

## Consent in real estate development contracts

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**Abstract---**Real estate development contracts are considered as named contracts to which the legislator has devoted specific provisions as well as general provisions, similar to other contracts. What distinguishes them is their subject matter, which concerns a property that has not yet been completed. Furthermore, the principle that “the contract is the law of the parties” is among the principles governing real estate development contracts. For the conclusion of this type of contract, it is necessary to meet the elements and requirements that ensure its validity, namely consent, object, cause, and formalities. Consent in these contracts has the characteristics of being future-oriented, which is the essence of the contract. Offer and acceptance take several forms, such as an invitation to contract. A sales contract may be a sale on credit or a contract to preserve a right. It requires sufficient legal capacity to act between its parties, with the will being free from defects.

**Keywords---**Consent, real estate promotion contracts, Offer, Acceptance.

### Introduction

Real estate development contracts consist of the off-plan sale contract and the right reservation contract, which are two sale contracts relating to a property that has not yet been completed and whose conclusion is based on consent. Consent is the essence of the contract. Its existence is required for the conclusion of the contract and is achieved through the exchange by both parties of the expression of their wills and their conformity, provided that the will is free from defects and legal impediments.

The determining factor in consent is its existence on the part of both contracting parties, and not the consent of one contracting party without the other, that is to say, the mutual agreement of the parties, as provided for in Article 51 of the Algerian Civil Code: “**The contract is concluded as soon as the two parties exchange the expression of their corresponding wills, without prejudice to legal provisions.**”

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1782

In addition, both parties to the contract must possess the necessary legal capacity to perform the legal act, given that real estate development contracts are classified as sale contracts – the off-plan sale contract and the right reservation contract – since the sale is considered a disposition act requiring a will free from defects and based on discernment. Therefore, once discernment is complete and the individual reaches the age of majority, their capacity becomes full, making the sale contract a disposition act, which requires the availability of sufficient legal capacity for that purpose.

This is why we have addressed this element, which constitutes one of the requirements of real estate development contracts, within this research paper, by raising the following issue:

**How did the Algerian legislator regulate consent in real estate development contracts? Does consent have a specific nature within this type of named contracts ? Or is it subject to general legislation, like other consumer contracts?.**

To answer this issue, we will adopt an integrated methodological approach through the use of the descriptive and analytical method, and divide the study into two sections: the first section concerns offer and acceptance in real estate development contracts, while the second section is devoted to the validity of consent. The research paper will be concluded with a conclusion.

## **Section One: Offer and Acceptance in Real Estate Development Contract.**

### **01- Offer**

Before addressing offer and acceptance, it is necessary to have two wills for contracting, namely the two parties to the contract. As is known in real estate development, it has mechanisms that lie in the nature of its contracts, which naturally affects the parties to the contract and their legal status, as the parties to real estate development contracts vary depending on the technical forms adopted by the real estate developer.

The parties to the consent relationship include the real estate developer on the one hand, and the buyer or purchaser on the other hand. If we are dealing with a right reservation contract, the buyer is referred to as the right reservation holder, while in an off-plan sale contract, we are dealing with the purchaser. However, if the real estate development contract takes the form of a lease-to-own sale contract or a lease contract, the parties to the contract are the real estate developer as the lessor and the beneficiary as the lessee.

The real estate developer, whether public or private, represents the only person authorized to conclude the right reservation contract and the off-plan sale contract, in accordance with Article 29 of Law No. 11-04, in addition to the fact that they are not included among the exceptions provided for in Article 20 of the same law<sup>1</sup>.

For the condition of consent to be fulfilled in real estate development contracts, an offer must be issued by one of the parties to the contract, which is represented by the real estate developer, and it must be met by the acceptance of the second party, namely the buyer – purchaser – or the lessee.

This is due to the possibility for the real estate developer to undertake the completion of projects and buildings intended for long-term investment, in addition to expanding the scope of real estate developers by including the National Agency for the Improvement and Development of Housing within the scope of activity, which carries out housing projects within the framework of lease-to-own sales, thus giving the buyer the status of a lessee.

What can be affirmed is that any contract among real estate development contracts includes an offer and an acceptance, and their conformity leads to the conclusion of a contract that grants rights and

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<sup>1</sup> Article N° 20; Law N° 11-04 dated 17/02/2011, published in Official Gazette N° 14 dated 06/03/2011, containing the rules governing the activity of real estate development, which specifies the cases in which the real estate developer is prohibited from carrying out the real estate development activity and is excluded as an original party to real estate development contracts.

imposes obligations upon both parties. According to general rules, an offer is a final and specific proposal by which a person expresses, in a decisive manner, their will to conclude a specific contract under the conditions set out in the proposal, such that if it is accompanied by a corresponding acceptance, the contract is concluded.

Real estate development contracts are characterized by a specific nature, as they are named contracts governed by a dedicated legal framework whose basis lies in general rules. Within this type of contract, a new concept appears, namely “information” (disclosure), which constitutes one of the obligations of the real estate developer. The developer is bound by this obligation prior to the conclusion of the sales contract.

Some consider that disclosure, as an obligation, amounts to an offer when it includes all essential elements and data, such as information relating to the type of property, the nature of the construction, the completion period, etc. However, if it does not contain these elements, it is regarded as a mere invitation to treat that does not rise to the level of an offer <sup>2</sup>.

To determine the position of the Algerian legislator regarding the nature of disclosure, reference is made to Article 41 of Law No. 11-04, from which it is understood that disclosure constitutes an invitation to treat rather than an offer. It represents a pre-contractual stage preceding the conclusion of the sales contract, which is based on an offer followed by acceptance <sup>3</sup>, as inferred from the expression “prior to any offer for sale”.

The reason for the divergence between considering disclosure as an offer or as an invitation to treat lies in the legislator’s adoption of disclosure as a pre-contractual obligation, known as general disclosure, and post-contractual disclosure, known as specific disclosure. In real estate development contracts, disclosure corresponds to general disclosure, which does not produce legal effects on the parties’ obligations and merely serves as a general inquiry into market value in the real estate sector.

In practical terms, under real estate development contracts, the fact that individuals do not proceed to purchase housing does not generate any legal effect on them, which indicates the absence of agreement prior to the confirmation of acceptance through payment. This confirms the legislator’s approach of treating disclosure as an invitation to treat rather than an offer.

Accordingly, the offer arises after the invitation to treat established through disclosure of the project, which reflects the assessment of the real estate market and the possibility of investment and profit-making<sup>4</sup>; The offer confirms the temporal stage following disclosure. The reason why the legislator adopted disclosure as an invitation to treat lies in the nature of its addressee, which is the general public; thus, it cannot be considered an offer addressed to a specific person but rather an offer addressed to the public at large. As soon as offer and acceptance are established, the contract is concluded and thus acquires binding force; it may not be revoked except by mutual agreement of the parties or for reasons provided by law.

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<sup>2</sup> Chawki Binassi, Real Estate Development Contract (Right Reservation – Off-Plan Sale Contract) under Law N°11-04 Laying Down the Rules Governing Property Development Activities, unpublished, Dar al-Khaliduniya Publishing, Constantine, 2019.p112.

<sup>3</sup> Article N° 41 Law N°. 11-04 dated 17/02/2011: “The real estate developer is obliged to ensure the dissemination of information regarding his real estate project in the places designated for advertising in the municipality territorially competent, prior to any offer for sale ...”

<sup>4</sup> Any person wishing to acquire a housing unit under construction within the framework of real estate development is referred to as a beneficiary. This designation changes once he confirms his intention to continue the legal operation through the payment of the first instalment due, corresponding to the progress rate of the project, thereby becoming a purchaser.

## 02- Acceptance

Acceptance is the offeree's agreement to the offer made to him. It must therefore be clear, explicit, and definitive. The contract is formed once acceptance is attached to the offer and both correspond to each other. Acceptance may take several forms in real estate development contracts. Some consider that, in the right reservation contract, acceptance is reflected in the beneficiary's payment of the financial advance to the Guarantee and Mutual Surety Fund and the deposit of a monetary instalment confirming his acceptance, thereby reserving a housing unit under construction <sup>5</sup>.

The latter may withdraw from his intention to pay the remaining instalments during the construction phase of the real estate project, provided that he forfeits 15% of the advance payment in favour of the real estate developer <sup>6</sup>.

As for the actual acceptance in the right reservation contract, it follows the advance payment stage and reflects the intention of the right holder to pay the remaining instalments and proceed to conclude the final sale contract transferring ownership of the completed property. In this case, acceptance comes after the offer, while the offer itself is also shifted to a stage subsequent to the invitation to treat, which coincides with the real estate developer's intention to transfer ownership of the completed property after a certain period to the holder of the reservation right, if we consider the right reservation contract as a promise to sell.

The same applies to the off-plan sale contract with regard to the offer, whereas acceptance can be inferred from Article 28 of Law No. 11-04<sup>7</sup>, particularly through the obligation imposed on the purchaser, namely the payment of instalments corresponding to the progress of construction works. Once the purchaser pays the first instalment, acceptance of the developer's offer is deemed to have been established. Thus, the offer comes after the invitation to treat, while acceptance is also contemporaneous with the subsequent offer through the payment of instalments linked to construction progress, regardless of the period preceding the payment of instalments, which consists of submitting purchase applications.

## Section Two – Validity of Consent in Real Estate Development Contracts

The correspondence between offer and acceptance in real estate development contracts is not sufficient for the formation and validity of the contract unless consent is issued by a legally capable person and is free from defects. Capacity refers to the ability to acquire rights and assume obligations <sup>8</sup>.

A real estate development contract is considered an act of disposition for both parties, given that the developer provides the project and the land and speculates on its value in order to generate profit, while the buyer pays the instalments to acquire the property subject of the contract and disposes of part of his financial assets. This requires legal capacity for disposition, which presupposes a degree of discernment and awareness enabling the person to form a legally recognized will capable of producing legal effects. The legal acts of both parties therefore remain conditioned by discernment.

<sup>5</sup> Chawki Benassi, Previous reference, p115

<sup>6</sup> Article N° 32, Law N° 11-04 dated 17/02/2011.

<sup>7</sup> Article N° 28, Law N° 11-04 dated 17/02/2011: "The off-plan sale contract for a building or part of a building to be constructed or in the process of construction is the contract that provides for and formalizes the transfer of land rights and ownership of buildings by the real estate developer in favour of the subscriber, in parallel with the progress of the works, while the subscriber undertakes to pay the price as construction advances ..."

<sup>8</sup> Chawki Binassi, Previous reference, p114.

Capacity in real estate development contracts must be full. If the contract is concluded between two natural persons, both must be fully capable and legally competent to perform the legal act. However, if one of the parties is a legal person, the individual representing it in law must also possess full legal capacity<sup>9</sup>. Accordingly, the legal person acts through its representative, who substitutes it in legal transactions, concluding contracts in its name and on its behalf<sup>10</sup>.

The adoption of the idea that the real estate developer is considered a trader by virtue of his activities subjects him to registration in the commercial register and consequently requires commercial capacity, which consists of reaching the age of majority set by the Civil Code at 19 full years, in accordance with Article 5 of Ordinance No. 75-59 dated 26/09/1975: “A legally emancipated minor, male or female, aged 18 full years who wishes to engage in trade may not commence commercial operations, nor may he be considered an adult with respect to obligations arising from commercial acts, unless he has previously obtained authorization from his father or mother or a decision from the family council approved by the court ...”

However, the Algerian legislator, in regulating real estate development activity, departs from the general rules by requiring that a person wishing to exercise this activity must be at least 25 years old<sup>11</sup>. This condition is required for obtaining the authorisation to carry out the activity as a natural person. Where the real estate developer is a legal person, it takes the form of a commercial company that may not engage in real estate development activity unless it has acquired legal personality and has been registered in the commercial register, in application of Article 549 of the Commercial Code.

The second party to the real estate development contract, whether a right reservation holder, purchaser, or tenant depending on the designation and the form of the real estate development contract, is considered a civil contracting party for whom civil capacity is required. Accordingly, the provisions of civil law apply to him.

It is sufficient that he has reached the age of majority, set under general rules at 19 years at the time of contract conclusion. There is no scope for discussing incapacity or lack of capacity on the part of the second party, since all forms of real estate development contracts are characterised by a formal nature, as they are concluded before a notary who carefully verifies the contractual conditions to ensure validity and the absence of defects. The buyer’s capacity is therefore governed by Article 101 of the Civil Code<sup>12</sup>.

It should be noted that the legislator does not limit itself to capacity requirements as previously discussed, but also imposes restrictions on legal transactions based on certain considerations, including cases of prohibition provided for under general rules, such as pre-emption rules, bankruptcy situations, the nature of the property subject to the contract<sup>13</sup>, as well as the prohibitions set out in Article 20 of Law N° 11-04.

The legislator’s determination of the age of 25 for a natural real estate developer to exercise the profession and to conclude its contracts reflects the high degree of specialization characterising these

<sup>9</sup> Walid Mohamed saad Khalifa, *The Legal Regime of Off-Plan Real Estate Sale Contracts – A Comparative Study-enahda – egypt*; 2019.p128.

<sup>10</sup> Ali Filali, *Obligations – General Theory of Contract*, 3rd edition.moufed.algeria.2019.p128.

<sup>11</sup> Article 5 of Executive Decree N° 12-84 dated 20/02/2012, as amended, laying down the procedures for granting accreditation to exercise the profession of real estate developer and for maintaining the national register of real estate developers, Official Gazette N° 11 of 2012, as amended and supplemented by Decree N° 13-96 dated 26/02/2013, Official Gazette N° 13 dated 06/03/2013.

<sup>12</sup> Article, N° 549 of Ordinance N° 75-59 dated 26/09/1975 containing the Commercial Code, Official Gazette N° 101 dated 19/12/1975, as amended and supplemented.

<sup>13</sup> Article N° 795 , Law N° 07-05 dated 13/05/2007 amending and supplementing the Civil Code, Official Gazette N° 78 of 1975, as amended and supplemented by Law N° 07-05 dated 13/05/2007

specific contracts, which aim to reach the reality and factual nature of transactions concluded within the framework of real estate development. This, in turn, reflects the flexibility of legal rules as a product of social transactions arising from the diversity of sub-contracts within named special contracts under general law.

In addition, the legislator's confirmation, through the conditions for exercising the profession of real estate developer, reflects a shift away from the general theory of contract. It is no longer conceivable to imagine the existence of a contract without a specific legal framework governing it. This necessarily requires the legislator to develop a new approach, referred to as the special theory of contract, alongside the general theory, in order to align with the provisions of real estate development laws governed by specific rules.

For consent to be valid, the will of both parties must not be vitiated by any defect such as duress, mistake, fraud, or exploitation. If the will of either party is affected by one of these defects, the contract is not valid. This raises the issue of the application of defects of consent in real estate development contracts.

A real estate development contract, like any other contract, is subject to annulment if consent is vitiated by any defect of will, namely mistake, fraud (deceit), duress, and exploitation...

Thus, mistake can be envisaged in several applications within real estate development contracts, the most notable being mistake as to the identity of the real estate developer. The identity of the latter may constitute an essential element for the subscriber or purchaser, who contracts on this basis under the belief that he is dealing with the intended developer, only to later discover that it is a different developer<sup>14</sup>.

In such a case, we are dealing with a vitiating mistake, since offer and acceptance are corresponding, but the consent of the contracting party is not valid. The party was not fully aware of the situation, and had it not been for the mistaken belief, he would not have entered into the contract<sup>15</sup>. This leads to relative nullity. Accordingly, the subscriber or purchaser has the right to request annulment of the real estate development contract.

Mistake may also occur regarding the subject matter of the contract, where the purchaser believes that the building subject to the contract is located at a different address than its actual one and has different specifications.

Therefore, several situations of mistake may be envisaged, particularly essential mistake relating to the nature of the contractual subject matter, including mistake concerning the characteristics and qualities of the subject matter of the contract or one of the parties.

Fraud is also frequently encountered in practice within real estate development contracts. One of its main forms is misleading the purchaser by presenting an existing real estate project through lies and deceptive manoeuvres in order to attract as many purchasers as possible and misappropriate their funds through fraud and deception. This phenomenon became particularly widespread in the 1990s with the emergence of so-called "phantom developers", which was one of the reasons leading to the repeal of Legislative Decree N° 93-03.

Fraud may also arise in relation to the obligation of disclosure, where the real estate developer resorts to various methods to conceal the true nature of the project and withhold the specifications of the property to be constructed in order to mislead the purchaser, thereby engaging in fraudulent

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<sup>14</sup> Mistake here relates to the identity of the person, i.e., the contracting party's identity, where such a mistake constitutes the true determining motive for entering into the contract. This situation arises where the person of the real estate developer is considered essential, particularly in the case of a public real estate developer.

<sup>15</sup> Chawki Binassi, Previous reference, p. 117

concealment. This is directly linked to the principle of good faith, which must be proven during the execution of contractual obligations once the contract has been concluded.

To prevent such situations, the legislator has enshrined the obligation of project disclosure under Article 41 of Law N° 11-04<sup>16</sup>.

Article 25 of Executive Decree N°. 12-84, as amended and supplemented, assigns the same objective, namely ensuring honest and wide-ranging publicity through various media, particularly through clear and visible advertising at the developer's headquarters.

An example of the use of fraudulent manoeuvres is when the real estate developer relies on certificates and documents belonging to another person or on falsified documents in order to mislead the purchaser regarding the ownership of the property subject to the intended contract.

Fraud, by which one contracting party is induced to accept unfair terms, is referred to as "fraud as a defective motive of consent". It results in the conclusion of a contract vitiated by a defect, which is subject to relative nullity accompanied by a claim for damages<sup>17</sup>.

This situation arises in real estate development contracts, particularly in off-plan sale contracts, where the developer uses various methods and deceptive practices to convince the purchaser of the quality and specifications of the building to be delivered, based on plans establishing the future nature of the property, in exchange for an increase in its commercial value.

This leads the purchaser to accept unfair terms and to conclude the contract. In such a case, the purchaser may seek annulment of the contract and compensation for the damage suffered, or compensation alone without annulment of the contract, which is the more common practice. The Algerian legislator has sought to provide protective guarantees for the purchaser, allowing him to assert his rights, thereby granting the judge the power to modify contractual terms. Since duress vitiates consent, it is irrelevant whether it originates from one of the contracting parties or from a third party; in such a case, the other contracting party must be aware of it.

Duress in real estate development contracts is relatively rare in practice; however, it may occur when the real estate developer exploits individuals' circumstances and exerts pressure on their will, thereby compelling them to contract. This situation is often observed in lease contracts, where the developer may instead propose a sale of the property. The developer may pressure the tenant, forcing him either to accept an increase in rent or face eviction, which leads the tenant to accept the offer and submit to unfair contractual terms.

The notion of duress by a third party may also find broad application within real estate development contracts, whether through actions by the developer using various methods and mechanisms to ensure the success of his project, or through third parties exerting pressure on the developer to accept their demands.

To complete the analysis of defects of consent, it is necessary to address the application of exploitation within real estate development contracts, particularly the exploitation of the weaker party in the contractual relationship. This is reflected in the lack of balance between what one party pays and what he receives. The contract is concluded after the developer becomes aware of the other party's urgent need for housing and stability, resulting in a clear imbalance between the obligations of the parties. The developer's obligation consists of delivering the completed or to-be-completed housing unit, while the benefit he obtains is disproportionate and results from the weakness of the exploited party.

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<sup>16</sup> Article N° 41 ; Law N°. 11-04 dated 27/02/2011: "The real estate developer is required to ensure the dissemination of information regarding his real estate project in the places designated for advertising within the territorially competent municipality, prior to any offer for sale ..."

<sup>17</sup> Ali Filali, *General Theory of Obligations*. cit., p. 199

In other words, the value of the dwelling paid by the purchaser or tenant is higher than its real value, either because the developer has not complied with the required specifications or because the property does not meet the purchaser's needs. In such a case, we are faced with exploitation as a defect of consent, arising from the purchaser's necessity to contract, in addition to the standardized nature of real estate development contracts, which often leads to exploitation due to clauses imposed on the weaker party in the contractual relationship.

## **Conclusion**

From the foregoing, it is clear that real estate development contracts are named contracts subject to a specific regulatory framework established by Law No. 11-04, as well as general provisions found in other legal rules, including the Civil Code. These contracts produce their effects once their constituent elements are fulfilled. They relate to an unbuilt immovable property, where offer and acceptance are often expressed through closely related notions such as disclosure and invitation to treat. This is particularly evident in the manner in which intention is expressed and in the invitation to contract through the presentation of the project and the assessment of its acceptance by the public.

The right reservation contract is no longer widely used in practice, and the main mechanism now adopted by real estate developers is the off-plan sale contract. The right reservation contract is characterised by ambiguity, which discourages developers from using it. It also reduces the protection of the purchaser, particularly regarding the instalment value and the risk of forfeiture, and it resembles a promise to sell at its initial stage. As a result, it has become necessary to update Law No. 11-04 and to strengthen adequate protection mechanisms for real estate development operations.

- The legal mechanisms governing sale should be adapted to purchasing power and real estate market requirements.
- More modern and suitable techniques should be introduced, and the scope of real estate development contracts should be expanded in order to provide adequate housing formulas for different social categories, thereby achieving housing planning consistent with urban development schemes and citizens' needs.

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