

The preliminary agreement

In principle, reaching agreement on an asset and the price of the asset is tantamount to a sale, however, it is rare for all the conditions of a sale to have been met when the parties plan the transaction. Sales of real property particularly should be recorded in a deed of sale, in the form of an authentic act, by a notary. As the notary has to procure a certain number of documents, the whole process can take a while from start to finish. The commitment of both the buyer and the seller, in the period before the final deed is signed, is guaranteed by signing a preliminary agreement.

There are several types of preliminary agreement: the two most important are the unilateral promise to sell and the preliminary sale agreement (*compromis de vente*). The buyer may also sign a unilateral promise to purchase.

The unilateral promise to sell

(a type of preliminary agreement that is used mainly in Paris and the Paris region)

The unilateral promise to sell or "option to sell" is an agreement by which the seller grants the prospective buyer, who is the beneficiary of the promise, the right to buy his property at an agreed price, when the buyer makes clear his intention to buy. If the beneficiary accepts the promise, he does not make an immediate commitment to purchase; rather he has an "option" over the property that can be exercised if he decides to become the owner. If the beneficiary does not accept the promise, it is treated as no more than an ordinary offer which the promisor may withdraw at any time.

Form and content of the unilateral promise to sell

The unilateral promise to sell may be recorded in an authentic act or in a private document (*sous seing privé*). Various statutory provisions make it compulsory to include certain clauses protecting the beneficiary of the promise, or to provide the beneficiary with various documents that will enable him to give their informed consent.

Promisor's obligations before the option is exercised

Until the option period expires or until the beneficiary decides not to purchase the property, the promisor may only sell the property to the beneficiary. The promisor is bound during the period stipulated in the promise and may not, for example, accept a more advantageous offer during this time. However, there is no statutory requirement to specify a time period in the promise to sell.

Compensation for reserving the property for the promisee

As the promisor is deprived of his rights for a certain time, it is reasonable that he should be compensated for making this commitment. This compensation will be held by the estate agent or, more often, by the notary who is dealing with the sale, until the expiry of the time limit set. It will be paid to the promisor if the beneficiary does not exercise the option even though the conditions laid down in the promise have been fulfilled. It will be deducted from the purchase price if the sale goes ahead. It will be returned if any one of the conditions is not fulfilled.

Mandatory registration of the unilateral promise to sell

Any unilateral promise to sell relating to real property will be null and void if it is not witnessed in an authentic act or in a private document which must be registered within a period of ten days from its acceptance by the beneficiary. Acceptance of the promise does not mean that the option will be exercised, it merely indicates that the beneficiary takes note of the offer to sell without assuming any obligation to purchase.

The value of registering the promise at the land registry

It is not compulsory to register unilateral promises to sell. It is merely a right which allows users to be informed of the promise. However, it may be very advantageous for the beneficiary to register the promise, particularly if the promisor later sells the property to a third party in spite of the promise. Registering the promise makes it easier to prove the fraud of the third party to whom the promisor, himself acting in bad faith, sells the asset, in spite of the commitments made to the beneficiary.

Exercising the option

It is by exercising the option that the beneficiary will show his willingness to purchase the asset that is the subject of the promise. As the promisor has already given his agreement to sell, irrevocably, the sale agreement comes into existence when the option is exercised.

Exercising the option is not legally subject to any formalities. Regardless of the form that it takes, unless there is a stipulation to the contrary in the promise, it is sufficient to complete the sale. However, in practice the formalities and terms for the exercise of the option must be specified with care in the promise, if you do not want the beneficiary to become the owner without paying the price and the costs.

Promise to sell with reciprocal obligations (promesse synallagmatique de vente) or preliminary sale agreement (compromis de vente) (type of preliminary agreement used in the provinces)

The preliminary sale agreement is a contract in which both parties make a commitment, one to buy and the other to sell the property, at an agreed price. It is this situation which is referred to in Article 1589 of the Civil Code when it states that the preliminary sale agreement is equivalent to the sale: "The promise to sell is the same as a sale, where both parties agree as to the thing and the price". The buyer's acceptance of the preliminary agreement constitutes a firm commitment to buy. Like the unilateral promise, the preliminary agreement may be drafted as a private document or an authentic act.

Down payment, deposit, penalty payment, penalty clause

The preliminary sale agreement often includes provisions concerning a deposit, a down payment, a penalty clause or a penalty payment. The promise should specify the exact nature of the payment agreed and to whom it is due.

A down payment is a part payment which is deducted from the amount of the sale price. A penalty clause is a clause under which the debtor, if in default, has to pay the creditor a sum of money whose amount, determined in advance, is not related to the damage caused. Such a clause may penalise the seller, if he prevents the contract from being performed, or the buyer, if the sale does not take place or takes place late on his account.

The function of a deposit is to enable both parties to walk away from his commitments, at a price: the party that paid the deposit loses it; while the party that received it, has to give back twice the amount received. The inclusion of a penalty payment clause creates the same possibility, but for only one of the parties.

Conditions precedent

A condition precedent relates to an uncertain, future event, which means that it is impossible to know, when the preliminary sale agreement is drawn up, whether the event will occur or not. The promise to sell will only come into effect if the event occurs. If it does occur the promise will be effective retrospectively from the day on which the sale agreement was signed.

Several conditions precedent are very common in preliminary sale agreements. When the agreement relates to residential property or land on which residential property will be built, the preliminary agreement must state if the price will be paid with or without a loan. If the buyer decides to take out a loan, the preliminary sale agreement will be subject to the condition precedent that the loan is granted. If this is not the case, the buyer must acknowledge in his own handwriting, that he may not rely on the protection provided by the Scrivener Law of 13 July 1979.

The right of pre-emption is a right enjoyed in certain situations by public authorities or certain private sector institutions, by which they may acquire an asset when it is sold in preference to any other buyer. Obviously, the preliminary sale agreement is subject to the condition precedent that bodies that hold pre-emption rights do not exercise them.

The preliminary sale agreement may also be concluded subject to the condition precedent that the town planning documents, which the notary will procure, do not reveal any easements that might have a strong negative impact on the size or value of the property.

The issue of a building permit may also be included in the preliminary sale agreement as a condition precedent.

The execution of the sale

In most cases, once the conditions precedent have been fulfilled, the parties to the preliminary sale agreement will be invited by the notary to sign the deed of sale in the form of an authentic act, which will be the buyer's true title deed.

The unilateral promise to purchase

A promise to purchase is the opposite of a promise to sell. A prospective buyer (the promisor) promises to buy a property when the owner decides to sell; only the promisor is bound, not the owner.

Promises of this type are rare. They are subject to the same rules as the promise to sell. However, unlike the unilateral promise to sell, the unilateral promise to purchase does not have to be registered and does not become null and void if this formality is not completed.

Whatever form the preliminary sale agreement takes, the seller, or the promisor, is under an obligation to provide the buyer or beneficiary with a file containing technical information about the building, in accordance with the regulations in force.