

BUYING PROPERTY FROM A PRIVATE SELLER

Buying property in Spain from a private seller puts both parties on an equal footing with regards to the protection the laws contemplate. The transaction will be mainly governed by the Spanish Civil provisions. Once the buyer has chosen a property, it is recommendable he instructs a lawyer to assist in all the conveyancing procedure.

Normal Schedule of Events

In Spain, commonly the transaction is divided in three documents:

- Deposit document.
- Private purchase contract document.
- Completion by means of Public Deed of conveyance signed before a Notary Public document.

Deposit Document

The nature of deposit or reservation sum contract has been succinctly explained in the article "Buying from a Developer". In short, most of these agreements are to be construed as being true purchase sale-contracts, thus granting the same legal remedies to buyer and seller as for any purchase-sale agreement. Both parties are entitled to sue for performance and claim damages, if any.

The deposit is normally left to the real estate agency, which depending on what sort of agreement they have with the vendor will legally bind the latter. We will analyse in this section the relationship established between the purchaser and the agency and the purchaser and the seller. The legal relationship arising from the agency and the seller is to be analysed on an article titled "Real Estate Agencies: how they operate." This article will enable purchaser and seller to understand the degree of involvement of Real Estate Agencies in the transaction and what their position is.

The reservation sum document should describe the identity of the vendor, the property and price. If this is the case, a purchase-sale contract is construed when offer and acceptance by the required parties are met, not needing the parties to draw up the so-called private purchase contract in order to commit themselves. The commitment has taken place, and therefore, being the offer of the buyer and the acceptance of the seller put together, the law does not allow any of the parties to withdraw unilaterally. However, the lawyers of both parties will normally draw up a more extensive document, either an option to purchase or an 'arras' contract, which have significant differences as to the effects and remedies of the parties.

Another particularity of the reservation sum contract is that it enables the buyer to make his offer according to his needs and desires: for example, the buyer can insert a clause "subject to sufficient mortgage granted", or subject to "property sold together with furniture for the offered price." If the vendor or the agency, as the case may be, accepts the offer, the deal is struck.

Problems may arise where the vendor, either himself or by a representative, accepts the offer and subsequently decides to alter

the conditions of this reservation sum on a further document. On a normal case scenario, the buyer, in view that the vendor wants to, for example, stipulate that the buyer will bear all the costs arising from the deal, decides to stick to the reservation sum document which will be governed by what the parties have agreed and in the absence thereof, by the Spanish Civil Code. The dispute arises and the vendor decides to withdraw and refund the deposit or instructs the agency to refund the deposit. The buyer seeks legal advice and finds out the law entitles him to sue for performance, putting the seller in a very difficult position.

Conversely, a buyer may lodge with the agency a significant amount and sign a 'contract'. On the assurance that he has bought a property, he sells his property in the U.K., closes bank accounts, transfers his monies, ships his furniture and when visiting the property he has purchased, he finds out that the vendor has not been informed of any deposit left with the agency nor has the slightest intention of selling the property for that 'agreed price'. He has signed nothing but an instruction to sell slip, which is not an express mandate to sell, thus the vendor being not the least bound by the document. The multiple problems which may arise at this stage of the deal are sufficiently serious and are by themselves a powerful argument for employing the services of a lawyer. This applies as much to buyers and to sellers.

Private purchase contract document

If the parties decide to convene the signing of a further document, where new terms and conditions can be agreed, against payment of a sum which is normally 10% of the purchase price. Once this document is signed, the reservation sum document ceases to be valid and enforceable.

This agreement may adopt the form of an option to purchase contract, an 'arras' contract or a new private purchase contract.

Briefly, the option to purchase imposes obligations only on the vendor. Against a sum of money, the seller undertakes to hold the property for the buyer until a given date and obviously undertakes to complete when the balance is paid. If the buyer withdraws, the seller keeps the money. If he decides to go ahead, the vendor has to grant Public-deed of conveyance. This contract is unilateral, in that the vendor is the only party under any obligation. The buyer, after signing, is not liable for defaulted payment of the balance. Only the premium of the option is liable, which is lost to the vendor. Conversely, the vendor is liable and can not withdraw from the deal until it has expired. Before this date, the buyer informs the vendor he wants to exercise the right granted by the vendor, and against payment of the balance, the Public Deed of conveyance is signed.

The 'arras' contract enables any of the parties to withdraw from the proposed deal. The buyer loses the reservation sum, and the vendor will have to refund twice that amount if he withdraws. The Spanish Supreme Court has stated that in order for this to be applicable, the document has to specifically provide for this and mention without a cast of doubt that it is the intention of the parties.

The private purchase contract as such binds both parties, enabling the non-defaulting party to sue for performance and/or claim damages. Where the contracts previously described fall short of the requirements to qualify as such, then deal will be regarded as a plain private purchase contract. However, it has to be said that these types of contract are not water-tight compartments. Parties can draw up tailor-made contracts to suit their interests, inserting clauses of the most varied nature. These are valid and enforceable so long as:

1. They are not deemed unlawful
2. They are easily interpreted. Otherwise, an ambiguous or confusing clause will be interpreted by a Court of law to the detriment of the party who created the ambiguity or confusion.

What the buyer should check before handing over any monies:

- **Who holds the monies?** The deposit should be left with either a reputable and financially sound agency or directly with the seller. The most secure bank account for lodging these monies is the client's account of the lawyer of the vendor. Although not technically an escrow account, it is bonded inasmuch as lawyers have very restrictive rules as to monies given to them for custody. It is recommendable to use this procedure where the owner of the property is an offshore company or when the buyer's lawyer advises accordingly.
- **Property:** It is vital to make sure the description of the dwelling corresponds to the one you are buying. Read carefully the details, location, number of floor, inside division etc. The land registry certificate might be as clear as the air, the owner may offer you discounts and also a bank guarantee in exchange for the monies you are lodging with him to secure the property and indeed, many more facilities. But in spite of all these assurances, he might be selling the buyer another property of his own, not the one the buyer wants. What happens then? The seller is not really defrauding, unless the purchaser can prove it. And all the evidence supports his innocence: private purchase contract, correspondence exchanged, completion at the Notary Public, all these agree on the same property details. The buyer has an unencumbered property which is, quite simply, not the one he wanted but a cheaper one the seller wanted to get rid of.
- **Mortgages, liens, encumbrances or any charge registered against the property:** A mortgage on the property is something normal and a buyer should not be surprised to find one: all contracts include a clause stating that the seller sells free from any charge, including mortgages. But beware, since although a mortgage can be easily cancelled, charges or liens might be registered against the property due to court order arising from a previous procedure where the buyer is not party. A lawyer will make sure the property is clear in this respect.
- **Date of completion:** If the buyer is raising funds, he should agree a completion date far enough in time to enable the balance of the purchase to be in place. It is normal for buyers to exceed this date due to banking delays in swift transfers and clearance of drafts. Although not recommendable, not meeting the date of completion does not automatically amount to loss of

deposits. The seller who wishes to discharge the deal will have to prove that the buyer has deliberately delayed and avoided payment.

- **Costs:** The most favourable (for the buyer) wording of the clause regarding costs is the one which states that the costs arising from the transaction will be borne by the parties according to the provisions of the law. Agreeing this, the buyer saves some money. However, it is normal for the vendor to impose on the buyer payment of all costs. These costs include Notary fees, Land Registry fees and the Plusvalía Tax. (Increase in the value of the land over the years.). It is matter to negotiate between the parties.
- **Inventory:** If the price includes furniture or other items, run through the inventory list to make sure it is correct according to what has been agreed.

Signing of Public Deed of Conveyance before a Public Notary

This is the moment where the buyer becomes officially the owner of the new property. A private purchase contract is enough to buy a property and live in it. However, with this legal status, ill-intentioned vendors are in a position to create the most devastating type of fraud. Double sale of a property. He takes the monies of the first buyer on a private purchase contract and shortly afterwards sells on a Public Deed to a new buyer whilst the first buyer was away. It has happened. The first buyer has lost his property and his money if he cannot find the vendor. And the latter will never be found, since he is a professional fraudster. This type of fraud is possible, although fortunately quite improbable.

By becoming public and subsequently registering the deed in the Land Registry the buyer avails himself of the full protection the law offers. In addition to this, lodging all monies with the vendor's lawyer will render the transaction totally safe. The Public Deed also transmits possession from vendor to buyer, unless otherwise agreed. Occasionally, the buyer allows the vendor to stay in the property after signing. This can create more than one headache to the new proprietor if the vendor refuses to leave the property, because he is simply not entitled to kick him out by using the force. After all the latter reverted possession on the vendor.

The only recommendation to be made here is to withhold from the purchase price an amount equivalent to the legal costs of the eviction procedure, since more often than not the vendor will have nothing to sequester in order to cover those costs. There are many more issues surrounding the functioning and effects of the intervention of a Notary Public and Land Registry in a purchase sale transaction. These are however to extent to be addressed on a single article.

Always employ a lawyer for purchasing real estate. For a reasonable fee you protect yourself of what is at times a real minefield and could turn out to be the worst of nightmares.