

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: Law “On Financial Leasing”

I. Introduction

Rather than become party to a joint venture, foreign investors (and Ukrainians) have the option of leasing their property to Ukrainian entities under the protection of a well-drafted lease agreement.

Originally, the Law of Ukraine No. 723/97-VR “On Leasing,” dated December 16, 1997, provided for two forms of leasing, operative and finance, depending on the final goal of the leasing (i.e., buyout or return). On December 11, 2003, the President of Ukraine signed amendments to the on leasing effectively removing the concept of operative leasing from Ukrainian legislation. The amendments renamed the law as the Law of Ukraine No. 1381-IV “On Financial Leasing” (the “Leasing Law”).

Despite substantial amendments, the Leasing Law still allows foreign lessors to work with Ukrainian residents through a clearly defined legal regime rather than the offshore structures and various customs loopholes that were previously used to lease property to Ukrainian residents (e.g. agreements on joint cooperation and/or production).

This chapter briefly describes leasing in Ukraine and the legal principles governing its implementation.

II. Discussion

The Leasing Law provides that under an agreement on financial leasing a lessor acquires into ownership an object from a seller or supplier in accordance with the conditions and specifications determined by a lessee and transfers such object for use by the lessee for a specified term of no less than one year on a payment basis.

A more detailed review of the Leasing Law reveals that a foreign lessor may let out any unused fixed assets defined by specific characteristics. Although almost all kinds of property can be subject to a leasing arrangement, a few exceptions exist. For example, land plots, natural objects and unified property complexes of enterprises and their structural subdivisions (branches, departments,

etc.) may not be the subject of a leasing agreement. The Leasing Law also yields to the Civil Code of Ukraine with respect to its provisions on leasing, rent, sale-purchase and supply.

Leasing agreements are usually concluded between three parties, a lessor, a lessee and a seller (supplier). The lessor can be any legal entity transferring the right of possession and use of an object to a lessee. The lessee may be a legal entity or natural person receiving the right of possession and use of an object from a lessor. A seller is defined as a legal entity or natural person from which a lessor acquires an object, which will be subsequently transferred to a lessee. Other legal entities or natural persons may become party to a leasing agreement in certain cases.

Formerly, the Leasing Law provided for two types of leasing: financial leasing and operative leasing. Operative leasing was defined as “a leasing agreement under which, as a result of its conclusion, a lessee, at its own order, receives a lease object from a lessor for non-gratuitous use and for a period of no less than the period for which 90% of the value of the lease object is depreciated.” This type of leasing was abolished upon the passing of the amendments to the Leasing Law on December 11, 2003.

The Leasing Law, however, now provides for sub-leasing, which allows for a lessee under a leasing agreement to lease an object to a sub-lessee for use on a payment basis for an agreed upon term under a sub-leasing agreement. In this case, all claims of the sub-lessee toward the seller transfer to the lessee, who must subsequently deal with the seller itself in case any issues arise. The lessee must obtain written consent of the lessor to transfer an object into sub-lease and the provisions of the leasing agreement will apply to the sub-leasing agreement, unless the leasing agreement provides otherwise.

As previously mentioned, a leasing agreement must be in writing and contain all of the material terms and conditions provided by the Leasing Law, including:

- 1) the subject of leasing;
- 2) the term for which the lessee is granted the right to use the leased object;
- 3) the size of the leasing payments;
- 4) other terms and conditions pursuant to which the consent of at least one of the parties must be achieved upon demand.

A lessee may opt out of a leasing agreement unilaterally if the lessor fails to transfer the leased object within 30 days unless the leasing agreement provides for another transfer term. In this case, the lessee may demand the compensation of damages and the return of any leasing payments made

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