminary design suggestions for development (justification for urban development) of the land in question, considering the information that is available on the legal status of the land, the types of development that are permitted, and other particularities of its use. Preliminary design suggestions are not binding, in practice, however, they often simplify the process of granting lease rights to the land.

Based on the application and the attached documentation, the Land Department prepares a draft resolution on lease of the land plot to the applicant or refusal on granting the land and passes these documents to the Town Planning and Land Use Committee. The latter shall consider the documents and pass them to the mayor of Kyiv or his deputy, who consents the preparation of the land survey documentation for the questioned land plot.

The type of land survey documentation depends on technical objectives. It can be either technical land documentation on the transfer of land into lease or an allocation project. The technical land documentation is prepared where the boundaries of the land are determined in kind (in field) and the land's designated purpose remains unchanged (LCU, Art. 123, Part 1, par. 3). When land's boundaries are not determined in field or land's designated purpose is changed a land allocation project must be elaborated (LCU, Art. 123, Part 1, par. 2).

A land allocation project needs to be agreed with a number of departments of the Kyiv State Administrations (land, town planning and architectural, culture and heritage, environmental protection departments). After approvals from the mentioned authorities have been obtained, the allocation project shall undergo State land survey expertise.

Preparation of the technical documentation on the land plot is much easier than in an allocation project and requires agreement with the Land Department only.

When approved by the required authorities, the land survey documentation is transferred to the Land Department which shall consider the documents made available and prepare a draft decision for Kyiv City Council on transferring the land into lease. The draft decision

is first presented to the Town Planning and Land Use Committee, and with its consent, it goes to the city council session for a final decision.

The decision on giving the land into lease becomes void if the lease contract is not executed within nine months after the decision has been made.

5.5 Height of Buildings

According to the Kyiv Development Rules approved by Resolution of Kyiv Council No. 11/2587 dated January 27, 2005 (the "Kyiv Development Rules") the height of buildings to be erected in Kyiv shall be determined in accordance with the approved detailed plan of the territory or historical town planning substantiation (when no plan of the territory is available) and specified in each particular construction case.

As a general rule, in Ukraine, the height of residential buildings is limited to 73.5m (approx. 24 stories). The Kyiv Development Rules as well as Town Planning Concept of Height of the Buildings in Kyiv provide in some instances the possibility to construct buildings with a height exceeding 73.5m (so-called experimental height construction, which has lately been successfully implemented), however, in such a case additional technical approvals are required. Moreover, construction of the buildings is prohibited in the historic part of the city (Kyiv Development Rules, Item 2.3.10). In addition, for the erection of construction objects in the historic old part of the city additional requirements regarding the design of the façade, location of the object etc. must be adhered to.

5.6 City Restoration

All restoration works in Kyiv are subject to approval by the city's State authorities. The approval procedure for realizing restoration work is much simpler than the approval process required before a new structure is built. Even so, the particular issues that restorations in the historic part of the city involve must be a part of all considerations. If a particular building is a protected monument of national heritage, any type of work there requires additional approval from the architecture and building inspection and culture heritage protection authorities.

6. Taxes on Real Estate

6.1 Overview

From a tax law viewpoint, there is a difference between the tax levied on a piece of real estate itself, the income derived from a piece of real estate, and taxation of income from real estate transactions. Real estate transactions are also subject to other taxes, fees, and levies.

6.2 Taxes on Real Estate Property

6.2.1 Taxes on Building Property

Ownership of buildings is not taxed in Ukraine, and there is no estate tax assessed on the ownership of buildings.

6.2.2 Taxation of Land

Land ownership is taxed in Ukraine. The tax on land (called a "land levy" and, in the extended sense, a "land tax") is prescribed in the law "On Payments for Land". The land tax is a tax payable by legal entities and natural persons who own the land. The tax rate depends on a formula that is determined annually for a particular land unit (1 square meter, or 1 hectare). Which unit is used depends on whether a valuation of the land has been performed.

If a valuation of the land has been performed, the tax amount is calculated in a percentage of its evaluation. The land tax rates are as follows:

Category of Land	Tax Rate
Farmland, pasture	0.10%
Long-term cultivation areas	0.03%
Land within municipalities	1.00%
Land for the industry, transport and communication sector, and companies in other branches	5.00%
Train station premises, as well as other areas that are made available to the armed forces of Ukraine	0.02%
Land that is for transient use and that serves nature conservation or recreation or which is of historical and cultural value	50.00%
Land belonging to the Forest Reserve Fund	is paid as a part of the levy on the use of the forests, in accordance with forestry law
Land belonging to the Sustainable Water Fund	0.30 %

New provisions were introduced in 2009 with regard to tax calculation of lands within municipalities as well as for industrial lands, namely that the land evaluation taken as basis for tax calculation may not be less than the transaction price stipulated in the acquisition agreement. The new rule led to cases whereby two neighbouring land plots with the same characteristics have been taxed using completely different methods, because of the different prices at which they were acquired. A claim has been made with the Constitutional Court of Ukraine to declare the latest changes to land tax law invalid.

The tax rate on land that has not been valued depends on a variety of criteria. The table below provides an example of land tax rates for non-valued land located within municipalities:

Population in the Community (thousands)	Tax Rate (Kopiyka/1 m2)	Growth Rate
more than 0.2	0.075	-
from 0.2 to 1	0.105	-
from 1 to 3	0.135	-
from 3 to 10	0.15	-
from 10 to 20	0.24	-
from 20 to 50	0.375	1.2
from 50 to 100	0.45	1.4
from 100 to 250	0.525	1.6
from 250 to 500	0.6	2.0
from 500 to 1,000	0.75	2.5
more than 1,000	1.05	3.0

6.3 Taxes on Income Derived from Real Estate

Revenue derived from real estate (rent payment) is subject to the general individual income taxation rates.

In accordance with Ukrainian income tax law, the income of a natural person is taxed principally at the rate of 15 per cent. The income of non-residents is taxed at 30 per cent, while the tax on capital income (interest) earned by non-residents is often calculated differently due to international conventions for avoidance of double taxation.

Revenue earned by Ukrainian legal entities is taxed at a rate of 25 per cent according to the Profit Tax Law. Revenues of foreign companies are subject to taxation in Ukraine if they are permanently established in the country. Permanent establishment of foreign companies is always assumed if they own real estate in Ukraine. Income earned by a permanent establishment from the lease of real estate is also taxable at 25 per cent.

6.4 Taxation of Income from Real Estate Transactions

In the taxation of income, i.e., gains from real estate transactions, there is again a difference between natural persons and legal entities.

The income of a natural person from sales transactions is not taxed, as long as they do not execute more than one sale transaction per year and the total area of the building does not exceed 100 square meters. If the total area exceeds 100 square meters, income from the sale of property in excess of 100 square meters is taxed at the rate of 1 per cent. If more than one piece of real estate is sold within any given year, any additional revenue will be taxed at the rate of 5 per cent.

The income of legal entities from real estate transactions is taxable according to the general provisions of the Profit Tax Law in Ukraine.

6.5 Other Taxes, Fees, and Levies

6.5.1 Value-Added Tax

In Ukraine, the rate of value-added tax on sales transactions is generally 20 per cent. There are special rates and exemptions for certain types of merchandise. The alienation of buildings is principally subject to value-added tax in the amount of 20 per cent, although residential property is an exception. It is not subject to VAT except the first time it changes hands after building or capital restoration.

The transfer of land ownership is not subject to value-added tax if the land is not transferred as a component of the building. The latter does not occur in real practice, .

6.5.2 Fees and Levies

The government takes a fee on real estate transactions subject to the notary's certification. In principle, these fees are paid by the natural person or legal entity benefiting (i.e., the purchaser), and it is not permissible to formulate a different agreement on this in the contract.

The amount of government fees are:

- The notarization of contracts on the alienation of houses, apartments, holiday and garden cottages, garages, and other real estate objects that are the property of natural persons is levied with a fee of 1 per cent of the contract value, but not less than the income tax free minimum (17 UAH, ca. 3 USD).

- The notarization of contracts on the alienation of a plot of land that is the property of natural persons is levied with a government fee in the amount of 1 per cent of the contract value, but not less than the income tax free minimum.

- For the notarization of a contract on land lease (sublease), a government fee is levied in the amount of 0.01 per cent of the declared land value. Where the value of the land has not been assessed, a government fee is levied in the amount of 1 per cent of the value of the contract, but the fee may not be less than the minimum basic personal allowance.

- For the notarization of a mortgage contract, a fee is levied in the amount of 0.01 per cent of the value of the mortgaged object.

- For the notarization of a lease on real estate (sublease) a government fee is levied in the amount of 0.01 per cent of the contract value, but the fee may not be less than five times and not more than 50 times the minimum basic personal allowance.

- For the notarization of a pledge contract, a government fee is levied in the amount of 0.01 per cent of the pledged object, but the fee may not be less than five times and not more than 50 times the minimum basic personal allowance.

- For the notarization of a contract on the purchase of property from a government-owned business, a government fee is levied in the amount of 0.1 per cent of the purchased property.

- A real estate auction (but not a foreclosure auction) of property belonging to a natural person is levied with a government fee in the amount of 1 per cent of the sale value of every real estate object that is auctioned off, but not less than one minimum basic personal allowance.

On acquisition of a building, a fee that goes to the nation's Pension Fund is charged in the amount of 1 per cent of the contract value in addition to the government fee.

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