


THE SPECIFICITY OF THE OFF-PLAN SALES CONTRACT

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Abstract:

The off-plan sale contract is a technique which allows individuals to acquire a dwelling through a contract under which the buyer can pay in several instalments the price of the property to be acquired.

What distinguishes this type of sale is that the object of the contract does not exist when the contract is concluded, but it is possible to exist in the future, which gives it a particularity that distinguishes it from the ordinary sales contract.

Through this research work, we would like to clarify to what extent the rules governing off-plan sales contract deviate from the general rules which apply to the traditional contract of sale, by highlight the specificity of this type of sales due to its importance.

Keywords: *Contract, off-plan sale, specificity, real estate developer, Algerian law.*

INTRODUCTION:

The off-plan sale contract is one of the most important legal techniques in the field of real estate promotion. As it is one of the modern contracts in Algerian legislation, as it was organized by the legislator for the first time under Law No. 86-07¹ on real estate promotion, then under Legislative Decree No. 93-03², which canceled the previous real estate promotion law, and then finally organized under Law 11-04³ specifying the rules governing the activity of real estate promotion.

In fact, the reason for the spread of this sales technique is the housing crisis that the country is experiencing, and the citizen's desire to own Housing instead of renting, as well as the benefits it achieves for both the seller, the buyer and the state.

Indeed, the Algerian legislator has taken a fundamental step regarding real estate legislation with its recent regulation relating to the off-plan sales contract established by law No. 11-04, which distinguishes it from the ordinary sales contract because it concerns an object which does not exist at the time of the sale contract, but which is likely to exist in the future, which gives it a specificity.

In view of these data, it is appropriate to ask to what extent the rules governing an off-plan sales contract, deviate from the general rules applicable to the traditional sales contract contained in a contractual object existing at the time of the contract?

To answer this question, it is necessary to clarify the specificity of the objectivity of the off-plan sales contract, by addressing the special legal nature of this contract (the first topic). Then highlight the specificity of the legal effects resulting from this type of contract (the second topic).

I.Substantive specificity of the off-plan sale contract

¹ Law No. 86-07 of March 4, 1986 on real estate promotion, Official journal No. 10 of March 23, 1986.

² Legislative Decree No. 93-03 of 7 Ramadan 1413 corresponding to the first of March 1993, relating to real estate activity, Official journal No. 32, of March 03, 1993.

³ Law No. 11-04 of February 17, 2011, fixing the rules governing the real estate promotion activity, Official journal No. 14, of March 6, 2011.



The Algerian legislator adopted the technique of selling real estate on plan as a means to alleviate the growing housing crisis. So several legal texts were issued to regulate it, and determine its legal nature (1).

And as this technique is unique from the rest of the other techniques in sales contracts, in fact, the contract for the sale of real estate on designs is characterized by several peculiarities being located on a place that does not exist during the contract (2).

1- The special legal nature of the off-plan sale contract

Many different jurisprudential opinions have emerged trying to qualify the nature of the sales contract on the designs, in light of the ambiguity of the legal texts regarding the fact of its nature, some of which considered the contract of sale on designs an ordinary contract of sale, and some of them considered it a contracting contract, while there are opinions that consider the off-plan sale contract a mixture between sale and contract for services (A), this on the one hand, and on the other hand there are those who consider the contract of sale on designs a commercial contract, and there are those who consider it a civil contract, and there are Also who considers it a mixed contract (b).

A- The off-plan sales contracts Contract for services

The off- plan sale contract is defined by the Algerian legislator in Article 28 of Law 11-04 as "a contract of sale on designs or part of the building or in the process of completion, a contract that includes the transfer of land and building rights by the real estate promoter for the benefit of the subscriber in parallel with the progress of the works, and in return the subscriber is obligated to pay the price whenever the completion progresses"⁴.

It is clear through this definition, that the essential obligation that this contract places on the seller is the obligation to build, and if the seller is committed to building within a period specified in the contract, determining the legal nature of this contract is not easy as it is a composite contract.

Based on the obligation of the seller to construct a building within the agreed period of time, it is adapted as a contract for services on the basis that the promoter is obliged to manufacture something in the form of a building in the process of completion⁵.

However, in exchange for paying the price, the contract for selling the property based on the designs approaches the contracting contract, where the seller is obligated in this contract to establish a building within a specific period in exchange for a price that the buyer is obligated to pay, the seller's obligation is similar to the contractor's obligation in the contracting contract because the latter also undertakes to accomplish work for the buyer, but there is a difference between the two contracts represented in⁶:

- If the owner of the land provides the materials used in the completion of the construction process, and the contractor's role is limited to work only, the contractor in this case undertook to advance his work only, that is, to establish a building for the benefit of the owner of the land and his materials, here changing the condition of the land does not mean changing its ownership and is considered a contracting contract.
- If the employer provides the land, and the contractor provides in addition to his work the materials he uses in the construction, then we are in the process of contracting a contract, and we should not count the value of the work compared to the value of the materials used.

⁴ See, Art 28 of Law No. 11-04, previous reference.

⁵For more detail see :

Fawzia AMOUCHE, *off-plan sales contract in accordance with Law No. 04-11 specifying the rules governing the activity of real estate promotion*, Algerian Journal of Legal and Political Sciences, Vol., 57, No. 05, Year, 2020, p. 09.

⁶ See :

AYACHI Chaaban, *The Legal Nature of the Real Estate off-plan sale Contract* , Journal of human sciences , No. 37, Year 2012, pp. 131-130



- If the contractor erects the construction on land owned by him, or at least has the authority to build its boxes, and its materials, then the contract is considered the sale of a property under construction, as is known in the sale based on designs.

What distinguishes the off- plan sale contract from the contract for services is the obligation to transfer ownership, the first includes an obligation to transfer ownership, and the second does not include this obligation⁷, so we can say that the contract of sale on designs is a contract of a special nature, not a contract of sale nor is it a contract for the sale of an ordinary property, whether compared to the general provisions governing the contract of sale in the Civil Code, especially the sale of real estate and even for the contracting contract.

Hence, the Algerian legislator qualified the off- plan sale contract as a special contract, because it regulated it and singled it out with special provisions through various legal texts, the first of which is the repealed Legislative Decree No. 93-03, then Law No. 11-04, which defines the rules governing the activity of real estate promotion, as well as Executive Decree No. 94-58⁸, which includes a model contract for sale on designs, canceled by Executive Decree 13-431⁹ specifying the models of the contract of preservation of the right and the contract of sale on designs, all these special provisions distinguish it from other contracts.

B- The dual nature of the off-plan sales contract:

There has been a jurisprudential debate over the legal adaptation of whether the contract of sale on designs is a commercial contract or a civil contract. With reference to the text of article 04 of Law No. 11-04, which states: "Real estate promoters accredited and registered in the Commercial Register shall be authorized to initiate real estate projects", in addition to the text of Article 19 of Law No. 11-04 on real estate promotion, which states: "Every natural or legal person qualified to carry out business is allowed to practice the real estate promotion activity subject to articles 03-18 above, in accordance with the legislation in force and under the conditions specified in this law"¹⁰.

Through the two articles, it is clear that the contract of sale on designs is a mixed contract, as it is considered a commercial and civil business at the same time a commercial business for the seller and the provisions and rules of the Commercial Law apply to it, and a civil work for the buyer and the provisions of the Civil Code apply to it.

Moreover, the legislator has introduced new obligations that are not defined by the Civil Code, neither in the sale nor in the contract, such as the obligation to ensure good implementation and delivery formalities on the one hand, and on the other hand, the legislator distinguishes between the contractor and the real estate promoter as previously mentioned, and considered the latter¹¹ - the real estate promoter - explicitly text that he is a seller. So it cannot be said therefore, that the real estate promoter is in the position of the seller and the contractor at the same time. And the off-plan sales contract as a result is not considered a composite contract.

2- Extension of the exception scope rules relating to the contract object

⁷ See : Jean – Bernard AUBY, Hugues PERIET – MARQUET: Planning and construction law, 7th edition, 2004 Montchrestien, p. 886

⁸Executive Decree No. 94-58 of March 7, 1994 on the model contract of sale on plan applicable in the field of real estate promotion, Official journal No. 13 of March 9, 1994, repealed by Executive Decree No. 13-431.

⁹Executive Decree No. 13-431 of December 18, 2013, laying down the models of the contract of preservation of rights and the contract of sale on designs of real estate, as well as the limits for payment of the price of the property subject to the contract of sale on designs, the amount and duration of the delay penalty and the methods of payment thereof, Official journal No. 11 of December 25, 2013.

¹⁰Art19 of Law 11-04, previous reference.

¹¹ See: Article 3, which defines both the contractor and the real estate promoter.



The off-plan sale contract is a binding contract for both parties, and the main obligation of the subscriber is to pay the price (A), and the main obligation of the real estate developer is the construction of the building and the transfer of ownership of the property (B). Therefore, the sale and the price are two main objects in the sale contract.

A- Facilitating the payment of the price:

The price in the off-plan sales contract is one of the essential elements that must be agreed upon, and its payment is in the form of installments that suit the progress of the construction and in return the real estate promoter is obligated to use the price paid by the importer for the purpose of construction, and the price is first estimated and subject to explicit review text 38 of Law 11-04¹², and the legislator regulated this by the text of Article 03 of Executive Decree No. 13-431¹³.

If it is mentioned in the contract that it is subject to review, the modalities of the review of the price must be mentioned, provided that the review does not exceed a maximum of 20%, unlike the French legislator, which requires that the estimator be final or not reviewable.

Although the price in the off-plan sales contract is preliminary and subject to review, the price must be real, which matches the reality of what was agreed upon by the parties and not be trivial to the extent of disproportion between it and the value of the sale¹⁴.

B- Selling a building before its completion:

Considering that the sales contract based on designs is unique from the rest of the sales contracts that are similar to it, as it is applied in the field of real estate promotion, in addition to the fact that it is held according to a special model specified in Executive Decree 94-58, which includes a model contract of sale on plan that applies in the field of real estate promotion (canceled), and that all its peremptory rules related to public order may not be agreed to be violated, and its place is the sale of a building that has not yet been completed or is in the process of completion.

therefore, the off-plan sale contract is unique from the rest of the contracts by the characteristics of Law 93-03 repealed by Legislative Decree 11-04, which confirmed that specificity through the fact that it is a contract that responds to a place that does not exist at the time of contracting but is capable of future existence, as Article 92 of the Algerian Civil Code allows dealing in things as it reads: "The object of the obligation may be something future and realized", and the sale of a building before its completion is considered one of the future things .

The object sold under an off- plan sales contract is a good that is likely to exist in the future and sufficient for the sale to be valid.

As for the second element of the off-plan sales contract, represented by the price, as provided for in Article 53 of Law No. 11-04, the subscriber to the off-plan sales contract must pay the compensation due to him within the stipulated deadlines, and it must therefore be estimated at the time of entering into the contract, or at least be estimable.

However, the legislator did not stipulate in this case the final determination of the price, but left it to the parties to the contract to agree on an estimated price that can be returned, which is stipulated in Article 38 of Law No. 11-04, where conditions were set to determine how to review the price, represented in the change

¹² See, Art 38 of Law No. 11-04, previous reference.

¹³The payment of the selling price in the sale is adjusted to the designs according to the progress of the completion works within the limits stipulated by the regulation, Article 03 of Executive Decree No. 13-431 of December 18, 2013 Defining the standard models of contracts for the reservation and sale of real estate on plans as well as the limits of payment of the price of the property subject to the contract of sale on plans and the amount and maturity of the late penalty as well as the terms of its payment, Official journal No. 66, of December 2013.

¹⁴See: AJIRI Jahida, *Off-plan sale Contract* , Journal ELMOFAKER, Faculty of Law and Political Science, Mohamed Khudair University, N° 15, Biskra, 2017, p. 336.

of official indicators, prices, materials, equipment and labor, the absence of emergency circumstances, the auditor did not exceed 20 percent, which is the maximum for review, and the review must be justified ¹⁵.

II. Legal effects specificity of the off-plan sales contract

The contract for the sale of real estate on plan is one of the binding contracts for two sides, it entails obligations on the real estate promoter and the subscriber, and in addition to the traditional obligations stipulated in the general rules, there are new obligations stipulated by the Algerian legislator in new texts related to the organization of real estate promotion activity (1), as well as to protect the subscriber the Algerian legislator has developed many guarantees (2).

1- The introduction of new types obligations

The Algerian legislator stipulated several obligations on the real estate promoter, including traditional obligations according to the legal texts related to real estate promotion, in addition to the new obligations stipulated by the Algerian legislator under the new legal texts that regulate the activity of real estate promotion (A), and also imposed obligations on the subscriber, and it was included in the new legal texts regulating this type of real estate sale contracts (B).

A- The real estate developer obligations:

The real estate promoter is committed to the transfer of ownership and delivery, but how the time of transfer of ownership of the property on the designs differs from it in the ordinary sales contract, as the transfer of ownership in the contract of sale of the ordinary property is accompanied by possession by the buyer, but in the contract of sale on the designs, the ownership of the property subject to the contract is transferred from the date of the buyer's signature on the contract, while enjoying it and possession of the property is only after the subscriber signs the delivery report written in front of the notary. As for the delivery, it takes place after the completion of the construction within the period specified in the contract, and one of the peculiarities of this contract is that it is proven by a record signed by the parties (the subscriber and the real estate promoter), written by the notary who drafted the sales contract on the designs, in accordance with the text of Article 34 of Law 11-04¹⁶.

It is noted that between the obligation to transfer ownership and the obligation to deliver, there is an obligation to establish the building within the deadlines specified in the contract, which entails all legal effects. The legislator has stipulated that the certificate of conformity, which is an administrative document granted by the competent authorities to the qualified construction services, by the real estate promoter after obtaining it, and depositing it with the notary who drafted the off-plan sales contract.

In the case of the real estate, the promoter must also provide the subscriber with all the information he deems necessary and on which his will to conclude the sales contract depends on the designs along the stages of concluding the contract, starting with the announcement stage until the possession of the sold property when writing the delivery report¹⁷.

Moreover, the real estate promoter is also committed to the management of the construction project, including the preparation of the joint ownership system as well as the determination of various burdens in the case of individual buildings.

B- Underwriting obligations:

The subscriber is obligated to pay the price of the property, just like the buyer in the contract for the sale of the ordinary property in accordance with the general provisions, but the difference is evident, as if the payment of the price through installments is permissible in ordinary sales, the specificity does not lie in the installments.

¹⁵ See articles 38 and 53 of Law No. 11-04, previous reference.

¹⁶ Article 34 of Law 11-04, previous reference.

¹⁷ For more detail see :

LAAOUAR Rim Rafia, off- plan sale Contract in Algerian Law and French Law, Thesis for thesis for obtaining a Doctorat of Science in Private Law , Specialization in Comparative Business Law, Faculty of Law and Political Science, University of Oran 2, Algeria, 2019, pp. 123-124.



But rather lies in linking the installment to the progress of the works on the one hand, and on the other hand, the limits of these installments have been set by a legal text, and this is what gives the special character in paying the sale price in this type of contract. According to Article 3 of Decree 13-431 states: "During the conclusion of the off-plan sales contracts , the price of the real estate property shall be paid according to the status of the progress of the completion works within the following limits:

- Upon signing, twenty percent (20%) of the agreed sale price, upon completion of the foundations, fifteen percent (15%) of the agreed sale price upon completion of major works.
- including the external and internal railings and fences, thirty-five percent (35%) of the agreed sale price, upon completion of all works combined,
- Including connection to various roads, and networks as well as external preparations, twenty-five percent (25%) of the price of the remaining balance must be paid at the time of preparation of the possession record estimated at five percent (05%) of the agreed sale price¹⁸.

Through this article, privacy is evident in determining the obligations of the text of the law, and this determination is opposite for the subscriber as well as the real estate promoter, as the buyer pays for progress in the completion and the real estate promoter performs the completion for the price he receives, the price enters into the financing of the construction process, so the installments have been linked to the process of progress of completion.

It also shows specificity, through the agreement of the parties to review the price when necessary, and the necessity of determining the modalities of such review, Article 38 of Law No. 11-04 sets conditions for determining how to review the price, such as changes in official indicators, prices, materials, equipment and manpower, failure to meet emergency circumstances, failure to exceed 20 percent, which is the maximum limit for review, and the obligation to justify the review.

The buyer is also obligated under the sales contract to receive the sale, which is a complementary obligation to the seller's obligation to deliver that takes place when the buyer receives the keys, so that the subscriber does not receive the property unless he fulfills the full due installments, after the subscriber receives the property, the liability of the perishing is transferred to him, except for apparent construction defects. The buyer is obligated under the sales contract to receive the sale, which is done when the buyer receives the keys, so that the subscriber receives the property until if he fulfills the full due installments, after the subscriber receives the property, the liability of the perishing is transferred to him except Defects of apparent construction.

However, the buyer's receipt of the property subject to sale does not differ from what it is in the general rules of the actual seizure of the sale, and the receipt takes place at the time and place agreed upon between the contracting parties, the Algerian legislator did not stipulate in Law No. 11/04 the time and place of receipt, leaving the matter to the agreement of the parties, in accordance with the text of Article 394 of the Civil Code Algerian¹⁹.

2- Guarantees prescribed for off- plan sales contract

The sales contract for the building in a future state of completion imposes special guarantees in favor of the subscriber to be borne by the real estate promoter, as a seller under Articles 45, 42, 49 of Law No. 11-04 (A), as well as the general guarantees enjoyed by the buyer in the sales contract in accordance with the general rules, such as guarantee of non-exposure and entitlement (B).

A- Special guarantees:

These special guarantees are represented in the promoter's commitment to subscribe to a guarantee with the Mutual Guarantee, and Guarantee Fund, and to ensure the completion of the completion, and the progress of

¹⁸ See the Art 03 of Decree 13-431, previous reference.

¹⁹ See: Article 394, Order 75-58, previous reference.



the processing elements, in addition to the real estate promoter's commitment to guarantee hidden defects and damages.

– The subscription of the real estate promoter is a guarantee with the Mutual Guarantee and Guarantee Fund: Law No. 11-04 defining the rules for the activity of real estate promotion does not define this fund, with reference to Legislative Decree No. 93-03, and Executive Decree No. 97-406²⁰.

However, we find that it is a public institution that exercises its functions under the tutelage of the Minister in charge of housing, enjoys legal personality, and financial independence, and has a cooperative and non-profit-seeking nature.

The legislator regulated this guarantee within articles extending from 54 to 59 of Law No. 11-04, where every approved real estate promoter registered in the National Schedule of Promoters is obligated to join this fund, and to put guarantees and insurances upon subscription²¹.

– Ensuring the completion of the completion and the proper functioning of the building: The Algerian legislator obligated the real estate promoter to ensure the complete completion of the completion works under the text of Article 26, paragraph 03 of Law No. 11-04²²: "However, the possession and the certificate of conformity do not exempt ... , nor from ensuring the complete completion of the completion works to which the real estate promoter is committed for a period of one year."

Thus, the legislator has legally obliged the real estate developer to have this guarantee, the guarantee of complete completion of works, is an objective guarantee that is not based on the idea of error like other traditional guarantees.

It is considered a contractual obligation to achieve a result²³.

As for the Article 44 of Law No. 11-04 stipulates that "the execution of works necessary for the repair of building defects and/or the proper functioning of the elements of building equipment under the contract mentioned in Article 26 above" obliges him to repair any defect that occurs in the built property, provided that the defect is indicated in a report.

– Underwriting insurance from the ten-year guarantee: The Algerian legislator stipulates ten-year liability in the text of Article 46 of Law 11-04, which states: "The ten-year responsibility lies with the study offices, contractors and other interveners who are related to the owner of the project through a contract, in the event that all or part of the building is destroyed due to defects in construction, including due to the poor quality of the foundation floor.

In this regard, the Algerian legislator also stipulates ten-year liability in the model of the off-plan sale contract in Executive Decree No. 13-431 that: "The seller is committed to the benefit of the subscriber with his civil liability in the field of real estate, and assumes the task of monitoring, and following up the guarantee through ten-year insurance, for all architects, contractors, and peremptory workers invited to participate in the completion of the building, and declares that he accepts to act jointly with them towards the acquirer, and third parties, unless an error occurs that cannot be attributed to him²⁴.

²⁰ Executive Decree No. 97-406 of November 3, 1997, Establishing the Fund for Mutual Guarantee and Guarantee in Real Estate Promotion, Official Journal No. 73, issued on November 5, 1997 (amended and supplemented).

²¹For more details see: YAHIAOUI Hakim, *real Estate Promotion In Algeria critical Reading Of The Provisions of Law No. 11-04 of February 17, 2011, fixing the rules governing the real estate promotion activity*, Algerian Journal of Security and Development, Volume 11, No. 02, July 2022, p. 547.

²² See: Art 26, paragraph 03, of Law 11-04, previous reference.

²³ See: Appendix I of Executive Decree No. 13-431 of December 18, 2013, specifying the models of the contract of preservation of rights and the contract of sale on designs of real estate, as well as the limits of payment of the price of the property subject to the contract of sale on designs, the amount of the delay penalty, its deadlines and the methods of payment.

²⁴ For more details see:

LAAOUAR Rim raffia, p.131.



B- Guarantee of non-exposure and entitlement:

The sales contract in accordance with the general rules entails an obligation to ensure non-exposure, as the contract of sale within the framework of real estate promotion is like other contracts transferring ownership, in which the seller is obligated to guarantee the building sold to the buyer, and enable him to possess a quiet, and continuous possession, by refraining from any material or legal act that hinders this possession, whether this exposure is personal, or issued by others. Furthermore, the buyer shall refer to the seller for the guarantee of maturity in one of the following cases:

- If the buyer notifies the seller of the claim of entitlement, the seller intervenes in the lawsuit and fails to pay the compensation.
- If the buyer notifies the seller of the claim of entitlement, the seller does not intervene in the lawsuit, and the objector is judged, and the seller cannot prove the buyer's fraud or gross error.
- If the buyer notifies the seller, and the seller does not intervene, and the buyer acknowledges the right of the objector or reconciles with him, and the seller cannot prove that the objector was not right in his claim²⁵.

CONCLUSION:

The Off-plan sales contract have a specific feature, this is what makes it deviate from the general rules of the sales contract in many of its provisions.

Indeed, the Algerian legislator has made a qualitative leap to regulate this contract within Law 11-04, where many of the shortcomings that he knew under Legislative Decree 93-03 were corrected by reconsidering this contract more accurately than it was in the past.

Although the new provisions introduced by the Algerian legislature in Law 11-04 have filled the gaps that existed in Legislative Decree No. 93-03, but these provisions have some shortcoming. So we propose the following:

- Since the legislator did not specify the percentage paid by the subscriber at each stage of completion, and also the lack of permanent control, and follow-up of real estate projects during the construction, and completion period, which opens the door for real estate promoters to circumvent, and not respect the technical procedures, and specifications of construction and reconstruction, so the legislator must reconsider, and determine the percentage that the real estate promoter deserves for each stage.
- Based on the close link between the certificate of conformity, and the writing of the minutes of possession, and receipt of the building and the effective date of the condition preventing the disposal of housing benefiting from the state subsidy, it is necessary to include a legal text that prevents the delivery of the keys to the residential apartment from the real estate promoter to the buyer before obtaining the certificate of conformity, in order to preserve the safety of individuals from non-conforming buildings, and the buyer's right to assign the apartment within a period of 05 years for the validity of the condition preventing disposal.
- It is necessary to coordinate all the provisions related to insurance on ten-year liability, whether the rose within the provisions of the contracting contract in the Civil Code, Or the rose within the provisions of Law 11-04 or those contained in the Insurance Law.

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