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Buying and Selling Real Estate in Chile

ILN REAL ESTATE GROUP



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KEY ASPECTS OF REAL ESTATE ACQUISITIONS UNDER CHILEAN LAW

I. STANDARD FORMS OF AGREEMENTS

1. Offer to Purchase: Offer to Purchase sets forth Buyer's offer of price, date for closing, contingencies for inspections, financing, etc., and date for entering into a formal purchase and sale agreement. Seller may accept, reject or counteroffer, based on the original offer.

2. Promise to Purchase: The most usual form of agreement to sell and purchase real estate is through a Promise to Purchase. The Promise to Purchase must detail the terms and conditions of a Definite purchase as thoroughly as possible, and, consequently, the Definite Purchase and Sale Agreement shall contain the same terms set forth in the Promise to Purchase. The key condition contained in the Promise to Purchase to enter into the Definite Purchase and Sale Agreement is that the titles of the property must comply and be according to law.

3. If no Promise to Purchase is entered into and/or or the titles of the property were not properly reviewed, the Buyer may agree to accept the property's titles without actually reviewing them. In this case, the parties often agree on a clause having the Buyer acknowledging this situation and waiving its action to rescind the sale.

4. The most used terms of the Promise to Purchase are:

A. Description of the property: It includes the address / location, boundaries, land tax identification number, and registration number under the competent Real Estate Register.

B. Price and payment form: Buyer and Seller would declare that payment is made in full by the Seller, declaring that the Seller's obligation to pay is entirely fulfilled at the moment of the deed signing.

Occasionally, the Buyer will pay a portion of the price with a loan granted by a bank or financial institution. The Seller will usually state that the Buyer's failure to obtain credit will not be considered a condition for declaring the agreement void and/or a breach of the Promise to Purchase.

The parties will often agree that the purchase price will be paid through one or more bank instruments left in escrow before the notary public that authorizes the deed of sale, with instructions to deliver said documents to the Seller once the property is registered under the Buyer's name in the competent Real Estate Registrar, with no encumbrances (except known previous encumbrances, such as Co-ownership Regulations or easements) and those warranties granted by the Buyer to guarantee payment of credits taken for the purchase (i.e., mortgages and prohibitions to sell).

If the parties agree that the purchase price will be paid in installments, the Seller will usually not waive its action to terminate the contract and will not grant the Buyer settlement. Once payment is done in full, Seller will often be obliged to both waive its action to terminate and grant settlement to the Buyer's obligation to pay.

C. Form of sale and delivery: This is usually done *ad corpus*, which means, "in its current state". The Buyer declares to acknowledge this situation, and that the property is free of any encumbrances and, in general, any limitation to ownership. However, for large plots, mainly rural real estate, the parties usually agree to review the property's exact surface through a topographical survey, setting a unitary price per square meter



sold, which may eventually result in an adjustment in the price. For example, if the topographical survey reveals that the property's actual surface is less than 2% of the property's surface in its titles, that difference is accepted by the Buyer. If the difference is higher, the Buyer will be entitled to request a proportional price reduction.

Other commonly used conditions include:

- For condominium properties, Buyer will have to submit to the relevant Co-ownership Regulation.
- The property must be delivered empty, with no debts of any kind, i.e., land tax, utilities, common expenses, etc.
- In the case of rural property, it must be delivered without workers of any kind. The Seller guarantees that the labor contracts of any workers of the property have been terminated.

D. Titles: the sale is usually subject to the condition of having the Buyer's attorneys review the legal titles of the property. If the titles do not conform to the Law, said condition fails, and the Promise to Purchase turns void with no party liability.

A review of the property's legal titles seeks to verify, at least, that:

- The Seller, either directly or by adding the possession of the property by prior owners, has owned the property for at least ten consecutive years (being this term the statute of limitations for acquiring real estate).
- The Seller (and prior owners), especially in the case of corporations, were legally entitled to acquire, maintain, and sell the property (i.e., corporations are mandated by Law to count with the

authorization given by an extraordinary shareholders meeting, of the sale of real estate that represents 50% or more of the company's assets).

- The property is not subject to encumbrances and limitations that may hinder its transfer or its full exploitation and use by the Buyer, due to, for example, leases, seizures, mortgages, prohibitions, mining permits, easements, expropriations, usufructs, environmental conservation rights, co-ownership regulation, etc.
 - Technical and environmental conditions that may affect the transfer or full exploitation and use of the property by the Buyer: For example, farming and forestry subsidies, debts owed to public institutions for land taxes, subsidies, declarations of public utility (which means part, or all of the property may be subject to future expropriation due to eminent domain), or the approval of the exploitation of the property by Environmental Impact Evaluation System (SEIA). If the property is rural and the sale is agreed upon before subdivision of a larger property, the Chilean Agricultural Service Office shall approve the subdivision for the buyer to acquire the respective plot.
 - In the case of urban real estate purchased for the construction of any building, both the city and the district's land-use master plans must be reviewed to verify if the construction in the property is authorized based on the use of land designated in the master plan.
5. Term and place of execution: the parties will often agree on a term to enter into the Purchase Agreement, usually based on the



time necessary for the Buyer's counsel to review the property's legal titles and, when applicable, to obtain financing for the purchase. The parties will also agree on the notary public's office where the deed will be entered into. In case the property's price is paid partially or entirely with a bank loan, the relevant notary public is usually appointed by the financial institution granting said loan.

6. Guarantees: The usual security to ensure compliance of obligations set forth in the Promise to Purchase (for the Seller, providing the legal titles of the property and signing the deed on the agreed date; for the Buyer, signing the deed on the agreed date and paying the purchase price), the parties provide cross-guarantees in the form of banking instruments with a sum usually equivalent to 10-20% of the sale price, which may only be collected if the other party breaches its contractual obligations.

7. Conflict resolution: Any disagreements between the parties, including any differences regarding the legality or completeness of the property's titles, are usually settled by the ordinary courts of justice or an arbitrator.

8. Formalities: Promises to Purchase may be executed as private documents, or as public deeds. In the case of a public deed, if authorized by the Seller, the Buyer may register the Promise to Purchase under the competent Real Estate Registrar, for publicity matters.

9. Prohibitions: The Seller may also accept, at Buyer's request, to abstain from offering the property to third parties or encumbering it during the term of the Promise to Purchase. If authorized by the Seller, this prohibition may be registered in the competent Real Estate Registrar.

II. BROKERS

1. Real estate brokerage is an unregulated activity in Chile. No special qualifications or permits are required to operate as a broker.
2. The common broker's commission rate is 1-2% of the sale price, payable by both the Seller and the Buyer, unless negotiated otherwise.
3. Brokerage is not mandatory. It is usually employed in the sale of used real estate. Sellers of new residential/commercial/industrial/forestry /agro projects hire established brokerage firms to look for potential buyers, and to prepare bidding processes, usually for large properties with commercial/industrial/forestry/agro potential.

III. BUYER'S INSPECTIONS

1. Inspections are not mandatory, although the Buyer usually performs a visual inspection of the property, to verify its state. Technical checks are not customary but are generally requested for old properties. The Seller usually imposes a sale "as is" of the property, meaning the Buyer accepts to purchase the property in the state verified during visual inspection. Buyer reviews technical information as part of the legal review necessary to confirm the Seller has owned the property, either by her directly or by adding possessions of prior owners, for at least ten years.
2. When buying new property, the Buyer usually inspects the property with an architect to verify any flaws or construction defects, which must be repaired before receiving the property. Additionally, the sale of new property, especially for residential purposes, is subject to Chile's Consumer Protection Act in all aspects unrelated to



construction quality. Therefore, the inspection may reveal differences between the conditions offered by the Seller versus the actual needs of the property, which may configure deceptive advertising and leave the Seller liable for infringing Chile's Consumer Protection Act.

IV. FORMS OF OWNERSHIP

1. Residential property is usually held to an individual's name, or the name of a company controlled by the Buyer. Joint ownership is allowed in the percentage determined by the joint purchasers, even if it is not a 50-50% assignment.
2. Commercial property is usually held to a commercial real estate ("*inmobiliaria*") company's name.
3. Rural property is usually held either to an individual's name (especially in case of small plots of at least half a hectare) or to a rural real estate ("*agrícola*") company's name.

V. FORMALITIES

1. The purchase of real estate in Chile is categorized in Chilean law as a formal agreement. This means that the transfer of ownership does not happen when the parties sign the Purchase and Sale Agreement, but only when two copulative requisites are fulfilled: i) execution of the Purchase and Sale Agreement through a public deed granted before a notary public, and ii) the deed is then registered at the competent Real Estate Registrar.
2. If any of the parties needs to appear represented by a proxy, for example, in case they are unable to be physically present on the day of execution, a power of attorney must be granted by public deed and said power of attorney must give all the

necessary authorities to the proxy, including agreeing the sale price and form of payment, granting settlements and waiving resolutive actions. If the property is owned by a legally incapable person (such as a minor), the sale must be authorized by the competent judge.

VI. CLOSING COSTS/ADJUSTMENTS

1. The notary public's costs for authorizing the Sale and Purchase Agreement are usually borne 50% by each party, unless agreed otherwise. Costs of registering the Sale and Purchase Agreement before the competent Real Estate Registrar are usually borne by the Buyer. The fee paid to the Real Estate Registrar is 0,002% of the sale price, considering a maximum price ceiling of CH\$ 128,000,000. - (USD 140,000. - approx.)
2. Buyer and Seller adjust for land taxes, which must be paid in four yearly installments (April, June, September, and November). In addition to the previous, if the property is commercial, adjustments are also made for rents, third party operating expenses and everyday area maintenance expenses.
3. Land that has been subjected to agricultural purposes may be subject to taxes and payments derived from obtaining agricultural/forestry subsidies. Those subsidies must usually be respected by the Buyer or previously terminated by the Seller. For example, subsidies for irrigation works make the property owner, even after it is sold by the owner who obtained the subsidy, liable for failure to maintain the irrigation works that were paid through the subsidy.
4. The sale is subject to VAT if the seller is in the real estate industry, or if the property is part of the fixed assets of a company, among other specific cases.

**VII. OTHER CLOSING DOCUMENTS**

1. Condominiums: The Seller will provide the Buyer with a copy of the corresponding Co-ownership Regulation, in the case of properties that are part of a condominium regulated by Law 21,442 of Real Estate Co-Ownership. The Buyer also usually requires the Seller to provide a certificate, issued by the condominium's administrator, stating that the Seller does not owe any ordinary expenses for his unit.

2. Land tax: Real estate subject to land tax may not be transferred if land tax payments are owed to the National Treasury. Therefore, a land tax debt certificate issued by the Treasury or the Tax Authority showing no outstanding land tax payments has to be attached to the sale deed.

3. Utilities: Seller is usually required to prove to the Buyer that all bills for utilities, such as sanitary services, electricity, gas, cable TV/Internet services have been duly paid and no outstanding debts for these services exist. Buyer may request that some of these services, especially telephone and cable TV/Internet services, be terminated before the sale.

VIII. RECORDING REAL ESTATE DOCUMENTS

1. Since real estate must be transferred by a public deed registered before the competent Real Estate Registrar, copies of the deed are always available firstly in the notary public office that legalizes the deed, and then in the competent Judicial Archive, after one year counted from the sale and purchase's date.

2. Regarding the actual registration, the sale deed is registered in the property Registry of the competent Real Estate Registrar, which may then issue copies of the property's registration to the Buyer's name

and a certificate evidencing all the liens and encumbrances on the property, including mortgages, prohibitions, seizures, litigation, easements, usufructs, Co-ownership Regulations, etc.

3. Since the recommended form of transferring property is to settle all obligations that arise from the sale and purchase agreement in the same deed, this must be reconciled with the Seller's interest of not materially delivering the property until he or she receives full price paid, and the Buyer's interest of not delivering the payment of the purchase price until the inscription of the property to the Buyer's name in the Real Estate Registrar is completed. To leave no obligations pending, the parties agree in the Sale and Purchase agreement to state that the Seller received payment in that act, and the Buyer received the property in the same act. Then, along with signing the Sale and Purchase Agreement, the parties will also sign a separate document with instructions to the notary public that legalizes the deed. The Buyer provides the notary with the payment documents, which are left in escrow with the notary public. As instructed, the notary will hand over the payment documents once the notary has verified that the property is registered to the Buyer's name in the competent Real Estate Registrar and that the only encumbrances that lien the property are those that existed before the sale or those granted by the Buyer. If the instructions are not completed in a predetermined period, the notary will be entitled to return the payment documents to the Buyer once the Buyer signs a deed annulling the Purchase and Sale Agreement.



IX. ANNUAL COSTS FOR PROPERTY OWNERSHIP

1. Property Insurance: it is not mandatory, but very common. For condominiums, insurance is contracted for the condominium's common property. When property is purchased through loans by banks or other financial institutions, the lender requires the Buyer to hire fire and earthquake insurance. Unemployment insurance for the Buyer, a natural person, is also usually demanded by financial institutions, which may be enforced contractually but is not legally mandatory.

2. Real Estate Tax: This tax is levied on a property's assessed value. It is an annual tax but can be paid in four installments in April, June, September, and November.