

TO: Clients and Friends of the Firm  
FR: Frishberg & Partners  
RE: Industrial Land Lease

## **I. Introduction**

Until the passage of the Land Code, which came into effect on January 1, 2002, foreign investors in Ukraine long dreamed of the time when they could by-pass the central government bureaucracy and run things on their own terms. As Cargill's foray into the uncharted Donetsk free economic zone confirmed, constructing a 100% foreign owned pre-fabricated building on a parcel of land has numerous advantages. Now that such treatment is equally extended to other Western investors, greenfields has become one of the favorite methods for foreign investors to establish quality production in Ukraine.

Until recently, no parcel of Ukrainian legislation dared to raise the topic of land allocation for industrial use (production purposes). True, the former Land Code governed many questions concerning land rights, but these were concerned primarily with agricultural or "datcha" land allocations. Once, ex-President Kuchma made a half-hearted effort to allow investors access to land for industrial use, but it was virtually unenforced notwithstanding any attempts by foreign investors to secure its benefits. Several years later, in the crisis-ridden fall of 1998, a law on land lease was adopted, which once again attempted to grant some land rights to foreign and local investors alike.

For historical purposes, we briefly compare the laws passed in 1995 and 1998 (which was subsequently re-written upon the passage of the current Land Code).

## **II. The Decree "On Privatization and Leasing of Non-Agricultural Land for Business Purposes"**

At the height of his power, on July 12, 1995, President Kuchma signed a very promising Decree No. 608 "On Privatization and Leasing of Non-Agricultural Land for Business Purposes" ("Decree No. 608"). This decree specifically permitted privatization and leasing of so-called "non-agricultural" (industrial) land and, therefore, was potentially quite interesting for foreign investors. Unfortunately, to the best of our knowledge, the Decree was completely ignored. Even foreign investors did not complain, realizing it was simply too good to be true. In fact, Decree No. 608 was eventually cancelled by virtue of Presidential Decree No. 650 of July 20, 2007 with no explanation as to why such cancellation was necessary.

For the record, the purpose of the Decree was to increase foreign and Ukrainian investment by finally opening access to industrial property for production purposes. The Decree expressly promised foreign investors clear land ownership rights, giving them greater security in controlling their investments. The Decree also aimed at solving the duality of real property rights, whereby an investor could formerly privatize a building located on a plot of land, but could not actually privatize the land thereunder. The land rights always remained with the State, as represented by the Local Councils of People's Deputies.

Decree No. 608 was unique because, for the first time, it expressly granted the purchasers of buildings the right to purchase the land underneath. Unfortunately, such rights were not extended to non-residents. However, by forming a Ukrainian resident company, the non-resident was able to effectively participate in the privatization process through its Ukrainian resident company.

Also, Decree No. 608 provided that many land parcels would be privatized on a competitive basis. The Decree further provided that new owners of privatized industrial land would enjoy full rights to their property, including the right to possession, use and disposal of by any means (sale, gift, will, exchange, collateral, lease, etc.). The owner of land could also contribute the land to the authorized capital of any business entity.

Indeed, the Decree was a breakthrough in land ownership rights. The only problem was the complete lack of its application and enforcement in practice. The Decree gave potential investors false hope that they would finally be able to purchase Ukrainian land and obtain full control over their production facilities, but this time nobody was surprised.

Because this precedent-setting, but useless, legislation found no application whatsoever before its cancellation, we will devote the bulk of our discussion to the more relevant legislation (which has proved to have at least some effect).

### **III. Law “On Lease of Land”**

#### **A. Introduction**

On October 6, 1998, President Kuchma once again attempted to provide land rights by signing Law No. 161-XIV “On Lease of Land.” On October 2, 2003, this Law was completely amended under Law No. 1211-IV “On Amendments to the Law of Ukraine ‘On Lease of Land’” (the “Lease Law”). The Lease Law permits anyone, Ukrainian or foreign legal entities and natural persons, including international associations and organizations and foreign governments, to lease land.

The Lease Law specifically states that the lease of a land parcel does not affect the rights of third parties with regard to that land parcel. In other words, protection of a third party's interests in land,

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