

The information in this notice  
is intended to draw your attention  
to the most important issues  
concerning the subject  
of interest to you.

For more information,  
please consult your notaire.

PARIS NOTAIRES INFOS



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PARIS NOTAIRES INFOS



## Preliminary contracts

Commitment of sale  
Purchase offer  
Agreement of sale

CDMN  
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CHAMBRE DES NOTAIRES DE PARIS  
SEINE-SAINT-DENIS • VAL-DE-MARNE

The sale of property is almost always preceded by a preliminary contract under the terms of which the future buyer and seller express their interest in the transaction whilst providing themselves with time to verify feasibility (obtain financing or preliminary documents or information, etc.).

There are three main types of preliminary contract: the unilateral commitment of sale, the purchase offer and the provisional agreement of sale. Each of these instruments has important and different consequences to which your notaire, if contacted before you commit yourself, will draw your attention and will provide practical advice.

You should never rely on the title of the instrument: these are binding 'commitments' and 'offers' (respectively in French, 'promesses' and 'offres'). Only by carefully reading the contents of the instrument can you understand to what you are committed.

Do not forget that the terms and conditions of the sale are set from the preliminary contracts onwards. It will be very difficult to amend these terms thereafter.

*Preliminary contracts do not apply to the sale of buildings under construction. For this type of building, only a 'reservation contract' can be signed.*

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- **Acquisition of property intended for housing: a waiting period before making a commitment**

Since 1 June 2001, people wishing to acquire property for housing are subject to a seven-day waiting period before being committed. This measure applies only to buyers who are not property professionals. However, it does apply to all sellers, irrespective of whether they work in the property sector or not.

**The principle is as follows.**

- **If the sale is preceded by a privately signed preliminary contract**, i.e., signed only by the buyer and seller and not by the notaire, the seller must provide the buyer with a copy of the signed contract.

The buyer then has a seven-day period to retract. If the buyer retracts, he or she is no longer held to any commitment to the seller.

All amounts paid to an estate agent or notaire must be returned within 21 days of retraction. (Please note: any direct payment to the seller during this period is forbidden.)

- **If the preliminary contract is signed as a notarised act**, i.e., drafted and signed by the notaire as well, the notaire must provide the buyer with a draft of the act.

The buyer then has a seven-day period for reflection. No payment may be received or requested from the buyer during this period. After the seven-day period has expired, the buyer may or may not decide to sign a preliminary contract.

Notification is made by means of either a registered letter with acknowledgement of receipt or a bailiff's order. It can also be issued against signature of a receipt. The periods in question begin on the day after the letter or instrument has been submitted or transferred.

If the buyer has not retracted or has decided to continue with the transaction after the seven days of reflection, the preliminary contract may apply in terms which vary according to the type of preliminary contract signed, unilateral commitment of sale, purchase offer or provisional agreement of sale.

## THE UNILATERAL COMMITMENT OF SALE

### • Who is committed to what?

In the unilateral commitment of sale, the owner undertakes to sell his or her property to a specific person (the 'beneficiary').

The owner thus provides the beneficiary with an 'option', generally for a limited period. If the beneficiary states within the period granted that s/he wishes to buy (i.e., "exercise the option"), the sale will be deemed signed under the terms and conditions stated in the commitment.

If the beneficiary states that s/he does not wish to buy the property or fails to respond within the period, the seller is entitled to sell the property to someone else.

***NOTE: for the beneficiary, the act of a signing a 'unilateral commitment of sale' does not mean that s/he states his or her commitment to buy, but merely that s/he accepts the conditions under which the decision will be taken.***

### • What should the commitment of sale contain?

As the commitment of sale is transformed into a sale when the option is exercised, the commitment must stipulate at the outset all the terms and conditions regulating the transaction. Otherwise, the buyer and seller could finally be committed to a transaction neither really wanted.

Before signing a commitment of sale, all the relevant information must be available. The information in question is:

- the civil status of the seller and of the his or her family situation, as well as the status of owner and provenance of the title to the property to be sold (prior acquisition, donation, etc.); the exact identity and family situation of the beneficiary must also be verified
- comprehensive description of the property (location, type, purpose as housing, for exercising a trade or as offices, content, land register description, joint ownership plot, rental position, etc.) and its accessories (basement, attic, garage, garden, any furniture, etc.)
- if the property is a joint property plot, the surface area of the individual proportion of the plot (the Carrez law makes it compulsory to state this in the preliminary contract). It is preferable for liability reasons to have the measurement carried out by a professional. It is also strongly advised that the amount of charges be stated along with payment conditions for the joint owners and the latest resolutions of the meeting of joint owners, in particular with regard to work voted on and its cost
- information on work carried out on site (type, plans, insurance, administrative or joint owners' authorisation, completion, etc.)
- certificates required by law concerning asbestos, lead and termites
- and of course the price, tax system for the sale (VAT or stamp duty) and terms of payment (immediate, subsequent, use of a loan, etc.).

If all the relevant information cannot be made available to the beneficiary immediately, a prudent measure is to condition the completion of the sale on providing the said documents. This practice is known as a 'suspensive clause'.

The same applies if measures must be taken (such as obtaining a building permit, for example) or if events must incur beforehand, such as the departure of an occupant.

Finally, some information vital to completing the sale can be disclosed only after the commitment of sale has been signed given the timeframes required to obtain it. This applies mainly to information concerning the position in terms of urban development, purging pre-emptive rights and any mortgage inscriptions.

- **What should be stated when the beneficiary requires a loan?**

If the property is used for accommodation, articles L312-15 et seq. of the French Consumer code require that the unilateral commitment of sale state whether the price paid makes use of a loan, even in part. If one or more loans are involved, the commitment will necessarily be signed conditional on obtaining the loans. The beneficiary enjoys an interval for this which cannot be less than one month.

If the beneficiary fails to obtain the loan, s/he is released from his or her commitments and any money already paid to the seller must be returned in full including in the restraining compensation (see below).

If the beneficiary does not wish to use a loan, the commitment must necessarily state in writing that the beneficiary acknowledges the fact if s/he subsequently needed a loan, the inability to obtain one cannot be used as grounds to request repayment of the restraining compensation. In the absence of this statement, the beneficiary may apply the suspensive clause for the term of the commitment of sale.

The suspensive clause is not compulsory for property intended for purposes other than accommodation. The beneficiary must therefore ensure that it is stated in the commitment where required. The beneficiary may not apply it otherwise.

- **Can the seller go back on the commitment?**

Once the beneficiary has exercised the option, the sale is signed; the seller can no longer retract. The beneficiary is then entitled to demand that the transaction be notarised. If the seller persists in refusing, the buyer can request that the Tribunal de Grande Instance enforce the transaction. The court's ruling will have the same effect as a notarised deed of sale. However, given the problems arising from this measure, the beneficiary may prefer to terminate the sale and demand damages from the seller.

- **What is a retraction clause?**
- **What is a criminal clause?**

Some commitments of sale stipulate a 'retraction clause' [clause de dédit] under the terms of which the seller (or buyer) reserves the right to retract from the commitment even after the option has been exercised in return for a specified amount. The clause is rare, although it is valid. The beneficiary can receive from the seller only the payment of the specified amount.

When the commitment of sale includes a 'criminal clause' [clause pénale], the clause stipulates the amount that the party failing to honour his or her commitments must pay to the other party. The amount may be increased or reduced by the courts. However, in contrast to the retraction clause, the criminal clause does not exempt the party paying it from settling the sale if the option has been exercised.

***NOTE: do not count on the title of these clauses; only the contents apply. Your notaire will provide you with practical information on the clauses in the commitment.***

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- **What is restraining compensation?**
- **What are the consequences for the beneficiary who does not exercise the option?**

In a unilateral commitment of sale, the beneficiary is entitled not to exercise the option. In this case, the sale is not concluded. The possibility of not exercising the option should not be mistaken for the right of retraction which applies only for seven days after notification of the commitment or draft commitment (see the top of this brochure).

Commitments of sale frequently stipulate the payment of ‘restraining compensation’ [indemnité d’immobilisation] by the beneficiary (generally 10% of the price). This amount will be retained by the seller if the option is not exercised. These clauses are legally binding. Compensation is payable to the seller and cannot be reduced even if s/he has not incurred any prejudice (for example, even if the seller was able to sell the property soon afterwards). However, compensation is not payable to the seller if the sale could not be concluded as a result of his error or if a suspensive clause could not be applied.

Restraining compensation remains ‘sequestered’ by the notaire for as long as the failure to conclude the sale is uncertain. In the event of a dispute between the buyer and seller, the notaire retains the amount until an out-of-court solution is found or a court ruling has been handed down.

- **How is the option exercised?**

To have an effect, the option must be exercised under the forms and within the timeframes specified in the commitment of sale, the terms of which cannot be amended. If no form has been stipulated, a registered letter with acknowledgement of receipt is strongly advised.

***NOTE: the option exercise must be sent to the recipient before the term expires. Enough time should therefore be planned for it to arrive. A further item for attention is that commitments of sale generally stipulate that to be effective, the exercise of the option must also include payment of the price and expenses arising from the transaction before the notaire.***

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- **What happens after the option has been exercised?**

Once exercised, the option cannot be retracted. The transaction becomes immediately final; restraining compensation becomes an advance on the sale price. The seller is entitled to the same means of coercion as the buyer in the event of a refusal to regularise the transaction (see above, “Can the seller go back on the commitment?”).

However, for the transaction to be fully effective, the sale must be regularised by means of a notarised deed.

Generally, the price is paid in full to the seller on the date of signature of the notarised deed of sale and the effective transfer of property is carried out. It is also generally at this date that transfer rights that must be paid to the tax authorities become payable. The notaire will also have taken care to request the amount from the buyer.

## THE PURCHASE OFFER

The purchase offer (also known as the “commitment of purchase” or “purchase option” [respectively, promesse d’achat and option d’achat]) is sometimes erroneously presented to the potential buyer as a deed which does not commit him and which simply makes it possible to retain the property for a while to think.

Be careful, however. The purchase offer is a deed which is just as important as the commitment of sale and observes the same principle. It commits only the buyer to purchase the property from the beneficiary of the commitment (the owner of the property) if the owner states his intention to sell. However, as soon as the declaration is made, the sale becomes final (see the commitment of sale).

***Since 1 June 2001, it is forbidden to request the potential buyer signing a commitment of purchase to pay any sum to the seller or intermediary. For transactions concerning real estate, the periods of retraction and reflection apply as with the commitment of sale (see the beginning of this brochure).***

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The purchase offer must include the same statements as the commitment of sale with regard to suspensive clauses. Its term must also be limited.

## THE AGREEMENT OF SALE

In the agreement of sale (known as the “compromis de vente” or occasionally the “promesse synallagmatique de vente”), both parties are committed. The owner commits to the sale and the potential buyer to purchasing the property. This mutual commitment is a sales transaction if the property is identified and its price has been set.

***NOTE: the agreement of sale is a sales transaction, not a commitment.***

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For the acquisition of property intended for accommodation the periods of retraction and reflection apply as with the commitment of sale (see the beginning of this brochure).

If the buyer has not retracted his intention to purchase, the amount paid by the buyer when signing the agreement (generally 10% of the purchase price) is deemed an advance on the sales price and may not be returned (unless the suspensive conditions are not implemented in time and in particular, the suspensive clause of obtaining a loan).

No one has to exercise an option. The mutual commitments are immediately irrevocable and, in the event of difficulties, each party can compel the other to pay the remainder of the agreed price and finalise the sale with a notarised act that is fully effective.

All the observations made above concerning the unilateral commitment of sale are applicable to the agreement of sale with regard to the contents of the instrument, the provisions concerning borrowers, retraction or criminal clauses and suspensive clauses.

***Please feel free to contact a notaire before signing a preliminary contract and ask him or her to draft the instrument.***

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