PETERKA & PARTNERS

Table of contents

I. GENERAL SECTION

I.1 BASIC INFORMATION ABOUT UKRAINE 3
I.2 ADMINISTRATION SYSTEM 3
I.3 LEGAL SYSTEM 3
I.4 EUROPEAN CHOICE 3
I.5 WTO MEMBERSHIP 4
I.6 PROBLEMS 4

II. OUTLINE OF CRUCIAL LAWS

II.1 COMPANY LAW 4
II.2 REAL ESTATE 10
II.3 CONSTRUCTION 15
II.4 PROTECTION OF ECONOMIC COMPETITION 17
II.5 PUBLIC PROCUREMENT AND TENDERS 19
II.6 LITIGATION 20
II.7 BANKRUPTCY 21
II.8 INTELLECTUAL PROPERTY 22
II.9 LABOUR LAW 24
II.10 TAXES 29

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I. GENERAL SECTION

I.1 Basic information about Ukraine

Ukraine gained independence in 1991 after the break-up of the former Soviet Union. Ukraine is situated in Eastern Europe, has a population of about 46 million, which is on the decrease, and an area of 603,700 square kilometres. The capital of Ukraine is Kyiv, with a population of about 2.8 million.

I. 2 Administrative system

Ukraine is divided into 24 regions and the Autonomous Republic of Crimea. The regions have some independent authority to the extent established by law. In particular, local executives are empowered to issue local normative acts that regulate construction, health, education, public order and other matters.

After constitutional reform in 2005, Ukraine became a parliamentary-presidential republic. The president's powers were considerably reduced while the prime-minister gained an increased influence over the political situation.

I. 3 Legal system

Ukraine recognises statutory law as the main source of law. Secondary sources such as various bylaws (regulations and decrees of the Cabinet of Ministers of Ukraine and other executive authorities) may be issued only in accordance with the Constitution of Ukraine and the law.

However, there is a significant volume of bylaws which leads to a lack of transparency in legislation.

Court decisions are not recognised as sources of law, though the courts may follow previous decisions in everyday practice.

Ukraine has also proclaimed the priority of international law by establishing a rule according to which all international agreements of Ukraine ratified by Parliament become part of national legislation and have priority over it.

I. 4 European choice

Upon independence European integration became a priority of Ukraine's foreign policy. One of the first steps towards the European Union was taken by the signing of the Partnership and Cooperation Agreement between Ukraine and the EU (PCA) on 16 June 1994 (entering into force on 1 March 1998) which constitutes the legal basis of EU-Ukraine relations and establishes cooperation on a wide range of political, trade, economic and humanitarian issues.

The EU is the largest donor to Ukraine. Total assistance since 1991 within the TACIS program, including financial and humanitarian assistance, amounts to more than €1 billion.

Recently, Ukraine has made substantial progress in negotiations on the EU-Ukraine Association Agreement, including those aspects related to a deep and comprehensive Free Trade Area, has launched a visa dialogue with the aim of establishing a visa free regime as a long term perspective and continues to positively cooperate with the EU Border Assistance Mission (EUBAM).

In 2009 Ukraine joined the Eastern Partnership to create the necessary conditions to accelerate political associations and further economic integration with the European Union.

In addition, following the 2010 presidential elections that were won by Viktor Yanukovich, foreign policy seems to be to maintain partnerships with the USA and EU but also to intensify relations with the Russian Federation and CIS countries.

I. 5 WTO membership

On 16 May 2008, Ukraine became the 152nd member of the World Trade Organisation. According to the Protocol on Accession, Ukraine committed itself to far-going legislative reforms of trade. Despite some difficulties that may arise for national producers, the general liberalisation of the Ukrainian trade market is expected in light of its WTO membership.

I. 6 Problems

Despite apparent successes in a number of key areas of legislation and business there are still problems which remain unsolved in Ukraine.

There are many gaps in legislation that enable local authorities and other executive organs to issue their own internal regulations especially regarding the granting of various kinds of permits. Even though these regulations do not contravene the law they establish extra regulations which overburden the whole process. As a result, local authorities are very reluctant to issue permits in due time and there is a risk of corruption.

The courts are not fully independent of the state and the enforceability of law in Ukraine is significantly reduced.

II. OUTLINE OF CRUCIAL LAWS

II. 1 Company law

Business activities of foreign entities and protecting foreign investments

Foreign investments in Ukraine may take the form of (a) minority or majority participation or other acquisition of a share (corporate part) in commercial companies established under Ukrainian law; (b) the establishment of foreign legal entities in Ukraine in the form of branches, overseas representative offices and other subdivisions of a foreign legal entity; (c) the acquisition of movable or immovable property rights, intellectual property rights, stocks or other securities, easements or rights to use natural resources in Ukraine; (d) commercial activity on the basis of production or distribution agreements, and so on.

If the registered capital of a company is made up of at least 10 percent foreign capital, the company is deemed to be a company with foreign investment.

Foreign investments in Ukraine, of whatever form, should be registered within three working days of the date of investment. If duly registered, foreign investors benefit from special guarantees and protection of their investments.

The main guarantees are:

1. Protection against legislative changes;
2. Protection against compulsory requisitions and unlawful acts of government bodies and their officials;
3. Compensation and indemnification of losses (in particular lost profit and damage caused by the unlawful acts or omissions or negligence of state authorities and their officials);
4. Protection if the investment activity terminates;
5. Remittance abroad of profits, revenues and other assets obtained as a result of foreign investments after the payment of all taxes and other dues.

Though there are different methods for foreign entities to do business in Ukraine, the most usual are establishing or acquiring a Ukrainian company or establishing a representative office of foreign entity.

Establishing Companies

A Ukrainian company may be established either solely by foreign entities and natural persons or by foreign and domestic entities and natural persons (joint-venture). Ukrainian legislation defines the following types of commercial companies:

- joint-stock companies;
- limited liability companies;
- additional liability companies;
- general partnerships;
- limited partnerships.

Rules exist which limit the creation of chains of limited liability companies (LLC) and joint stock companies (JSC) with only one shareholder. This means that **an LLC or JSC founded or owned by a sole member cannot establish another LLC or JSC as a sole member.**

Founding and Registering Companies

The founders of and participants in a commercial company may be natural or legal persons.

Foreign citizens, foreign legal entities and international organisations may be founders of or participants in commercial companies under the same conditions as Ukrainian natural persons and legal entities.

The founders are required to apply for State registration of the new company. The company comes into existence and acquires its legal personality upon registration.

The administrative fee for the registration process is UAH 170 (€17).

By law, state registration should be undertaken **within three working days** after filing all required documents and formalised through the issuance of a Certificate of State Registration.

Subsequently it is also necessary to register a new company with the Department of Statistics, the tax authorities and the social funds, which takes approximately an additional **ten working days.**

If a company provides services which require licences it may only start providing those services after obtaining the licences.

Limited Liability Company

An LLC may be founded by one or more persons or entities. By law the number of members of an LLC cannot exceed ten. If there are more than ten members the LLC must be reorganised as a Joint-Stock Company within one year; otherwise it may be dissolved by the courts.

Moreover, an LLC founded or owned by a sole member cannot establish another LLC as a sole member. Neither can the sole founder of an LLC be the sole founder of another LLC.

An LLC's minimum registered capital should be not less than €90[1]. Non-monetary contributions are permitted.

Contributions to an LLC's registered capital may be in the form of money in the national or a foreign currency, securities, property and non-property rights, premises, buildings or equipment.

Non-monetary contributions must be evaluated by the founders or members and established in the Statutes. **The founders are free to determine the rules on evaluating contributions in kind.**

Before registering an LLC, each founder must have paid up no less than 50 percent of their contribution as provided by the Statutes. A certificate issued by the founders' bank must confirm these payments.

All contributions to the registered capital must be paid up within a year of an LLC being registered. Otherwise, the company must decide to decrease the registered capital or to liquidate itself.

Starting from the second and for each following year after the LLC's state registration, if its registered capital falls below the minimum amount required by law (currently €88), the LLC can be dissolved by the courts.

An LLC must establish a reserve fund in the amount provided by the Statutes which must not be less than 25 percent of the registered capital and which must be founded at the moment of

[1] The minimum amount of registered capital varies. It corresponds to the official minimum salary, which is regularly increased (see chapter 9).

State registration. Yearly contributions are provided by the Statutes but cannot be less than 5 percent of an LLC's net profit.

An LLC's members are not liable for its obligations. However, members who have not fully paid up their contributions bear joint responsibility for an LLC's obligations within the amount of the unpaid parts of their contribution.

The Statutes are an LLC's constituent document. They must be adopted by the founders and constitute the basis of the company's State registration.

An LLC's executive body is **one or more directors (who may only be natural persons)** elected by the General Meeting of members. **They must be, in principle, in an employment relationship** with the company, which means that **foreign directors must obtain a work permit.**

An LLC's supreme body is the General Meeting. While the General Meeting generally adopts decisions by simple majority, it has authoritative power only if more than 60 percent of members are present. Thus, **the acquisition of a simple majority (51 percent) does not guarantee full control over the company.**

A supervisory committee must be created to check the company's annual reports and accounts. The supervisory committee must be created by the General Meeting and must have at least three members. Its members may only be members of the LLC. However, the legislation is unclear and contradictory regarding the obligation to create the supervisory committee[2].

Members of the supervisory committee cannot at the same time be members of an LLC's executive body.

Members of an LLC may transfer their corporate part to another person. However, the transfer is subject to the approval of the General Meeting and other members enjoy a pre-emptive right to the corporate part.

A member of an LLC may withdraw from the company and collect their proportionate share of company assets. The member must notify the company of the withdrawal no later than three months before it occurs, unless another term is established in the Statutes.

The procedure and methods of estimating the value of the property proportional to the participant's share in the capital, as well as the procedure and the term of its payment, is established by the Statutes and by law.

Joint Stock Company

A JSC is a commercial company with its registered capital divided into a fixed number of shares, each having an equal nominal value.

[2] Under the Act on Companies such creation is obligatory. Under the Civil Code it is voluntary.

Ukrainian company law defines two types of JSC:

- a private joint-stock company is a company whose shares are divided among its members; the public cannot subscribe to these shares or acquire them on the stock exchange;

- a public joint-stock company is a company whose shares are distributed to the public by subscription or purchase-and-sale with the participation of a licensed securities trader.

The registered capital of a JSC currently amounts to approximately €110,000.[3].

Founding and operating a JSC in many aspects is similar to founding and operating an LLC, but there are some substantial differences.

When founding a JSC, the first distribution of shares must be private, that is, among the founders only. After the private distribution of shares, the founders must proceed towards state registration of the JSC and register all shares with the Ukrainian State Commission on Securities and Stock Market (the "State Commission").

An application to register the shares must be made no later than 60 days after the company's state registration. The State Commission should decide within 30 days of the application.

Issuing shares (that is, their public distribution) is possible only after their private distribution has been registered by the State Commission.

The shares must be registered in the shareholder's name, that is, **anonymous (bearer) shares are not permitted.** The shares may be only dematerialised. Priority shares are permitted (the maximum number of priority shares is 25 percent of the registered capital). All shares must have the same nominal value.

If registered shares are transferred to a new owner, the new owner must register their proprietary right to the shares with the respective depositary (if the shares are dematerialised).

The transfer of shares in a public JSC is not subject to the approval or pre-emptive right of other shareholders, unlike in a private JSC, where the shareholders have a pre-emptive right to acquire shares transferred by other shareholders.

Additional Liability Company

An additional liability company is a company structured and governed in the same manner as an LLC.

The only difference between an LLC and an additional liability company is that members of an additional liability company are liable up to the amount of their contribution to the registered capital. If they are unable by their contribution to cover all debts, they are additionally liable with their own property up to the limit stipulated in the Statutes of the company.

[3] The minimum amount of registered capital varies. It is 1250 times the official minimum salary, which is regularly increased (see chapter 9).

General Partnership

A general partnership is a company in which two or more partners jointly exercise commercial activity and are jointly liable for the company's obligations with the entirety of their property.

Partners in a general partnership are registered as private entrepreneurs by the State registrar at their place of residence[4].

A natural person may be a partner in only one general partnership, and may not at the same time be a full partner of a limited partnership.

Limited Partnership

A limited partnership is a company in which, besides one or several partners who perform commercial activity on the company's behalf and have joint liability for a company's obligations with their entire property (full partners), one or more partners are liable only to the amount of their contributions (depositors) and do not perform commercial activity on the company's behalf.

A natural person may only be a full partner in one limited partnership

Moreover, the total amount of depositors' contributions may not exceed 50 percent of the company's nominal capital as stipulated in the founding agreement of a limited partnership.

Representative office

The other option for a foreign investor to create an outlet in Ukraine is to establish a representative office to carry out marketing and promotional activities on behalf of a foreign legal entity.

A representative office may also exercise commercial activities in Ukraine except for commercial activities which require a trade licence. However, this form of creating and establishing an outlet may be impractical in the light of complicated rules on taxing the profits made by representative offices.

A representative office of a foreign legal entity does not have a legal personality and **its activities are exercised on behalf of and on the account of the foreign parent company. The foreign parent company is fully bound by the acts undertaken by the Ukrainian representative office.**

Representative offices must also be registered with the State tax authorities and consequently keep their own accounts.

[4] To be registered as a private entrepreneur an application must be filed with the State registrar, which includes a completed registration card, a copy of the application for the inclusion of the applicant into the State Register of natural persons who are taxpayers, a copy of the registration fee payment receipt and a copy of the applicant's passport. The registration is completed within two working days. The registration fee for private entrepreneurs is UAH 34 (€3.20).

Trade Licences

In general, any company or entrepreneur may perform any activity which is not prohibited or otherwise contravenes the law. However, for a limited number of specific commercial activities in Ukraine a licence must be obtained, for example, for securities brokerage, construction, education, medicine, transportation, or gambling.

Specific qualifications on the part of the applicant are required for certain types of activities (such as educational, organisational and technical requirements for providing certain types of commercial activity).

A trade licence is granted for a limited period, usually five years.

II. 2 REAL ESTATE

Ownership and acquisition of real estate

1. Main principles

The objects of ownership rights to real property include buildings and their parts (such as non-residential premises) and land plots.

In Ukraine, the principle *superficies solo cedit* does not apply and thus the owner of a land plot can be different from the owner of a building located on it[5].

2. Ownership of real estate by foreigners

While the ownership of buildings by foreign persons and entities is not, in general, limited, there are substantial restrictions on the ownership of land plots by these persons.

As a rule, foreign citizens and legal entities may not acquire ownership of agricultural land.

As for non-agricultural land, foreign natural persons may acquire property rights only to (i) land plots within the boundaries of urbanised settlements, and (ii) land plots outside the boundaries of urbanised settlements on which a building or another construction that they already own is situated.

Foreign legal entities and legal entities with foreign participation may acquire non-agricultural land only (i) within the boundaries of urbanised settlements and only if purchasing real estate or constructing buildings connected with executing commercial activity in Ukraine, and (ii) outside the boundaries of urbanised settlements, if purchasing real estate located on a land plot.

[5] However, the Civil Code and the Land Code stipulate that when purchasing a building or other construction, the seller's rights to the land plot (property right, lease, and so on) are transferred automatically to the person purchasing the building (unless otherwise provided in the purchase agreement). Consequently, the purchaser of the building should in principle hold the same property rights to the land plot as the seller did, though it is advisable to have the lease contain rules for using the land plot.

3. Acquiring real estate

Ownership of real estate may be acquired on the basis of civil contracts which must be made in writing and certified by a notary. The notary fee may be around 1 percent of the property's value.

If property is disposed of by a person who had no authority to do so, a *bona fide* purchaser acquires the right of ownership if the property cannot be obtained on demand by the real owner in certain cases (particularly if the real owner was deprived of the property against their will).

If property was acquired free from a person who had no authority to dispose of it, the real owner has the right to have it returned from a *bona fide* purchaser in all cases.

There are special provisions under the Land Code on acquiring land, in particular state and municipal land (which is quite complicated and time consuming).

All real estate transfer contracts must be registered by the State register and the property right to the real estate is transferred at the moment of registration. There are two different State registers for (i) land and (ii) other real estate.

Access to these registers is not public, as only a limited number of persons is entitled to obtain the respective information (persons whose rights are registered, notaries, representatives of state authorities, and so on).

The documents that prove the proprietary right to a land plot are the State Act on land ownership or a duly registered civil agreement in the case of acquisition of the proprietary right on the basis of such an agreement.

The document that proves the proprietary right to the building (or its part) is the State Certificate on Ownership.

4. Acquisitive prescription

Under the Civil Code, a person who possesses real estate in good faith and uses it publicly for at least ten years acquires property rights to it. However, **acquisition requires court approval** after the ten years have lapsed.

Furthermore, under the Land Code, citizens who use a land plot publicly and continuously for 15 years but do not possess any documents certifying their ownership right may address the State body with an application to transfer the land plot to them.

Restitution

The 1991 act on the rehabilitation of victims of the political repression in Ukraine stipulates that natural persons (i) recognised as victims of political repression and (ii) rehabilitated by the court have the right to the restitution of buildings and other property confiscated since 1917.

However, it was not possible to return buildings that were occupied by other persons. In these cases the value of the buildings was compensated to the rehabilitated persons.

Applications had to be filed within three years of the adoption of the 1991 act or after the rehabilitation of the natural person.

The Land Code of 1992 stipulates that persons (or their successors) who owned land plots before 1992 could not claim restitution of them, which in practice limits the law on rehabilitation.

Currently, the Local Deputies Commission on the renewal of rehabilitated persons' rights is engaged in examining the claims of rehabilitated persons. If there is a dispute regarding the restitution claim the claim will be transferred to the court. During the examination of the restitution claim the court may decide to prohibit the disposal of the property.

Information on the state of immovable property (namely whether there is a prohibition on the disposal of immovable property imposed by a court decision due to the claims of a rehabilitated person) can be acquired by submitting an application to the Information Centre of the Ministry of Justice or to a notary to obtain the extract from Unified Register of Prohibitions on Disposal of Immovable Property.

Leases

1. General rules

The Civil and Commercial Codes provide general rules relating to the lease of real estate held in private ownership. The Act on Lease of State and Municipal Property specifically regulates the lease of real estate held as State or Municipal Property. Rules on the lease of land plots are also found in the Act on Land Lease.

In principle, foreign citizens and legal entities enjoy the same rights to lease real estate, including land plots and state or municipal property, as Ukrainian citizens and legal entities. Further, the rules and essential provisions for leases are standard and similar to rules used in other European countries.

A lessor must be the owner of the property or the possessor of its proprietary rights (for example, an authority that may lease State property).

Rent is established in the lease and its periodical revision or alteration is possible; there are rules for reduction or non-payment in cases of a considerably less frequent use of the property or an inability to use it because of circumstances beyond the control of the lessee, for example, if the property is low-quality.

The lease term must be established in the lease. If not, the lease is considered as concluded for an indefinite term.

In the event of an indefinite lease term, each party to the agreement may **terminate** it at any time in writing with three months' notice, unless otherwise stipulated in the lease.

A lease concluded for a limited term may be prematurely terminated by the lessor if the lessee (a) uses the property without regard to its purpose or in violation of the lease, (b) gives the property for use to another person without the prior approval of the lessor, (c) causes by

negligence the possibility of damage to the property, or (d) if the lessee does not make capital repairs to the property although this was provided for in the lease.

Simultaneously, a lease concluded for a limited term may be prematurely terminated by the lessee if the lessor (a) provides them with property the quality and identity of which does not correspond to the stipulations of the lease, or (b) does not carry out their obligations to make capital repairs to the property.

Both parties can terminate a lease prematurely in the case of a substantial change in the conditions.

Unilateral withdrawal is prohibited. On the other hand a lease may be terminated upon the prior request of one of the parties by a court decision in the parties do not fulfil their obligations, except where the lessee does not pay the rent for three months[6].
The Commercial Code provides additional grounds for terminating a lease for property used for commercial activities (for example, when the lease expires, property leased from the State or a municipality is privatised, the lessee is liquidated or the lease object is destroyed).

A sublease is, in general, only possible with the prior consent of the lessor unless otherwise stipulated by the lease.

2. Lease of buildings

A lease of buildings must be in writing. If it is for a term of three years or more it **must be certified by a notary and registered.** However, under tax law, regardless of the term of a lease, notary certification is compulsory if the lessee is a natural person who is not registered as an entrepreneur. The notary fee is around 1 percent of the value of the agreement.

When leasing a building the right to use the land plot on which the building is situated and any land plot connected to the building to the extent necessary for the standard use of the building is provided to the lessee, even if the parties did not stipulate this in the lease.

If the lessor is not the owner of the land plot connected to the building it is deemed that the owner agrees to grant a right to use it to the lessee if not otherwise stipulated in the agreement between the lessor of the building and the owner of the land plot.

A sublease of a building by a lessee is allowed only with the lessor’s prior consent unless otherwise stipulated by the agreement.

3. Lease of land plots

The lease of land is governed by the Act “On the Lease of Land”.

A lease must be concluded in writing.

Notary certification of agreements on land plot leases is obligatory in particular if the lease is concluded between legal entities or natural persons registered as entrepreneurs.

[6] In such cases the agreement is terminated at the moment of receiving written notification from the lessor of the withdrawal.

If one of the parties to the lease is a natural person (who does not conduct commercial activities) notary certification is obligatory in the following cases:

- upon the request of a party to a lease;
- if the lease term exceeds five years;
- if the lessee is a natural person who is not registered as an entrepreneur (regardless of the lease term).

In addition, such leases of land plots must be State registered. A lease comes into force at the moment of State registration.

The Act “On the Lease of Land” prescribes the essential provisions of a lease and its annexes. Their absence may render the lease invalid.

A lease of a land plot may not exceed 50 years.

The Act “On the Lease of Land” also provides additional grounds for terminating a lease of land, namely (i) the lease expires, (ii) the land plot is purchased for social needs, (iii) the owner and the lessee are unified in one person, (iv) the death of the lessee or the liquidation of the lessee, if it is a legal entity, and (v) alienation of the right to lease the land plot by the pledgee.

The land plot (or part of it) may be subleased by the lessee if allowed by the lease or with the written permission of the lessor.

The lessee has a pre-emptive right to purchase the leased land plot if it is sold. The lessee can purchase the land plot at the price proposed to a third party or, if sold at auction, the lessee has the pre-emptive right to purchase it if they pay the price equal to the highest bid at the auction. If the lessee waives their pre-emptive right the new owner becomes the lessor under the existing lease. This rule on pre-emption applies on condition that the lessee is in principle entitled under the Land Code to be the owner of the land plot concerned (for example, foreigners are not entitled to own agricultural land, if a foreign natural or legal person inherits agricultural land, they should dispose of it within one year).

4. Lease of State or municipal real estate

In general, State or municipal property may be leased on the basis of an application by the potential lessee to the authorities with a draft of the lease corresponding to the standard lease under the Act on the Lease of State and Municipal Property, other documents foreseen by legislation (for example, applications, expert evaluations of real property, copies of the statutory documents of a lessee, certificates on the registration of a lessee with tax authorities and social funds) and with the approval of the authority managing the property.

A lease of State or municipal property is possible only on the basis of a public auction.
The lease must be concluded in writing and must contain provisions prescribed by the Act on the Lease of State and Municipal Property. The absence of such provisions may render the lease invalid.

To determine the rent, an estimate of the value (market value) of the respective real estate according to the rules of the Cabinet of Ministers is applied. These rules are obligatory for determining the rent for State property and may be used for municipal property following a

decision of the respective municipal authorities. The annual rent for State or municipal land plot leases may not exceed 12 percent of their value, unless the land plot concerned was leased on the basis of an auction, with the result that the rent may be higher. The amount of rent may be reviewed once every three years for state-owned and municipal land.

The Act on the Lease of State and Municipal Property also provides additional grounds for terminating a lease if (i) the agreement expires, (ii) the leased property is privatised, (iii) the lessee is liquidated (including becoming bankrupt), (iv) the leased property is destroyed, or (v) the parties agree. At the request of one party the court may terminate the lease if the other party fails to fulfil its obligations.

Sublease is permitted unless expressly excluded by the lease or the law. The sublease of the integral property of the enterprise (containing the entire equipment for providing goods and services, land plots, engineering infrastructure and energy supplies, such as a factory) is prohibited. The term of a sublease may not exceed the remaining term of the principal lease and the amount of the sublease rent must not exceed the amount of rent for the lease.

II.3 Construction

Current Ukrainian legislation stipulates the rules on urbanisation. Plans for territory used within settlements must be respected when planning any construction (for example, the possibility to build a certain type of building in a certain zone, maximum number of storeys, distance between buildings and construction of parking lots).

Local urban planning documents and zoning plans are established by local authorities, but local acts must be adopted within the scope of rules prescribed by the Act on Planning and Constructing Territories and the Model Rules on Construction.

The construction of a building (or another construction) may only be performed if all appropriate permits have been issued. The same applies to reconstructions or significant repairs.

Construction works may only be carried out by entities with the respective construction licence. The granting of a licence is subject to different conditions laid down by special acts.

The procedures for obtaining all necessary permits and licences, as well as requirements regarding the implementation of the construction process, are highly dependent on local administration and the specific rules set for given districts, administrative units or regions. Consequently, a harmonised national set of rules and regulations cannot be discerned.

Each natural person or legal entity wishing to construct a building must obtain the following permits:

(i) urban construction requirements;
(ii) preparatory works permit (only if the applicant wishes to undertake preparatory works before obtaining a construction permit);
(iii) construction permit;
(iv) certificate of compliance.

Urban construction requirements

A constructor intending to start construction works must apply to the local authorities to obtain urban construction requirements which provide urban planning conditions and limitations on constructions on the land plot. If the future construction complies with the local construction rules the respective body issues the urban construction requirements.

The urban construction requirements serve as the basis for development of project documents for future constructions but do not authorise an investor to start construction works.

Preparatory works permit

The preparatory works permit is designated for the organisation of a construction and preparation of a building site by the builder.

A preparatory works permit is issued by the State Architectural Construction Inspectorate.

The builder may start preparatory works after the expiration of a seven day term from the issuance of the permit.

The preparatory works permit must be obtained by the investor and does not attribute a right to start the construction itself, or any guarantees with respect to the future obtaining of the construction permit.

Construction Permit

The construction permit constitutes a right to build a certain construction on the given land plot.

A construction permit is issued by the State Architectural Construction Inspectorate.

The technical and architectural specifications of the intended construction described in the project documents are evaluated by the authority and once approved must be complied with when erecting the construction.

A construction permit may only be applied for if the project documents have already been approved by state expertise performed by the authorised institution Ukrinvestexpertiza (Ukrainian Investment Expertise).

Foreign entities may only receive this permit if they establish a branch office or another kind of commercial representative in Ukraine.

Certificate of compliance

After the completion of the construction works the certificate on compliance of the construction with project documents and construction standards is issued by the Inspectorate for Architectural and Construction Control on the basis of the act on the fitness of an object to be used.

The certificate of compliance allows the use of the building and serves as a basis for registering the ownership rights for the building.

II.4 Protection of economic competition

Economic competition is regulated mainly by the Act "On the Protection of Economic Competition" which determines the legal principles of the support and protection of economic competition, the limitations on monopolies in economic activity and defines the rules concerning the abuse of a dominant position in a market, discriminatory acts of business entities and concentrations of undertakings.

State control of the protection of competition is undertaken by the Antimonopoly Committee of Ukraine ("AMC").

A monopoly is defined as an enterprise that has 35 percent or more of the product market share. If a monopolistic position is attained, the Antimonopoly Committee may refuse to approve the monopoly.

a) AMC's prior approval is required for economic concentrations. A concentration is defined as follows:

- merger of companies with commercial activities (competitors);
- direct or indirect (through other persons) acquisition of control by one or more commercial companies over one or more other commercial companies, including, specifically:
  - › direct or indirect purchase, acquisition of ownership by other assets in the form of integrated property or the structural division of a commercial company, receipt into management, rent, leasing, concession or acquisition by other means to exercise rights to assets in the form of integrated property or the structural division of commercial companies, including purchasing assets of a company in liquidation;
  - › selecting or appointing a chairman or deputy chairman of a supervisory council, management board, other supervisory or management authority of a commercial company, of a person who already holds one or more offices in other commercial companies, or creating a situation where more than half of supervisory board members, or the management board of two or more commercial companies are held by the same persons;
- creation of a new commercial company by two or more other commercial companies,
- direct or indirect purchase, acquisition of ownership of shares which have a 25 percent or 50 percent vote in a higher management body of a commercial company.

Prior approval of the concentration from the Antimonopoly Committee in Ukraine is required if the following thresholds are met:

I. The aggregate value of assets, or the aggregate turnover for the last financial year of participants to the concentration, taking into account their control relations (affiliated entities) including those abroad, exceed an amount equivalent to €12 million at the exchange rate of the National Bank of Ukraine ("NBU'), effective on the last day of the financial year; and,:
   a/ the value (aggregate value) of assets or the turnover, including those abroad of at least two participants to the concentration, taking into account their control relations (affiliate

entities), exceeds by each of them an amount equivalent to €1 million at the exchange rate of the NBU effective on the last day of the financial year; and

b/ the value (aggregate value) of assets or the turnover in Ukraine of at least one participant to the concentration, taking into account its control relations (affiliated entities), exceeds an amount equivalent to €1 million at the exchange rate of the NBU effective on the last day of the financial year.

AMC's approval in Ukraine is also required if either participant (including its affiliated entities) has a market share over 35 percent, or the combined market share of the participants to the concentration exceeds 35 percent; and the concentration takes place on the same market or in adjacent markets, regardless of fixed thresholds.

In general, the Act "On the Protection of Economic Competition" imposes sanctions for a breach of the rules on the protection of competition, among other ways in the form of fines of between 1 percent and 10 percent[7] of the annual revenue from the turnover for the last reported year. The sanctions are imposed by the Antimonopoly Committee.

b) Moreover, protection against unfair competition and responsibility for its violation are stipulated in the Act on the Protection against Unfair Competition.

Unfair competition is defined as all actions which violate the rules and the practice of business intercourse in commercial activity, namely:

1. The illegal use of the commercial reputation of other enterprises or entrepreneurs (the illegal use of trade marks, advertising materials and labels, the illegal use of the commodities of other producers and reproduction of the form of other producers' commodities).

2. The creation of obstacles which limit competition and are intended to gain illegal advantages, such as discrediting other enterprises or entrepreneurs, inciting the employees of an enterprise or entrepreneur to strike, or discriminating against a purchaser, the subordination of a supplier's employees, subordination of a purchaser's employees and obtaining illegal advantages in competition or spreading misleading information.

3. Obtaining and divulging commercial secrets (illegally obtaining the commercial secret of other enterprises or entrepreneurs, divulging another's commercial secret, inciting others to divulge a commercial secret).

A legal entity or entrepreneur may protect its rights which may be violated or were violated by an act of unfair competition in the following ways:

a) Apply to the court with the following requests:
- Withdraw the commodities which violate the rights of other enterprises or entrepreneurs (infringing commodities);
- Indemnify the damage caused by actions determined as unfair competition.

b) Claim to the AMC for the following actions:

[7] Up to 5 percent if failing to obtain the prior approval of the Antimonopoly Committee.

- Impose a fine of 5 percent of the annual revenue for the last reported year (or up to €17,300 if the legal entity does not have any revenue);
- Withdraw the commodities which violate the rules of protection against unfair competition (infringing commodities);
- Official disproof of the infringer's costs for untruthful, inaccurate or incomplete information;
- Prohibit executing corresponding actions (fabricating infringing commodities, marking commodities with contradictory trademarks);
- Apply for immediate measures aimed at protecting the rights and interests of other parties.

The AMC or the legal entity or entrepreneur whose interests were violated by the acts of unfair competition may also address other authorities such as:

- the State Department of Intellectual Property;
- the Directory on Repression of Intellectual Property and Advanced Technologies;
- the customs authority of Ukraine.

II.5 Public procurement and tenders

Fundamental principles of public procurement are set out in the Law On Public Procurement No. 2289-VI of 1 June 2010 ("Law").

Under the Law, public (State) procurement is the acquisition of commodities, works and services by a customer at State expense in the manner set by law.

The Law is applied to public procurements realised at state expense if the price of goods or services is at least UAH 100,000 (€10,000), works at least UAH 300,000 (€30,000) and provides the following procurement procedures:

- *an open tender,* in which all potential suppliers can submit their bids;
- *a tender with prior qualification,* in which only suppliers qualified by the customer can participate;
- *a two-stage tender,* used when a contracting authority cannot provide a specific list of goods (works) or needs to conduct prior negotiations with suppliers, or when all tender proposals made by suppliers during the open tender were rejected by the contracting authority because of an agreement on the price between the suppliers, or when the bids of all the suppliers did not comply with the tender documents, or with the purpose of concluding a following contract on construction works if the first one was concluded according to the procedure of the tender with limited participation pursuant to the Decree, or when the subject of the procurement is scientific research or other special services;
- *requesting price proposals (quotations),* used for goods and services which have a permanent market, if the price of procurement does not exceed UAH 200,000 (€20,000);
- *procurement from one participant,* used for procurement of a work of art, if there is an absence of competition.

Announcements of the procurement are to be published in the official print mass media ("Messenger of State Procurement", the information bulletin of the Tender Chamber) and in information systems on the internet.

As a result of the public tender the procurement agreement is concluded in writing and becomes valid from the date it is signed by the contracting authority and the supplier which won the tender. Notarising the procurement agreement is obligatory if the agreements must be notarised under current law (in such a case it becomes valid on the date of the notarisation).

Every supplier who feels to have suffered damage or may suffer damage because of a violation by the contracting authority of procurement procedures may appeal against a decision, act or omission of the contracting authority. The appeal may be directed to the Antimonopoly Committee or to the court.

II.6 Litigation

All entities and natural persons, including foreigners, have a right to apply to the commercial, administrative and general courts of Ukraine to protect their rights, freedoms and interests.
The Act on the Judiciary of Ukraine provides that the court system consists of the Constitutional Court of Ukraine and courts of general jurisdiction. The courts of general jurisdiction include general and specialised courts.

The courts' independence from the State is debatable, which is especially obvious in disputes with the State or state authorities. Further, court proceedings are quite slow and the enforceability of judgments is consequently lower.

However, according to the Act on International Private Law, it is possible, in an agreement with a foreign party, to provide for the application of law other than Ukrainian law.

Foreign court judgments are recognised and enforced in Ukraine if established by an international treaty to which Ukraine is a party or by virtue of a reciprocal or ad hoc agreement with another state.

However, the Act determines cases in which Ukrainian courts claim exclusive jurisdiction, notwithstanding the involvement of foreign parties (for example, disputes related to real estate located in Ukraine, disputes concerning intellectual property rights registered in Ukraine and disputes concerning the validity of records registered in a Ukrainian State Register).

So, if a foreign court makes a decision on an issue which falls under the exclusive jurisdiction of Ukrainian courts or other competent bodies, the decision may not be legally recognised or enforced in Ukraine.
The execution of court decisions is carried out by the State Executor Service, a state authority independent of the courts and governed by the Act on Execution Procedure.

In addition to court proceedings, it is possible, under an agreement between the parties, for business-related disputes between a foreign legal entity or natural person-entrepreneur and a Ukrainian legal entity or natural person-entrepreneur to be referred for settlement to an ad hoc or institutional arbitration body established in Ukraine or abroad.

Foreign arbitral awards are recognized in accordance with the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

II.7 Bankruptcy

All proceedings related to bankruptcy are regulated by the Act "On Restoring a Debtor's Solvency or Recognising its Bankruptcy".

Bankruptcy proceedings can be initiated either by the creditor or several creditors if:

- a creditor (or creditors) has claims against the debtor which equal or exceed UAH 266,400 (€26,200)[8];
- the claims were not satisfied within three months of the date when they should have been;
- the claims are indisputable (confirmed by documents according to which the right to the debt can be evidenced, for example, acknowledgment of claim or court decision).

Bankruptcy proceedings must be initiated by a debtor if:

1. the satisfaction of the claims of one or more creditors will lead to the inability of the debtor to fulfil its monetary obligations in the full extent to other creditors;
2. the debtor's statutory body adopts a resolution on the commencement of bankruptcy proceedings;
3. during the company's dissolution it was revealed that the debtor is unable to satisfy in the full extent all creditors' claims.

Possible ways of concluding (depending on the circumstances of each specific case) bankruptcy proceedings are:

- amicable settlement;
- readjusting the debtor
- dissolving the debtor;.

Amicable settlement is a written agreement between the debtor and creditors which establishes the terms of the debt payment, which can be agreed at any stage of bankruptcy proceedings. The main requirements for amicable settlement are that it may be concluded only with regards to debts stipulated under the abovementioned Act and must be approved by the court.

Readjustment is a system of measures directed at the full recovery of a debtor's financial situation, as well as the full or partial satisfaction of creditors' claims by issuing credits, restructuring an enterprise, capital or changing a debtor's organisational, legal and manufacturing structure. The duration of readjustment is 12 months and may be extended for a further six months.

If dissolution takes place creditors' claims are satisfied by a liquidator (a natural person appointed by the court who manages the company's dissolution and the satisfaction of creditors' claims) after selling the debtor's assets at auction.

Creditors' claims are satisfied in the following order:

- Claims secured by pledge, salary debts and expenses for court proceedings;

[8] The amount of claim should be not less than 300 times the minimum official salaries.

- All other claims arising from labour relations;
- Creditors' claims under insurance agreements;
- Claims of tax authorities concerning the payment of taxes and duties;
- Claims of creditors that are not secured by pledge;
- Employees' contributions to the debtor's authorised capital;
- All other remaining claims.

Claims which remain unsatisfied are considered written off.

After a court decision on liquidation is issued a copy of it is forwarded to the tax authorities and the state registrar, which will delete the debtor from the state register.

II.8 Intellectual property

The intellectual property legislation of Ukraine provides protection of patents, trademarks, registered designs, geographical indications, integrated circuits, copyrights, confidential information, trade secrets, and so on.

Ukraine is a signatory to international treaties on intellectual property rights' protection, among which is the International Convention on Copyright Law, the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, the Madrid Agreement Concerning the International Registration of Marks, the Berne Convention for the Protection of Literary and Artistic Works, and the Trademark Law Treaty.

Following Ukraine's entry to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), became part of its legislation.

Intellectual property is also regulated by the Civil Code of Ukraine, which gives a general overview of intellectual property, and a number of specific laws, such as: (i) on copyright and related rights, (ii) on the protection of rights to inventions and useful models, (iii) on the protection of rights to industrial models, (iv) on the protection of rights to signs for products and services, and (v) on protection against unfair competition.

Patents

The length of the protection period is 20 years and starts to run from the day the application for a patent is filed with the State Department of Intellectual Property.

Trademarks

Trademarks are registered by the State Department of Intellectual Property and enjoy the protection of the international conventions to which Ukraine is a party.

The certificate is valid for ten years from the moment of depositing the application requesting protection and may be extended for the same period.

Industrial designs

Rights over designs originate from the patent issued by the State Department of Intellectual Property for a ten year term. Protection may be renewed for an additional period up to a maximum of five years.

Copyright

Use, protection, registration and other issues related to copyright are governed by the Act on Copyright and Related Rights.

Special registration or any other kind of special legalisation of the work is not required for legal protection of copyright, but it is possible to obtain a certificate of copyright from the State Department of Intellectual Property, which is especially recommended for some works such as software, computer programs and books.

Copyright takes effect from the date of the creation of the work and is valid during the whole of the author's life and for 70 years after their death. Personal non-property copyright is protected without a time-limit.

Under the Act "On Copyright and Related Rights" an employer owns the proprietary rights to a work created by their employee during their employment or civil service contract, unless otherwise stipulated in the contract between them. Nevertheless, in compliance with the Civil Code proprietary rights to a work created as a result of an employment contract belong in common to the author and employer, unless otherwise stipulated in the contract between them. Thus, it is highly recommended to regulate this issue in the contract between the employer and employee.

However, an author's personal rights to their work remain unaffected. An employer may assign copyright to any third party only with the author's consent. Moreover, in cases strictly stipulated by the law or the employment agreement it is possible for an employer to be an owner of certain non-proprietary rights of copyright.

Trade secrets

Ukrainian legislation considers information of a technical, organisational, commercial, industrial or other similar character to be a trade secret. To be defined as a trade secret this information should be useful, not commonly available in the business world and confidential. Trade secrets are protected as long as any of the elements of a trade secret exist.

To ensure the legal protection of a company trade secret, it is necessary for the company to specify in its internal act (such as a resolution of company director) a list of information which constitutes a trade secret, and to have employees sign to acknowledge that they have read the resolution.

Ukrainian labour law is characterised by a **high level of protection for employees** which is one reason for lower flexibility in the organisation of work for employers with respect to their needs.

Establishing a labour relationship

Under Ukrainian labour law an employment relationship can be established between an employer and an employee through a **labour agreement** (*"trudovij dogovir"*) or through a **labour contract** (*"trudovij kontrakt"*).

1. Labour Agreements

All labour relations are established under labour agreements, with exceptions in some cases provided by the legislation where a labour contract may be concluded (see below).

It is advisable to conclude a *labour agreement* in writing, but it may, unless otherwise provided by law (for example, with employees executing work in certain geographic regions, works dangerous to health, with an employee younger than 18 years or if an employee insists on an agreement in writing), be concluded verbally.

Although the Labour Code does not stipulate the essential provisions of a labour agreement it is recommended to include the following:
(i) place of work,
(ii) labour function (as designated in the job or work description)
(iii) duration of any trial period and
(iv) salary.

The parties may agree on other provisions they wish to include in the labour agreement (for example, working hours).

In any case the provisions of the labour agreement must correspond to the Labour Code, otherwise they may be considered invalid if they reduce the employee's legal status.

A labour agreement is generally concluded for an unlimited time.

A labour agreement for a limited time may be concluded in cases when a labour relationship cannot be established for an unlimited time taking into consideration the nature of the work, the conditions for its execution or the interests of the employee. **The absence of specific conditions may render a labour agreement invalid regarding the length of the employment.** The labour agreement will then be deemed to be concluded for an unlimited time.

According to the general rule, a labour agreement for a limited time that is renewed at least once is deemed concluded for an unlimited time. If after the termination of a labour agreement for a limited time the labour relationship continues and neither of the parties requests its termination, the labour agreement will be considered extended indefinitely.

However, in some cases the renewal of a labour agreement for another definite time is possible without being considered extended for an unlimited period (such as labour agreements concerning peculiarities of work or the interests of the employee).

A trial period may be provided for in a labour agreement and cannot exceed three months. However, this is prohibited for certain categories of employees, such as minors, graduates, persons released from military or alternative service, invalids and pregnant women.

If an employee's work during the trial period does not meet the requirements, the employer is entitled to terminate the labour relationship on the basis of unsatisfactory results during the trial period.

On the other hand, an employee who wants to terminate a labour relationship during the trial period may terminate it according to general rules, that is, with a notice period of two weeks.

2. Labour Contracts

A labour contract constitutes a special form of labour agreement; it may only be concluded in cases expressly stipulated by law (for example, with directors of enterprises or education specialists).

A labour contract provides for the terms, rights, duties and responsibilities of the parties, the conditions of work and possibilities for termination of the contract which may be different from the provisions stipulated in the Labour Code.

However, the conditions cannot reduce the employee's status.

Terminating a labour relationship

Under the Labour Code, a labour relationship under a labour agreement may be terminated in the following cases:

(a) with the consent of the parties at the moment agreed by them,
(b) by the expiry of the agreement's term,
(c) by the employee enrolling for or being drafted into military service,
(d) at the employee's request,
(e) at the employer's request,
(f) by a transfer of the employee with consent to another enterprise or if the employee is elected to public office,
(g) by the refusal of the employee to transfer to other work in another district together with the enterprise or a refusal to work in connection with changes in essential working conditions,
(h) due to the imprisonment or other punishment of the employee preventing the continuation of the labour obligations,
(i) for reasons agreed by the employer and employee in the labour contract.

In the case of a change of ownership of the enterprise or its reorganisation, labour agreements retain their effect and force.

The rules governing the termination of labour agreements by an employer and by an employee differ in terms of the grounds and consequences of the termination.

1. Termination of a labour agreement by an employee

An employee may terminate a labour agreement without reason by giving two week's notice.

If reasonable and legal grounds are given (changes of residence, pregnancy and others) the employer must terminate the labour relations and abrogate the labour agreement in the terms declared by the employee.

Besides these cases an employee may terminate a labour agreement concluded for a limited period in the case of illness or a physical inability to execute the work or on the grounds of infringements of labour legislation or collective or labour agreements by the employer.

2. Termination of a labour agreement by an employer

The termination of a labour agreement by an employer may be effected on a limited number of grounds:

(i) changes in the organisation of production and work; in this case, the employer must respect a notice period of two months;
(ii) the unsuitability of an employee for a post due to insufficient qualifications or a state of health which impedes them from duly executing the work;
(iii) a regular default of obligations under the labour agreement or the internal rules of the company by the employee without justified reasons, if a disciplinary or a public penalty was imposed on the employee earlier;
(iv) absenteeism (including absence from work for more than three hours during a working day) without justified reasons;
(v) absence from work for more than four months due to temporary incapacity, with the exception of maternity leave;
(vi) the return to work of an employee who previously executed the work in question;
(vii) appearance at work in a state of intoxication, as proven medically;
(viii) theft of the employer's property, as confirmed by a court judgment which is in force.

Dismissal on grounds (i), (ii) and (vi) is allowed only if it is impossible to transfer the employee, with their consent, to another position.

An employer may not terminate a labour relationship while the employee is on vacation, on a business trip or in a state of temporary incapacity (such as being ill).

In addition to these basic grounds, an employer may dismiss employees in certain positions on additional grounds (for example, a grave infringement of labour obligations by chairmen or bookkeepers, the guilty actions of a chairman resulting in the late payment of salaries and in an amount less than the statutory minimum, the guilty actions of an employee who deals with money or commodities or the commission of an offence by teaching staff).

In the event that the employer terminates the labour agreement on certain grounds (for example, changes in the organisation of work), the Labour Code provides that the employer must pay the dismissed employee severance pay in general in the amount of one month's salary (or more in certain cases).

Working Hours, Rest and Vacation

In general, the working week of employees cannot exceed 40 hours. The Labour Code also prescribes reduced working time for several categories of employees.

Rules on vacation are governed by the Act on Vacations. Different types of vacation may be distinguished:

1. Annual leave amounts in general to at least 24 calendar days.

2. Social leave, for example, maternity leave for women of 70 calendar days prior to child birth and 56 calendar days after child birth

3. Other types of leave exist, for example, for education and scientific research, and unpaid leave.

Remuneration for work

There are two basic methods of remuneration, time and piece-work. Remuneration for work must be estimated in monetary terms and paid in UAH.

The monthly salary cannot be lower than the minimum monthly salary established by the Supreme Council of Ukraine. Currently, the minimum monthly wage is UAH 888 from 1 July 2010 (€88), and will be increased to UAH 907 (€90) from 1 October 2010, to UAH 922 (€92) from 1 December 2010.

The State regulates other norms and guarantee payments such as for out-of-hours work, work on public holidays and other non-working days, and days off for work performed at night.

An employer is obliged to pay salaries not less than twice per month, with a maximum interval of 16 calendar days between the two payments.

An employer is likewise obliged to deduct taxes, obligatory payments, and make other deductions under the law[9].

Employer and Employee Liabilities

1. Employer liability for damage or losses caused to the employee

An employer is liable for losses caused to an employee through (a) an infringement of the employee's right to work (in cases of infringement of the rules on employment, the legislation on the transfer to other work and on illegal dismissal), (b) an infringement of the legislation on

[9] Contributions to State pension insurance paid by an employer are currently 33.2 percent (with certain exceptions) and up to 2 percent is paid by employees from their income. The contributions to State social insurance paid by an employer are 1.4 percent for Social Insurance Against Temporary Disability, 1.6 percent for Social Insurance Against Unemployment and 0.56 percent to 13.5 percent for Social Insurance Against Accidents at Work (depending on the industrial accident classification) and up to 1.6 percent is paid is by employees from their income (including 1 percent for Social Insurance Against Temporary Disability and 0.6 percent Social Insurance Against Unemployment).

work protection, and (c) a breach of the obligation to issue all documents on the work and salary at dismissal.

The amount of compensation for losses is determined by the court.

2. Employee liability for damage or losses caused to the employer

An employee is liable for losses incurred by an employer in the case of a breach of labour obligations, where employee liability towards the employer can be:

a. Limited liability - up to the limit of one month's average salary if losses were caused by the employee's negligence,

b. Full liability - in a limited number of cases for losses caused by an employee's intentional act, among other things, by criminal conduct or intoxication.

c. Collective liability - when work is executed collectively by a group of employees and it is impossible to determine the liability of each of them (for example, work with cash operations, material values in a warehouse, service stations or selling goods).

Trade Unions and Collective Labour Agreements

Ukrainian citizens have the right to establish trade unions without a licence and to enter or leave them at will in the manner stipulated by their statutes.

Collective labour agreements can be concluded between an employer and its employees at the initiative of either party. If the employees request the conclusion of a collective labour agreement and the employer refuses, the employer may be sanctioned with an administrative penalty.

Employment of foreign citizens

Under international private law, a labour relationship is subject to the legislation of the country in which the work is done.

Thus, for work done in Ukraine, the labour relationship of foreign citizens is governed by Ukrainian labour law and international treaties to which Ukraine is a party.

However, the labour relations of foreigners or stateless persons working in Ukraine are not in general regulated by Ukrainian law if they are working at diplomatic representative offices or representative offices of international organisations or if labour contracts with foreign employers are concluded.

Foreign citizens who permanently live in Ukraine enjoy full labour rights on an equal basis with Ukrainian citizens and do not need to obtain a work permit or a visa.

On the other hand, foreign citizens living and working in Ukraine on a temporary limited basis may only work upon receipt of a work permit.

To obtain a work permit, an employer must submit an application for the employment of the foreign citizen, accompanied by a number of different documents, to the City Centre for

Employment in the location of its registered seat. Work permits are issued for one year and may be extended for the same period. Fees for the application and receipt of a work permit are UAH 3552 (€348)[10].

Taking into account that the position of company directors constitutes labour relations, directors who are foreign citizens are obliged to obtain a work permit.

If foreign citizens or stateless persons perform their activity without a work permit, the Employment Service of Ukraine could impose a fine of UAH 17,760 (€1,744)[11].

II.10 Taxes

Ukrainian taxes, levies, and general tax principles are established in the Act "On the Taxation System of Ukraine". The current Ukrainian tax structure consists of national and local taxes and the system of national taxes is similar to the tax system of European countries.

The differences in the Ukrainian tax system relate mainly to the tax treatment of foreign entities (legal or natural persons) and to cross-border transactions. However, these differences are often modified by numerous double taxation treaties concluded between Ukraine and other states.

The draft Tax Code which is currently being reviewed by Parliament is likely to be adopted in the near future. The Tax Code is expected to introduce a number of significant changes to corporate taxation, including reduction in VAT from the current 20 percent to 17 percent and a reduction in corporate income tax from the current 25 percent to 20 percent.

Corporate Income Tax

Tax residence status

Under Ukrainian tax legislation, legal entities incorporated and operating under Ukrainian law and with their legal address in Ukraine are regarded as Ukrainian tax residents and are subject to Ukrainian corporate income tax on their worldwide income.

Ukrainian tax non-residents are subject to Ukrainian corporate income tax solely on their Ukrainian sourced income.

Legal entities are taxed individually, but in certain cases, consolidated tax returns are allowed for a Ukrainian parent company and its Ukrainian branches.

Taxation of residents

The corporate income tax assessment base is stipulated as the entity's net income, that is, the difference between gross revenues and the sum of gross expenses and amortisation and depreciation expenses.

Currently, the corporate income tax rate is 25 percent.

[10] The fee varies and amounts to four times the official minimum salary, which is regularly increased (see chapter 9).
[11] The fine varies and amounts to 20 times the official minimum salary, which is regularly increased (see chapter 9).

Permanent establishment

Under Ukrainian law, a permanent establishment is defined as a permanent place of business through which a non-resident partially or completely carries out business in Ukraine. Permanent establishments include branches, places of management, offices, factories, workshops, mines, oil or gas wells, opencast mines or any other place of extraction of natural resources.

A permanent establishment may also be created on the basis of the activities of a resident agent having the authority to conclude contracts on behalf of a Ukrainian non-resident, regardless of whether the agent has dependent or independent status.

A permanent establishment is subject to taxation in Ukraine under rules similar to those which apply to Ukrainian resident entities.

Taxation of non-residents

The withholding tax is applicable to all types of non-resident legal entities and depends on the type of income. Besides the general tax rate of 15 percent, tax rates of 25 percent (revenues received from passive state bonds and treasury obligations) and 6 percent (freight charges obtained by non-residents from sources in Ukraine) are applied. Certain types of income from sources in Ukraine are tax exempt (for example, dividends received from Ukrainian state securities sold abroad). These withholding tax rates are applied only if the respective double taxation treaty does not stipulate otherwise. An obligatory condition of the application of a double taxation treaty is a Certificate of Tax Residence obtained by a non-resident company in its home country.

So far, Ukraine has effective double taxation treaties with 67 countries, among other countries, Austria, Belgium, the United Kingdom, the Czech Republic, Slovakia, the Netherlands, Portugal, France and Cyprus.

Transfer pricing rules

Under Ukrainian tax legislation the sale or supply of goods and the provision of services and other transactions between related persons should be at fair market prices (common prices), that is, the income gained in the transaction may not be lower than the “fair market income”. Otherwise, the Ukrainian Tax Authority will adjust the taxpayer’s tax base by the difference between the price agreed and the respective fair market price.

Under Ukrainian law a person related to a taxpayer may be

- a legal entity that controls the taxpayer or is controlled by this taxpayer or is together with the taxpayer under the common control of another person;
- a natural person or the family members of a natural person who controls the taxpayer. Family members are spouses, direct relatives (children and parents) and spouses of direct relatives;
- a taxpayer’s agent who is empowered to perform legal acts on behalf of the taxpayer and members of their family.

For the purposes of Ukrainian tax legislation, control is defined either as

- direct or indirect (through related persons) ownership of the majority of the corporate rights of a taxpayer;

- direct or indirect management over the majority of votes in the managing body of a taxpayer;
- direct or indirect participation of at least 20 percent in the taxpayer's registered capital.

Basic tax differences between establishing a branch (representative office) and a subsidiary (a separate legal entity) in Ukraine

Generally, foreign entities can conduct business in Ukraine by establishing a representative office (branch) or a separate legal entity (subsidiary).

Establishing a branch

Under Ukrainian law, a branch of a foreign entity receiving income from sources in Ukraine or carrying out representative functions is regarded as a permanent establishment of the foreign founder. Consequently, the branch is obliged to pay corporate income tax of 25 percent in Ukraine on its taxable income.

Under Ukrainian law a branch is also regarded as an entity independent of its founder for the purposes of taxation. Following current interpretations, payments or contributions made in favour of the branch by its founder are generally considered as the branch's gross revenues and as a result are subject to corporate income tax.

Payments or profit transfers made by the branch in favour of its founder are regarded as the founder's income from sources in Ukraine and are subject to a withholding tax rate of 15 percent, withheld by the branch.

However, these taxation principles may be modified by any double taxation treaty concluded between Ukraine and the respective state.

Generally, non-monetary (asset) transfers between the branch and its foreign founder are subject to VAT. On the other hand, monetary transfers are not regarded as supplies subject to VAT. (Monetary and non-monetary transfers between a Ukrainian branch and its Ukrainian founder are not subject to VAT).

Establishing a subsidiary

A separate legal entity established by a foreign person in Ukraine is regarded as a Ukrainian tax resident for the purposes of corporate taxation. As a result it is obliged to pay corporate income tax of 25 percent on its worldwide income (that is, income sourced both in Ukraine and abroad) in Ukraine.

A parent company and its subsidiary are regarded as related persons for the purposes of taxation. Therefore, they are obliged to apply fair market prices in their mutual transactions. Otherwise, the Ukrainian Tax Authority will adjust the subsidiary's tax base by the difference between the price agreed and the fair market price.

Distribution of the subsidiary's profit in favour of a parent company (in the form of dividends or other forms) is subject to a 15 percent withholding tax if the relevant double taxation treaty does not stipulate otherwise. Generally, withholding tax based on the provisions of double taxation treaties concluded between Ukraine and other states is lower.

Regarding the tax burden when creating a branch (namely the taxation of the contributions to the branch made by its founder and the distribution of profit), the unclear interpretations of the application of the double taxation treaties, and related administrative and accounting aspects of the bookkeeping of the foreign founder, it is preferable for foreign investors to establish a separate legal entity in Ukraine.

Personal Income Tax

Tax residence status

Under Ukrainian law tax residents are natural persons who have a permanent place of residence in Ukraine.

If a natural person also has a place of residence abroad they are regarded as a Ukrainian tax resident if their main personal or economic relations are situated in Ukraine.

If it is impossible to determine in which country a natural person’s main personal or economic relations are located, they will be considered as a Ukrainian tax resident if they spend at least 183 days in Ukraine in the respective calendar year.

If the tax residence status of a natural person cannot be determined by the above procedure, they will be regarded as a Ukrainian tax resident if they are a Ukrainian citizen.

However, a foreign natural person can in any case voluntarily apply to the Tax Authorities to obtain the status of a Ukrainian tax resident.

Ukrainian tax residents are subject to Ukrainian personal income tax on their worldwide income, whereas Ukrainian tax non-residents are subject to taxation solely on their income from sources in Ukraine.

The above procedure of determining the individual’s tax residence is applied unless the respective double taxation treaty stipulates otherwise.

Tax rate

Currently, the personal income tax rate is 15 percent.

Besides this standard tax rate, Ukrainian tax law also stipulates a double tax rate (30 percent), which should be generally applied to the income of non-resident natural persons. Nevertheless, due to inconsistencies in tax legislation, in practice, the profit of non-resident natural persons gained in Ukraine (including salary and dividends) is often taxed at the standard rate of 15 percent, but the opinion the Tax Authorities on this issue is ambiguous. In recent practice, to apply the 15 percent rate, a foreign national should obtain a certificate from the tax authorities evidencing that they are a tax resident in Ukraine. Without this certificate there is a risk that the tax authorities will view a foreign national as a tax non-resident, which triggers the double rate of 30 percent. Consequently, with regard to this type of income, we recommend always consulting the Tax Authority, even though under Ukrainian law the opinions of the Tax Authorities are not binding.

Specifics of payroll tax

Employment income is all income (salary, bonuses, premiums and so on) received from work (dependent professional activities) performed by a natural person or in connection with it.

An employer is responsible for collecting (withholding) personal income tax from the employment income of its employees. For the purposes of calculating the respective tax liability, employment income is reduced by the mandatory contributions to the social funds.

Unified Tax for natural persons-entrepreneurs and legal entities

If falling within special criteria, natural persons-entrepreneurs and legal entities can voluntarily obtain the status of a unified taxpayer.

The simplified tax system allows for the paying of one single tax instead of the multitude of taxes prescribed by the general tax system.

It is possible to choose one of two applicable tax rates of unified tax: 6 percent and 10 percent. Unified taxpayers who choose the tax rate of 10 percent are exempt from the obligation to pay VAT. However, it is expected that the draft Tax Code will decrease the rates from 6 percent to 3 percent and from 10 percent to 5 percent respectively. The income threshold to qualify for simplified taxation regime for legal entities will increase from UAH 1 million to UAH 2 million per year.

For the purposes of unified tax, the gross expenses of the taxpayer are not taken into consideration and thus the assessment base of the unified tax is the amount of sales revenue. As a result, despite the low rates of unified tax, for taxpayers with a high turnover this type of tax is not preferable.

Ukrainian legislation strictly prohibits specific types of businesses from profiting from unified taxation, among which are trust companies, insurance companies, banks, financial institutions, and individuals trading in alcoholic drinks, tobacco, oil and lubricant products.

Basic tax aspects of loans provided by Ukrainian non-residents to Ukrainian residents

Under Ukrainian law there are significant differences with regard to the tax aspects of interest bearing and interest-free loans provided by Ukrainian tax non-residents to Ukrainian tax residents.

Interest bearing loans

Generally, all interest payments under loan agreements are regarded as tax deductible expenses of the Ukrainian entity receiving the loan.

However, legal entities with 50 percent or more shares (corporate rights) owned by Ukrainian non-resident legal entities are subject to a special rule for income taxation. As regards the loans granted by non-residents or by related persons (under certain conditions natural persons

also) to the respective Ukrainian legal entities, the Ukrainian entities can include in their tax deductible expenses only the amount of interest paid which does not exceed the sum of revenues in the form of interest received from placing its own assets in the respective tax period plus 50 percent of their taxable income (excepting interest received from placing their own assets) from the same tax period.

Interest-free loans

Interest-free loans received by Ukrainian resident entities from non-resident companies are regarded as a revocable financial aid which is subject to special taxation. If the respective loan (or a part of it) is not repaid in the same tax period in which it was received, the Ukrainian taxpayer is obliged to include the amount of this loan (or a part of it) into its gross (taxable) profit for this tax period. In the tax period in which the loan (or a part of it) is reimbursed, the taxpayer's gross (tax deductible) expenses are increased by the respective (reimbursed) sum.

Taxation of Dividends

Dividends paid to Ukrainian tax residents by other Ukrainian tax residents

Dividends received by Ukrainian tax resident legal persons from another tax resident legal person are not regarded as gross revenue and are not included in their corporate income tax base.

However, a company paying out dividends will pay an advance for its own corporate income tax of 25 percent to the State Budget. In this case, the sum of the corporate income tax advance is not withheld from the total amount of dividends paid to the shareholders (participants).

Besides, payment of dividends by (a) institutes of joint investments, and (b) taxpayers whose incomes are formed mainly (more than 90 percent) by the dividends received from the legal entities-residents controlled by the tax payer are exempt from the duty of advance payment of corporate income tax (elimination of double taxation of dividends paid between related companies).

Dividends paid to Ukrainian natural persons are subject to personal income tax of 15 percent.

Payment of dividends in monetary form or similar forms of participation in profit (distribution of profit in the form of securities or corporate rights) is not subject to VAT.

Dividends paid to Ukrainian tax non-residents by Ukrainian tax residents

Generally, dividends paid from Ukrainian sources to non-resident legal entities are subject to withholding tax of 15 percent.

The dividend payer will pay an advance for its own corporate income tax of 25 percent of the sum of dividends that are paid out (the sum of paid dividends is not reduced by this tax advance) and withhold corporate income tax of 15 percent from the dividends transferred to a non-resident company.

Dividends paid to a non-resident natural person are subject to personal income tax of 15 percent withheld by the payer of the dividends.

The above tax rates are applied if the respective double taxation treaty concluded between Ukraine and the country of the dividend recipient's tax residence does not stipulate otherwise.

Dividends paid to Ukrainian tax residents by Ukrainian tax non-residents

If a Ukrainian legal entity receives dividends from a Ukrainian tax non-resident, the recipient must include the total sum of the above dividends into its gross revenues and pay the respective corporate income tax.

Dividends paid by a foreign company to a natural person resident in Ukraine are part of the individual's taxable income subject to personal income tax of 15 percent and are to be declared in their annual tax return.

Dividends received by a Ukrainian company from another Ukrainian company should be included in the dividend recipient's taxable income.

To avoid double taxation of the dividend income, the respective provisions of the relevant double taxation treaty are applied.

Value Added Tax

Taxable transactions

In general, value added tax (VAT) is imposed on the following operations:

- Supply of goods and services in Ukraine, including operations involving the transfer of ownership rights to pledged objects to a creditor to settle a debt, as well as operations on the delivery of financial lease objects to the lessee by the lessor;
- Importing goods and accompanying services, including importing property under lease, pledge agreements and mortgage agreements;
- Exporting goods and accompanying services including supply transport services outside Ukraine.

The most important operations that are not subject to VAT are:

- Contributions in monetary form or in the form of securities in the registered capital in exchange for corporate rights, including every subsequent sale of corporate rights.
- Payments of dividends and royalties

Besides operations that are not subject to VAT there are operations that are tax exempt, such as the supply (sale, transfer) of land plots (except those situated under the object's real estate), supply of medicaments or the supply of goods according to agency and other similar agreements.

Tax rate

VAT is levied at 20 percent of the taxable amount and is calculated on the basis of the contractual value of the goods or services supplied including excise-duty and customs duties. If the common price for the goods (services) exceeds the contractual price by more than 20 percent, VAT is calculated on the basis of the common price.

Regarding the export of goods and supplies of related services, the applicable tax rate is 0 percent.

Taxable persons

Generally, taxable persons are Ukrainian and foreign natural persons and legal entities (including the permanent establishments of Ukrainian non-residents), who conduct business in Ukraine or import goods into Ukraine.

Mandatory registration for VAT is required in the following cases:

- if the amount of VAT taxable revenue received by a person or entity during the last 12 months exceeds UAH 300,000 (€28,500);
- by payers of consolidated tax (railways and communication companies);
- by persons or entities supplying goods (or services) in Ukraine using the internet;
- by persons or entities selling confiscated property.

Natural and legal persons who do not fulfil the conditions for mandatory VAT registration can voluntarily register as VAT payers.

Calculation of the taxpayer's VAT obligation

Generally, VAT payers can reduce their output VAT liability for the respective tax period by the amount of input VAT accounted (paid) as a part of the price for goods and services (including capital assets) acquired in Ukraine or imported in the same tax period, with the purpose of use in production (in fact supplies, the cost of which is either deductible or depreciable or amortisable for the purposes of corporate income tax) and output supplies (operations), which are subject to VAT within the taxpayer's economic activity. Due to inconsistencies in current Ukrainian tax legislation, claiming the input VAT deduction with respect to supplies with their place of supply outside Ukraine can be very difficult in practice.

An essential condition for claiming the input VAT deduction is a tax invoice issued by the seller of goods or services who is registered as a VAT payer.

VAT credit

If the sum of the input VAT deduction relating to the respective tax period exceeds the sum of the VAT liability, the resulting difference is used to reduce the tax debt that arose in the previous tax periods (if any) or to reduce the taxpayer's tax liability in the future tax period. The remaining amount of the tax credit should be compensated to the company from the State Budget.

However, VAT compensation from the State Budget is excluded for the following entities:

- Natural or legal persons registered as a VAT payer less than 12 months before the month to which the application for the compensation relates, or

- If within the last 12 calendar months the volume of the taxpayer's taxable operations was lower than the sum of compensation that this taxpayer is applying for (except when the tax credit arose as a result of purchasing or creating or constructing fixed assets);

- Natural or legal persons entities which did not conduct any commercial activity during the last 12 months;

- Payers of unified tax of 10 percent and natural or legal persons who are exempt from VAT.

Other taxes and levies

Excise duty

Excise duty is an indirect tax that is imposed on special taxable items produced in or imported to Ukraine, such as alcohol and tobacco products, motor fuel, motor vehicles, beer and jewellery, and is included in the price of these goods. On exports, excise duty is 0 percent.

Customs duties

Customs duties are imposed on most goods imported to Ukraine and certain goods exported from Ukraine. Customs duties are normally levied on the basis of the customs value of taxable goods in accordance with the Unified Customs Tariff of Ukraine. Under the current Unified Customs Tariff, goods are classified by means of a harmonised system of numbers, which is similar to the European Union harmonised customs classification. Customs duties are usually levied at rates ranging from 2 percent to 50 percent.

Land tax

Land tax is payable by owners of land plots and permanent users (State or municipal enterprises using land plots on a permanent basis that are held in State or municipal property). Leaseholders of land plots need only pay lease payments.

Tax rates applicable to agricultural land are established as a percentage of each hectare of land based on its pecuniary valuation. The rates are as follows:

- 0.1 percent for agricultural fields and pastures;
- 0.03 percent for perennial plantings.

The tax rate for urban land is 1 percent of its pecuniary valuation. If no valuation exists, the respective tax rate is stipulated in UAH per square metre of the land plot. This rate depends on the population level and there is a special coefficient for large cities.

Other taxes

There are several local taxes in Ukraine, such as taxes on advertising, parking taxes and recreational taxes.

Basic tax aspects of investment activities in Ukraine

Customs duties

Foreign investments in the registered capital of Ukrainian legal entities may be in either monetary or non-monetary form.

Foreign investments in the form of non-monetary contributions to the registered capital of Ukrainian legal entities are exempt, under certain conditions, from customs duties. These contributions are to be registered as foreign investments in accordance with Ukrainian legislation. Monetary contributions are not subject to any customs duties.

However, if during a three-year period from the moment of a foreign investment's inclusion in the balance sheet the respective property imported into Ukraine as a foreign investment is disposed of (except for situations where the investment is transferred abroad), the Ukrainian entity with foreign investments must pay customs duties calculated on the basis of the customs value of the property converted into Ukrainian currency at the official rate of the National Bank of Ukraine on the day of the disposal.

Corporate income tax

Direct investments or reinvestments in the registered capital of Ukrainian entities are not subject to corporate income tax, regardless of their form.

VAT

Investments in the registered capital of a Ukrainian entity in monetary form or in the form of securities in exchange for corporate rights are not subject to VAT. On the other hand, foreign investments in non-monetary form are subject to VAT at 20 percent.

Basic tax aspects of the termination of investment in Ukraine

Customs duties

If a foreign investor terminates activities in Ukraine either because the respective Ukrainian company is liquidated or because the investor is withdrawing from the Ukrainian company, the refund of the investment contribution and, if applicable, of the related income is subject to the rules below. Generally, payments made between Ukrainian residents and non-residents are to be made in foreign currency. According to the general rules, payments between Ukrainian residents and non-residents in Ukrainian national currency are possible if based on an individual licence granted by the National Bank of Ukraine, but there are some exceptions (such as in cases when the transfer of monetary funds by a foreign investor are deposited into a special investment account in Ukraine).

The transfer of investments in the form of fixed assets, which were a contribution to the registered capital of a Ukrainian entity, from Ukraine abroad by their investor is exempt from the obligation to pay customs duties. However, if within three years of the moment of the

accounting of the investment, fixed assets are alienated or a company with foreign investments is liquidated and the respective contribution does not leave Ukraine, the Ukrainian enterprise with foreign investments is obliged to pay the related customs duties.

Corporate income tax

The investment (both in monetary or non-monetary form) which is returned to the foreign investor because of the liquidation of a Ukrainian legal entity is not regarded as a taxable income if the value recovered does not exceed the value contributed. Otherwise, the respective difference is subject to corporate income tax (withholding) at 15 percent (or personal income tax at 15 percent), unless the respective double taxation treaty stipulates otherwise.

If the investor withdraws from a company that continues to exist, this withdrawal is considered as the sale of corporate rights for the purposes of taxation.

If upon the withdrawal of the investor the registered capital of the respective company is decreased by the investment being returned to the withdrawing investor and the value recovered to the investor does not exceed the value previously contributed, the returned investment is not subject to income tax. Otherwise, the respective difference is subject to corporate income tax as stated above.

VAT

Returning an investment in the form of fixed assets to a foreign investor is regarded as an exportation of goods, subject to VAT at 0 percent, if the respective asset is transferred abroad. If the respective asset is not transferred abroad and is further used by the investor in Ukraine (for example, in the form of a new investment), the return of the investment is subject to VAT at 20 percent.

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The above text is for information purposes only and is valid as at 1 September 2010. It cannot be considered as a legal opinion or an exhaustive review of all aspects of Ukrainian law.

PETERKA & PARTNERS LLC remains at your disposal for any legal assistance or detailed analysis of any aspect of Ukrainian law that you may require.