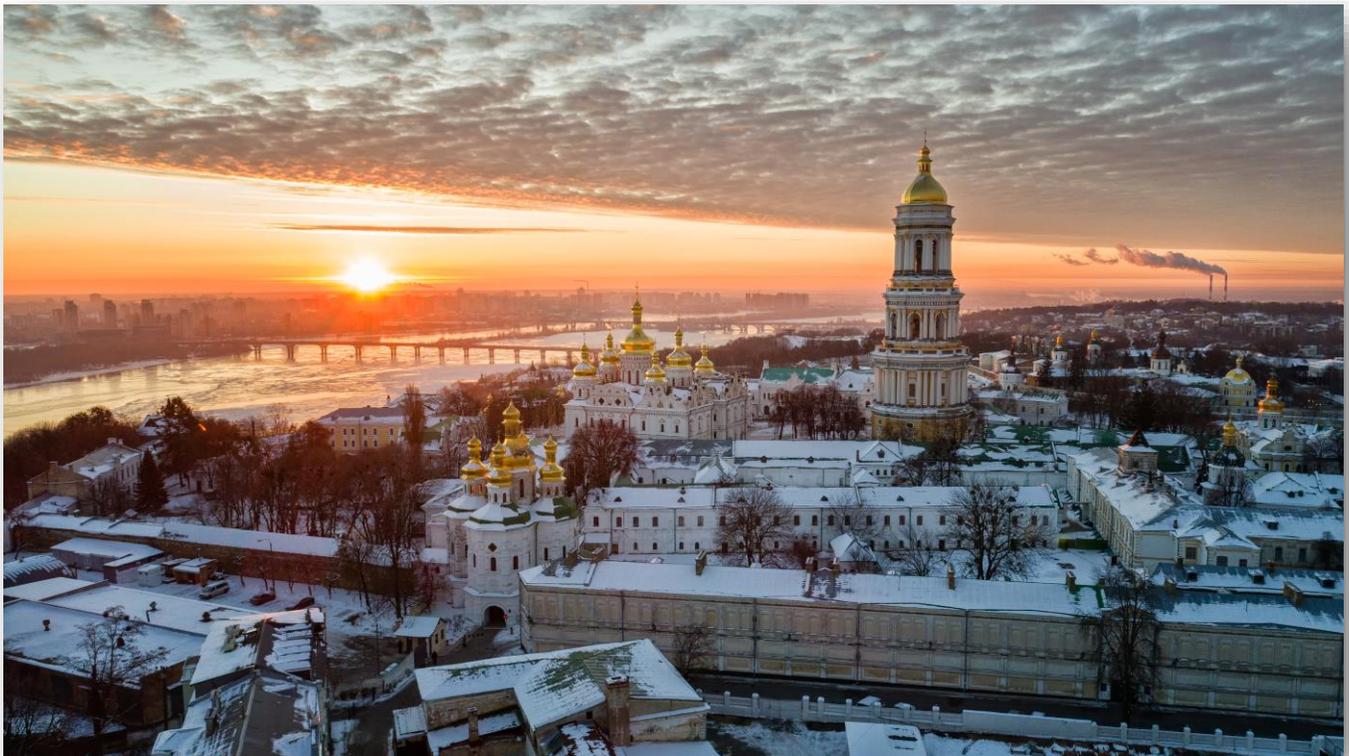




Fall | 22



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:

- plots of land;
- other objects that cannot be removed without their depreciation and change of their designation, such as 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, and objects in space, as well as other property, the rights to which are subject to state registration.

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

However, the latest developments to Ukrainian legislation aim at implementation in practice of the principle of "unanimous legal destiny of the plot of land and the real estate object located on it". Such principle shall ensure that in the case of acquisition of the real estate object (a residential building (except an apartment building), other building or construction), object of unfinished construction located on a plot of land, into ownership, the right to the underlying plot of land 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 (land for nuclear energy and the space system; military land; the land under state railways, objects of state ownership of air and pipeline transport; property of state authorities, state reserves, state entities, etc.). The state exercises its ownership right through the relevant public authorities (Cabinet of Ministers of Ukraine, State Property Fund of Ukraine, state administrations, etc.).

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

- Municipal ownership

Under the law, certain real estate objects are owned by local communities (e.g., all land within settlements, except for private and state-owned plots of land). 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 a share in co-ownership) or joint (when the

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

III. Restrictions for foreign investors

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

For non-agricultural land:

- foreign individuals are allowed to acquire ownership rights to non-agricultural plots of land:
 - 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 allowed to acquire ownership rights to non-agricultural plots of land:
 - within settlements in the case of acquisition of real estate objects and for construction of objects related to business activities in Ukraine;
 - outside settlements in the case of acquisition of real estate objects.

For agricultural lands, foreign investors are currently prohibited from acquiring (directly or indirectly) agricultural plots of land in Ukraine. However, subject to a positive decision of a referendum, foreign investors (with certain exceptions) may be provided with an opportunity to acquire agricultural land 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 – “SPA”) for 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 the existence of possible encumbrances as well as other details related to the 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 the Ukrainian State Register of Proprietary Rights to Real Estate (hereinafter – the “**Register**”). State registration in the Register is considered to be official recognition and confirmation by the state of the facts of acquisition, change or termination of proprietary rights to real estate, and encumbrances of such rights. Information on proprietary rights, and 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, and encumbrances within the procedure prescribed by the applicable laws on real estate.

Information on registered rights to real estate and their encumbrances contained in the Register is open, publicly available and is charged for. For individuals and legal entities, information on a 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 means of identification of a person, or in paper form.

In some cases, in order to verify title to real estate, it is also necessary to examine other documents related to such real estate such as a 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 a real estate sale-purchase transaction, it is usually recommended to undergo a real estate due diligence procedure to verify possible risks or consequences related to the 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 plot of land, etc.).

Preliminary agreement

Before entering into the main sale and purchase agreement for real estate, the parties may be interested in concluding 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 the preliminary agreement), to

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

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

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

- The form of the SPA

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

- Essential and other important terms and conditions of the SPA

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

Following the principle of “unanimous legal destiny of the plot of land and the real estate object located on it”, a **plot of land (or a share in co-ownership right to it)** must be the subject matter of the 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 plot of land owned by the seller of such object. The condition on simultaneous transfer of ownership right to such plot of land (a share in co-ownership right to it) from the seller to the acquirer of such real estate object shall be an essential condition of the SPA, which provides for such transfer of ownership right.

Also, an essential condition of the SPA under which the right of ownership (shares in co-ownership) to the real estate object (residential building (except an apartment building), other building or structure), or the object of unfinished construction connected with the transfer of ownership right to the plot of land is acquired, is a **cadastral number** of a plot of land, 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 part of a plot of land, the conclusion of the real estate SPA shall be made after the allocation of such part into a separate plot of land and assigning a cadastral number to it.

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

- Warranties

According to Ukrainian legislation, the parties to an 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 a real estate SPA are the following:

- clear title to the 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 of capital repair;
 - the parties or their representatives have all the needed authorizations to enter into a real estate SPA;
 - others.
- The parties to the SPA shall also pay attention to other terms and conditions of the SPA such as liability of the parties, payment conditions, bank details of the parties, allocation between the parties of possible expenses related to the 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 the SPA, simultaneously with the performance of such notary action.

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

VII. Costs and taxes (general notes)

1. Natural persons:

1.1. Seller:

- Personal income tax (PIT):
 - for sale of certain residential real estate/certain categories of plots of land owned for more than 3 years (one sale within the reporting tax year) – 0%
 - for sale of a second real estate object among certain residential real estate/certain categories of plots of land or an object owned less than 3 years – 5%
 - for sale of a third and following real estate objects or in other certain cases – 18%
 - for non-residents, an increased rate of 18% may apply in certain cases

- Defence contribution (applies if PIT rate is not 0%): 1.5%

1.2. Buyer (natural person):

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

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

- state fee of 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. In some cases, the tax base for PIT and defence contribution purposes can be reduced by the expenses incurred upon acquisition of the respective real estate object.

2. Legal entities

In general, paragraphs 1.2 and 1.3 (re: pension fund levy, state, notary, and broker's fees) apply to legal entities as well.

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

The statutory WHT rate is 15%; double tax treaty benefits are available in some cases.

The 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 the 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.

Contrary to an 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 the services of a real estate agent (broker). Currently, the use of a real estate agent (broker) in Ukraine is voluntary.

X. Donations

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 a donor can demand termination of the donation agreement (e.g., if the beneficiary intentionally committed a criminal offence against the life, health, property of the donor, his/her parents, wife (husband), or children).

The above information is provided for general understanding and information purposes only. Real estate acquisition may also involve other legal and tax aspects.

In general, information is provided according to the standard legislation of Ukraine and does not focus on specific regulations that may from time to time be introduced into the legislation of Ukraine due to the martial law introduced in Ukraine since February 24, 2022, in response to the military aggression of the Russian Federation against Ukraine.

We strongly advise that legal and tax advisors be involved in order to ensure that each specific case is



dealt with 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 as an integrated regional service.

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