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Rada Rewrites the Finance Leasing Law

On 4 February 2021, the Law of Ukraine "*On Finance Leasing*"¹ (the "Finance Leasing Law" or the "Law") was adopted by the Verkhovna Rada of Ukraine. The Law was officially published on 13 March 2021 and in accordance with its provisions will take effect on 13 June 2021.

Although the new Law is by no means revolutionary it is welcomed by the market participants because its new drafting intends to resolve some of the regulatory ambiguities which plagued the leasing industry since 2003.

Below we touch on some of the innovations of the Law:

1. THE ISSUE OF FORM

The new Finance Leasing Law is now express in that a finance lease agreement is not subject to mandatory notarisation². The parties however may specifically agree that the finance lease agreement will be entered into in the notarised form.

2. LEGAL EFFECTS OF INVALIDITY OF THE FINANCE LEASE AGREEMENT

The Ukrainian courts used to take the view that a mutual restitution among the parties in the event of invalidation of a finance lease agreement would not be feasible to achieve and this often allowed the lessees

¹ By way of background, the Ukrainian finance leasing as financing technique is often a combination of typical finance lease and hire purchase. The lessee would not be normally able to sell the leased object at the end of the lease however, will normally have a purchase option subject to payment to the lessor of the residual value. Notably, the Finance Leasing Law now provides that the purchase option can be exercised by the lessee only if it has *indisputably* discharged all of its obligations under the finance leasing agreement. The style of a customary Ukrainian finance lease agreement is such that almost any technical default by the lessee may result in termination of the finance lease agreement and the obligation of the lessee to return the leased property to the lessor. Hell or high water approach to drafting is generally not uncommon.

² Notarisation of an agreement (contract) is sometimes required by Ukrainian law as a matter of mandatory form. Vast majority of agreements can be formed (validly entered into) in a "simple written form". As a rule, an agreement is entered into in a notarised form, if notarisation is specifically required for a particular type of agreement by law. Although finance lease agreements are not of the type of agreements for which notarisation is mandatory, there was a growing uncertainty on the market caused by insufficient regulation and an array of contradictory court decisions which were entered especially during 2015 and 2016 where courts held that finance leases with individuals for the lease of transport vehicles were to be notarised. Under Ukrainian law, failure by the parties to notarise an agreement at signing makes it void.

to continue using the leased object for free. Against this background, the Finance Leasing Law amended the Civil Code of Ukraine by adding Article 809¹ (*Consequences of Declaration of the Leasing Agreement Invalid*) which now describes the procedure for mutual restitution³ between the parties if the finance lease agreement was declared invalid by court.

3. SUB-LEASE

Pursuant to the Law, the lessee will be able to sub-lease the leased object based on a separate sub-lease agreement subject to the lessor's consent. If the lessee, in its turn, intends to sub-lease the leased property on terms of finance lease, the sub-lessee must "*comply with the legal requirements established by law for the lessor*"⁴. This means that the leased property can be sub-leased by the lessee only to a legal entity having the status of finance company⁵.

4. LESSEE'S BANKRUPTCY

The Finance Leasing Law provides that the object of the finance lease will not form part of the lessee's liquidation estate in the event of declaration of bankruptcy of the lessee.

5. DETERMINATION OF LEASE PAYMENTS

Now the Finance Leasing Law expressly permits the parties to the finance lease agreement to determine (calculate) the amounts payable in UAH to the lessor by reference to their equivalent expressed in a foreign currency, (which is normally Euros or USD). Such method of determination of the lease payments is permissible only under finance lease agreements which are concluded by the lessor with legal entities or individuals (private entrepreneurs) as lessees.

6. AUXILIARY SERVICES

The Finance Leasing Law sets out certain types of services which can be provided on the leasing market. These broadly include services which are typically provided by vendors, insurers, property evaluators, surveyors and other services providers to the finance lease transaction parties. Pursuant to Article 11 (*Auxiliary Services on the Finance Leasing Market*) of the Finance Leasing Law, services provided on the leasing market will become a type of regulated activity supervised by the National Bank of Ukraine.

³ Under Ukrainian law, restitution in most cases is an automatic effect of invalidity of an agreement and not a type of remedy which needs to be separately sought from court.

⁴ Article 19 (*Transfer by the Lessee of the Leased Object to a Third Party*) of the Finance Leasing Law.

⁵ In accordance with the NBU's plans for the development of the non-banking leases, finance leasing will become shortly a type of regulated activity which can be carried on only legal entities which have the status of finance company and have obtained the relevant license from the NBU.

7. **NEW TERMINATION RIGHT FOR THE LESSOR**

Under the Finance Leasing Law, the lessor will now be able to unilaterally terminate the finance lease agreement and apply relevant penalties against the lessee (if those are provided by the finance lease agreement) if the lessor determines that the information or documents provided by the lessee for purposes of evaluating the lessee's ability to perform its obligations under the finance lease agreement were untrue.

8. **CONFIDENTIALITY**

The Finance Leasing Law now prohibits the lessor and its related parties from disclosing any information in respect of the lessee or its business which any of them obtained in connection with the entry into, performance under or the termination of the finance lease agreement.

The new Finance Leasing Law is a step in the right direction. It does attempt to address many of the uncertainties and defects in the previous legislation. We expect the Finance Leasing Law will give a boost to the finance leasing market in Ukraine.

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