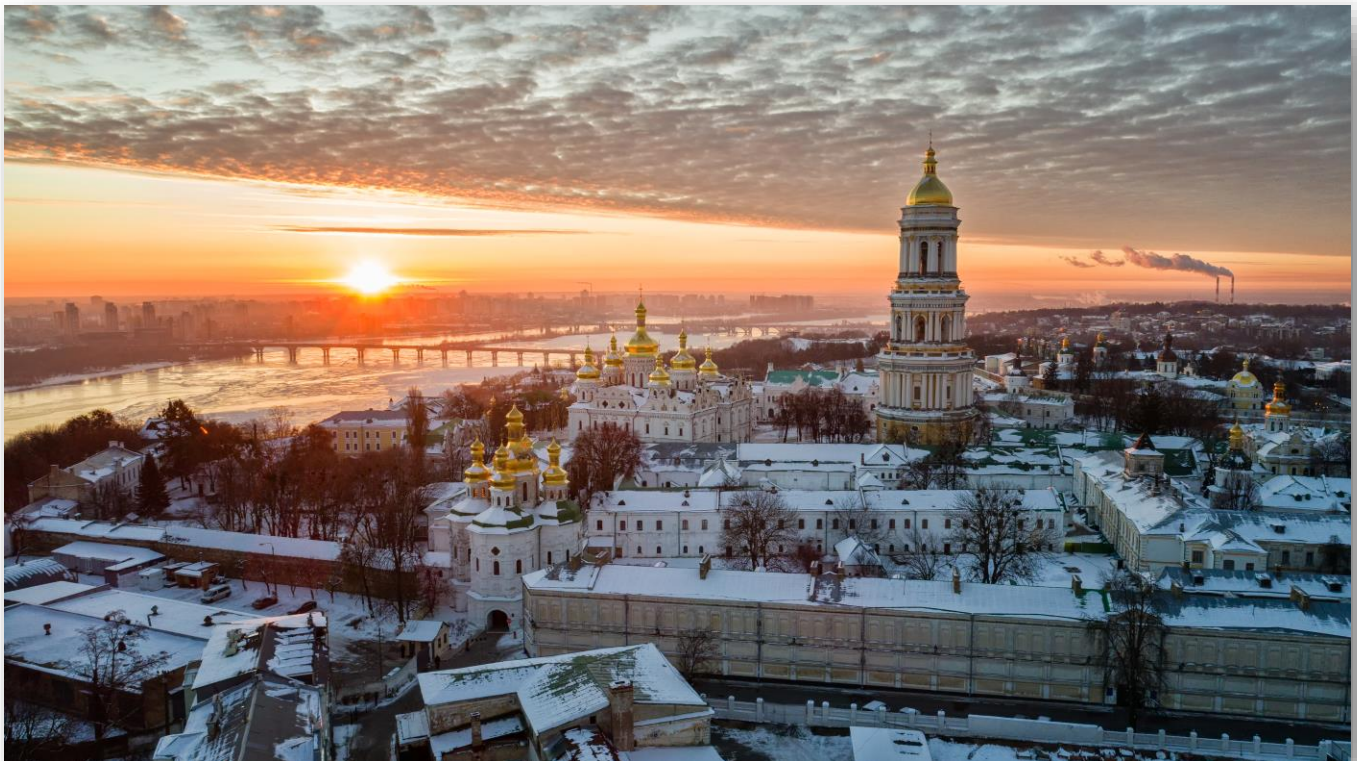




Fall | 21



INTERNATIONAL LAWYERS NETWORK



PETERKA & PARTNERS
BUYING AND SELLING REAL ESTATE IN UKRAINE

ILN REAL ESTATE GROUP

This guide offers an overview of legal aspects of buying and selling real estate in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER UKRAINIAN LAW

I. Types and specifics of real estate in Ukraine

The main types of real estate in Ukraine are the following:

- land plots;
- other objects that cannot be removed without their depreciation and change of their designation like buildings (residential and others), constructions, as well as their separate parts, apartments, premises (residential and non-residential).

The regime of real estate property may be extended by law to aircraft and ships, inland waterway vessels, space objects, as well as other property, the rights to which are subject to state registration.

In Ukraine, a land plot and real estate object located on such land plot (building, construction, etc.) are considered as two separate real estate objects. Thus, in practice, there are situations when a land plot and real estate object located on such land plot are owned (or used on other title) by different persons and based on different titles (e.g., a person can own a building and lease underlying land plot which is initially owned by the state).

Recently in Ukraine a set of developments to real estate legislation have been introduced which aim at implementation in practice of a principle of “unanimous legal destiny of the land plot and the real estate object located on it”. Such principle shall ensure that in case of acquisition of the real estate object (residential building (except apartment building), other building or construction), object of unfinished construction located on a land plot, into ownership, the right to underlying land plot is transferred simultaneously to the acquirer.

II. Ownership title to real estate

There are the following types of real estate ownership:

- State ownership

Certain real estate objects are owned by the state of Ukraine (lands of nuclear energy and space system; military lands; lands under state railways, objects of state ownership of air and pipeline transport; property of state authorities, state reserve, state entities, etc.). The state exercises its ownership right through relevant public authorities (Cabinet of Ministers of Ukraine, State Property Fund of Ukraine, state administrations, etc.).

As a general rule, the state real estate which is not forbidden for sale shall be sold on a competitive basis (auctions).

- Municipal ownership

Under the laws, certain real estate objects are owned by local communities (e.g., all lands within settlements, except for private and state-owned land plots). As in the situation with state-owned real estate, municipal property (which is not forbidden for sale as well) is sold by municipal authorities on a competitive basis (auctions).

- Private ownership

Real estate objects can be owned by individuals and legal entities on the basis of private ownership, which can be individual or co-ownership (when property is owned by two or more persons (co-owners)).

The co-ownership can be either shared (when each co-owner has determined share in co-ownership) or joint (when

co-owners' shares in co-ownership are not specifically determined, e.g., co-ownership of spouses).

III. Restrictions for foreign investors

Under current laws of Ukraine, foreign investors are limited in land plots acquisition.

As to non-agricultural lands:

- foreign individuals are enabled to acquire ownership rights to non-agricultural land plots:
 - within settlements;
 - outside settlements where real estate objects belonging to such foreign individuals on private ownership title are located.
- foreign legal entities (established and registered according to foreign state legislation) are enabled to acquire ownership rights to non-agricultural land plots:
 - within settlements in case of acquisition of real estate objects and for construction of objects related to business activities in Ukraine;
 - outside settlements in case of acquisition of real estate objects.

As to agricultural lands, foreign investors are currently prohibited to acquire (directly or indirectly) agricultural land plots in Ukraine. However, subject to positive decision of referendum, foreign investors (with certain exceptions) may be provided with a possibility to acquire agricultural lands through legal entities established and registered under the laws of Ukraine.

IV. Data and documents on titles to real estate

Prior to concluding a sale and purchase agreement (hereinafter – the “*SPA*”) of real estate, it is recommended that parties to the

transaction obtain valid and up-to-date information about the real estate object in question, verify title to it and existence of possible encumbrances as well as other details related to real estate object.

In Ukraine, the right of ownership (as well as other rights to real estate), encumbrances of these rights, their commencement, transfer, and termination are subject to state registration in Ukrainian State Register of Proprietary Rights to Real Estate (hereinafter – the “*Register*”). The state registration in the Register is considered to be an official recognition and confirmation by the state of facts of acquisition, change or termination of proprietary rights to real estate and encumbrances of such rights. Information on proprietary rights, encumbrances of proprietary rights recorded in the Register shall be considered reliable and may be used in a dispute with a third party until the state registration of termination of such rights, encumbrances within the procedure prescribed by applicable laws on real estate.

Information on registered rights to real estate and their encumbrances contained in the Register is open, publicly available, and chargeable. For individuals and legal entities, information on real estate object and the subject of proprietary right is provided in electronic form through the official website of the Ministry of Justice of Ukraine (<https://online.minjust.gov.ua/rrp/>), subject to identification of such person (individual or legal entity) by using an electronic digital signature or other alternative mean of identification of a person, or in paper form.

In some cases, in order to verify title to real estate, it is also needed to examine other documents related to such real estate like sale-purchase agreement of such real estate by which it was initially acquired by the seller,

certificate on ownership title to such real estate, etc.

V. Sale and purchase of real estate

Due diligence

Before execution of real estate sale-purchase transaction, it is usually recommended to undergo real estate due diligence procedure to verify possible risks or consequences related to acquisition of certain real estate which may have a material adverse effect on the transaction.

Due diligence usually includes verification of the following aspects:

- validity of a title to real estate property;
- existence and details of other proprietary rights to real estate property (lease, easement, etc.);
- existence and details of encumbrances (mortgage, tax lien, etc.);
- history of title transfer;
- unrestricted right to transfer of the real estate property;
- disputes, litigations in respect of real estate property;
- permitting situation;
- other details related to real estate (designation purpose of the land plot, etc.).

Preliminary agreement

Before entering into the main sale and purchase agreement of real estate, the parties may be of interest to conclude a preliminary agreement.

By concluding such preliminary agreement, the parties undertake, within a certain period (but not later than within 1 year from the moment of conclusion of preliminary agreement), to

conclude main sale and purchase agreement in the future based on terms and conditions established by the preliminary agreement.

Preliminary agreement shall contain conditions which allow to determine subject matter as well as other essential terms and conditions of main sale and purchase agreement and be concluded in the form established for main sale and purchase agreement.

The obligations established by the preliminary agreement shall be terminated if the main sale and purchase agreement is not concluded within the period established by the preliminary agreement, or if neither party sends a proposal to the other party to conclude it.

The party who unreasonably evades the conclusion of the main sale and purchase agreement provided for by the preliminary agreement, shall reimburse the other party for damages caused by delay, unless otherwise established by the preliminary agreement or legislation.

On contrary to preliminary agreement, the agreement of the parties on intentions (protocol of intentions, etc.) is not considered as a preliminary agreement and does not entail legal consequences.

Sale and purchase agreement (SPA)

Under SPA of real estate, one party (a seller) shall transfer a real estate property (land plot, building, etc.) to an ownership of the other party (a purchaser), and the purchaser shall accept a real estate property and pay for it a certain amount of money.

- The form of SPA

As a general rule, SPA of real estate shall be concluded in written form and is subject to notary certification.

- Essential and other important terms and conditions of SPA

In order to consider SPA concluded, the parties shall agree on all essential terms and conditions of such agreement - its subject matter, terms and conditions determined by law as essential or needed for such types of agreements (like price, term, cadastral number of underlying land plot) as well as all other terms and conditions which shall be agreed at the request of at least one of the parties.

- The **subject matter** of SPA shall be well defined and described, so that it is possible to distinguish real estate object among other similar real estate objects. Usually, the SPA of real estate shall contain information on location of real estate, its address, purpose, area, and other parameters that allow to unambiguously determine it.
- Usually, the **price** is set by the agreement of the parties, which shall not be less than the value of such real estate property defined by independent appraiser.
- Transfer of rights to underlying land plot

Following the principle of “unanimous legal destiny of the land plot and the real estate object located on it”, an essential condition of SPA under which the right of ownership (shares in co-ownership) to the real estate object (residential building (except apartment building), other building or structure), the object of unfinished construction connected with the transfer of ownership right to the

land plot is acquired is a **cadastral number** of a land plot, the right to which is transferred in connection with the acquisition of ownership right to such real estate object.

If under such real estate SPA, the right shall be transferred only to the part of a land plot, the conclusion of real estate SPA shall be made after allocation of such part into a separate land plot and assigning a cadastral number to it.

The **size of the underlying land plot** to be transferred shall also be specified in the SPA.

On 01.01.2022, new legislative developments related to transfer of rights to underlying land plot will come into force. Such legislative developments provide for additional requirements to SPAs, which shall be considered when concluding SPAs and which are the following.

A land plot (or a share in co-ownership right to it) must also be the subject matter of SPA, which provides for the transfer of the right of ownership to the real estate object (residential building (except apartment building), other building or structure, object of unfinished construction or share in the right of co-ownership to such object) located on such land plot (except for state- and municipal-owned lands) owned by the seller (previous owner) of such object. The condition on simultaneous transfer of ownership right to such land plot (a share in co-ownership right to it) from the seller to the acquirer of such object shall be an essential

condition of SPA, which provides for such transfer of ownership right.

○ Warranties

According to Ukrainian legislation, the parties to SPA may agree on a list of warranties provided by one party or parties regarding the circumstances significant for conclusion, performance, or termination of such agreement.

A party who intentionally or negligently provided the other party with false warranties about the circumstances significant for conclusion, performance, or termination of the agreement, is obliged to reimburse the party who relied on such warranties for damages caused by the falsity of such warranties, unless otherwise provided by the agreement.

The typical warranties in real estate SPA are the following:

- clear title to real estate;
- the seller is the sole owner of the property;
- absence of encumbrances (mortgage, tax lien, prohibition on alienation, etc.);
- absence of third-party rights to real estate property (leases, easements, etc.);
- absence of pending disputes, litigations in respect to real estate property;
- absence of any quality defects;
- absence of necessity in capital repair;

- the parties or their representatives has all needed authorisations to enter into real estate SPA;

- others.

- The parties to SPA shall also pay attention to other terms and conditions of SPA like liability of the parties, payment conditions, bank details of the parties, allocation between the parties of possible expenses related to SPA (notary fee, bank commissions, etc.) and others.

VI. State registration

As was noted above, the right of ownership (as well as other rights to real estate), encumbrances of these rights, their commencement, transfer, and termination are subject to state registration in the Register.

Usually, the state registration of rights to real estate in the Register is made by the notary, who certifies SPA, simultaneously with performance of such notary action.

Following state registration of rights to real estate property in the Register, a new owner is provided with related excerpt from the Register.

VII. Costs and taxes (general notes)

1. Natural persons:

1.1. Seller:

- Personal income tax (PIT):
 - for certain residential real estate/certain categories of land plots owned for less than 3 years - 5%
 - for certain residential real estate/certain categories of land plots owned for more than 3 years - 0%, but if more

than 1 object is sold within a year – then 5%

- for other types of real estate – 5%
- for non-residents increased rate of 18% may apply in certain cases.
- Defense contribution (applies if PIT rate is not 0%): 1,5%

1.2. Buyer (natural person):

- pension fund levy 1% (for certain types of real estate)

1.3. To be distributed between the parties upon their agreement:

- state fee 1%;
- notary fee (depends upon exact notary);
- broker's fee (depends upon exact broker, usually around 5%).

As a general rule, the base for the above accruals is a contractual price, which shall be not less than the price identified by an independent appraiser.

2. Legal entities

In general, paras 1.2 and 1.3 apply to legal entities as well.

In addition to that, it should be considered whether exact transaction is subject to withholding tax (if the seller is a foreign legal entity), and to VAT.

Statutory WHT rate is 15%, double tax treaty benefits are available in some cases.

VAT rate is 20%. As a general rule, the sale of land is VAT exempt, while the

sale of other real estate objects is usually VAT-able.

VIII. Share deal

Real estate property can also be acquired by way of a share deal – acquiring a share/participatory interest in a company holding title to real estate property. In some cases, real estate acquisition through a share deal may be preferable for the purchaser due to tax and other advantages of such a transaction. Sale of shares in a joint stock company or participatory interest in a limited liability company is not subject to VAT.

A share deal does not entail registration of transfer of ownership title to real estate, though within the share deal a target company is acquired by the purchaser along with all its rights, obligations, and liabilities.

On contrary to asset deal, a share deal may be governed by foreign law according to the parties' choice.

IX. Agents

The seller and purchaser can both use services of real estate agent (broker). Currently, attraction of real estate agents (brokers) in Ukraine is voluntary.

X. Donations

The real estate property can also be acquired by means of a donation agreement. Due to the specific nature of the donation, there are some cases when donor can demand termination of donation agreement (e.g., if the beneficiary intentionally committed a criminal offense against life, health, property of the donor, his parents, wife (husband) or children).

The above information is provided for general understanding only. The real estate acquisition may also involve other legal and tax aspects. We strongly advise that legal and tax advisors are involved in order to ensure that each specific case is dealt comprehensively. If you need any further information

on the issues covered by this overview, please contact Mr. Taras Utiralov (utiralov@peterkapartners.ua) or Ms. Galyna Melnyk (melnyk@peterkapartners.ua).

PETERKA & PARTNERS is a full-service law firm operating in Central and Eastern Europe providing one-stop access to an integrated regional service.

The firm provides legal services to multinational companies active in the region, as well as leading local groups, providing them with complex legal solutions with exceptional commercial value.