



Fall | 19



# INTERNATIONAL LAWYERS NETWORK



**GAMBOA, GARCÍA & CARDONA ABOGADOS**  
Buying and Selling Real Estate in Colombia



This guide offers an overview of legal aspects of buying and selling real estate in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER COLOMBIAN LAW

### 1. Standard Forms of Agreements to buy and sell Real Estate:

Despite the existence of different type of agreements to make real estate transactions in Colombia, the most common forms of agreements used to acquire real estate properties are the promise to sale and purchase agreement and the sale and purchase agreement.

#### 1.1 Promise to Sale and Purchase Agreement (*Promesa de Compraventa*)

Considering that there are some formalities to acquire real estate properties in Colombia and the need of the parties to be bound by a legal document, regularly the parties enter first into the promise to sale and purchase agreement. Under this agreement, the parties set the terms and conditions agreed by them to do the transaction of purchase and sale of the property, and the buyer paid a percentage of the price agreed as a down payment of the transaction. Under the promise to sale and purchase agreement, the seller promise to sell, and the buyer promise to purchase the property when some conditions are fulfilled, normally when a specific date arrived, depending on the complexity of the transaction.

There are some legal requirements to make valid and enforceable the promise to purchase and sale agreement, as follows: (i) the agreement must be done in writing; (ii) the object of the agreement, in accordance to the law, must not be prohibited or invalid; (iii) it must include

the specific date or condition that sets the date to celebrate the purchase and sale agreement. In relation to this requirement, as stated by case law, it is also necessary to indicate the Public Notary and the time where the purchase and sale agreement public deed will be executed; (iv) the agreement must determine the purchase and sale agreement, in such a way that to proceed with the closure, only the formalities or the legal means to transfer and delivery the property are missing to be completed.

The last requirement mention above, means that the promise must include on one hand, full description of the property, including its identification name, address, boundaries, registration number, tax identification number and, those of the condominium if the property is part of one including the public deeds by means of which is under a condominium regime. And on the other hand, the price agreed by the parties and its form of payment.

Some measures are included in the promise to warrant the fulfillment of the contract, which means the execution of the promised purchase and sale agreement by the parties, the transfer of the property by the seller and the payment of the price by the buyer. Among others we found the inclusion of penalty clauses equivalent to 20% or more of the price agreed, escrow accounts, banking letters of credit or, indication of the down payment amount as a confirmatory payment or prepaid penalty in case of

breach of the contract by any of the parties, as applicable.

### 1.2 Sale and Purchase Agreement (*Contrato de Compraventa*)

The sale and purchase agreement is the regular form of agreement used to acquire real estate properties. When it is preceded by a promise to sale and purchase agreement, this agreement accomplishes the object of the promise and it usually replicates the terms and conditions agreed on the promise to sale and purchase agreement, unless the parties agreed to modify some of those terms by means of the sale and purchase agreement. Under the sale and purchase agreement, the seller sells, and the buyer buys the property specified in detail in this agreement for the price set therein, just as it was mentioned before in relation to the promise agreement.

When the sale and purchase agreement is used to make a transaction over a real estate property, it must be done in writing by a public deed executed by the parties before a Public Notary. The agreement by public deed itself constitutes only the title by means of which the transaction is done, however, according to the Colombian applicable regulations, in order to actually transfer the property is required the registration of the public deed under its registration number at the Registration Office to which the property is linked (according to geographic location). Only when the public deed is duly registered, the property is considered transferred and

the main object of the sale and purchase agreement is fulfilled.

The same guarantees indicated for the promise to sale and purchase agreement may be included under the sale and purchase agreement to guarantee the registration of the public deed, any breach of the contract in relation to the reps and warrants included therein or, the existence of hidden flaws (*vicios ocultos o redhibitorios*) that could not be found beforehand in a due diligence process and that may affect the property right of the buyer after the acquisition.

### 2. Due Diligence:

In order to have certitude about the legal situation of the property at the time of the sale and purchase transaction, it is highly recommended to proceed with a due diligence process before the execution of any agreement in relation to real estate in Colombia. Such due diligence must include the revision of the property titles, and the urban or land use analysis, when applicable.

#### 2.1 Revision of Property Titles:

The revision of the property titles is conducted mainly to determine that the seller is the entitled owner of the property and, that there are not any circumstances that affect or may potentially affect the ownership right over that property in case of acquisition (e.g. encumbrances, limitations to the property rights or registered lawsuits). In relation to residential properties, it is important to highlight the existence of some legal figures to protect family housing, which



are encumbrances to the ownership right, denominated Family Housing Assignment (“*Afectación a vivienda familiar*”) and Unattachable Family Assets (“*Patrimonio de familia inembargable*”).

Such revision is done in relation to the acts related to the property duly registered on the registration number of the property, which are reported under a no liens’ certificate (*certificado de tradición y libertad*). Such certificate should not have an issuance date no longer than ten previous days and in any case, before the execution of any agreement, a new one should be checked to prevent new unknown registrations after the due diligence process.

Depending on the criteria used by the legal expert in charge of the due diligence, the revision would refer to the registered acts of the property since the beginning of the transference chain of the property, the last twenty years, or the last ten years. However, all the acts related to the titles chain, encumbrances and property limitations, that have not been duly cancelled or those that present some inconsistencies under the certificate, must be revised in detail.

Other documents are revised under this part of the due diligence process, among others, proof of tax payments at least of the last five years, cadastral certificate to verify and compare the constructive information of the property and its correct address based on the information managed by the public entities.

## 2.2 Urban or Land Use Analysis:

An urban or land use analysis pretend to verify which kind of building can be constructed over the property or which limitations have the land to be developed or used, according to the applicable urban law. When this analysis is pursuit over a property that has already a building, it will determine if the construction complied with the planning regulations applicable at the time of the construction and if the building can have its current or the intended destination.

Some of the documents revised in this due diligence are the construction permits and all the urban legal licenses or documents of the property, as well as the specific regulations applicable to the property.

## 3. Forms of Ownership in Colombia:

In Colombia, the ownership is the legal right of a person to use, enjoy and dispose over a thing (including real estate properties), without violating the law or the rights of other people. Nevertheless, there are some special forms of ownership in Colombia that are relevant to mention herein.

### 3.1 Fiduciary Trust Property:

A fiduciary trust is a legal vehicle whereby a settlor transfers the property to a trustee in exchange for fiduciary rights. Usually, but not always, the settlor is at the same time the beneficiary of the Trust. This legal vehicle is usually use for the development of construction projects, but it can also be used as a form of simple ownership.

### 3.2 Real Estate Investment Funds and Private Equity Funds:

A real estate investment fund is a legal and financial vehicle (mutual fund) which mainly invest in real estate properties, in order to generate long-term income and asset valuation which become financial returns for its investors. In the same, the real estate investment funds are managed by professional and its investors have their investment represented in participation titles of the fund. The real estate investment funds are highly regulated by the Colombian financial authorities.

### 3.3 Condominium Regime:

There is a special ownership type called Condominium Regime (*Regimen de propiedad horizontal*) in which exclusive property rights over private property and co-ownership rights over the land and other common parts of the property concur, to guarantee the security and peaceful coexistence of the co-owners. This kind of ownership is very usual in the residential or commercial buildings. It constitutes a limitation to the ownership right and generates to the owners of private properties the obligation to contribute to the maintenance of common property areas, through a monthly administration fee which is paid to the condominium administration.

### 3.4 Joint Ownership:

Joint ownership consists of two or more people owning the same property. This joint ownership is allocated in each person according to the percentage determined in

the public deed by means of which they are acquiring the ownership right over the property. If it is not indicated in the public deed the participation percentage of ownership to which each person is entitled of, it is understood that the ownership right is distributed in equal percentages.

### 3.5 Usufruct:

There is an ownership retaining usufruct, that consists in the kind of ownership in which the owner conserves the right to dispose over the property but not the right to use and enjoy the property, which are given to another person. The usufruct title is an example of this ownership form.

### 3.6 Rural Property:

In relation to rural property is important to mention that the acquisition of these kind of properties must consider the accomplishment of legal requirements related to the statutory limitations to acquire rural property in Colombia according to the Colombian agrarian legislation.

## 4. Notarial Aspects:

As it was mention before, the transfer of real estate in Colombia must be done with the formality of a public deed held before a Public Notary. Similarly, when fiduciary contracts involving transfer of real estate are constituted, the formality of a public deed must be complied, even though the transfer of fiduciary rights over them can be made by means of a private document. The public deed content is public which means that anyone can access the information of a real estate transaction.



The process to prepare a public deed begins when the interested party approaching any Public Notary office in the country, since there is freedom of choice except when dealing with transactions in which the state participates as a party, because there it would apply a distribution system to select among notaries. Once the request is made, the officials of the public notary will inquire which legal transaction is going to be held and request the documents required for each specific deal; in the case of the sale and purchase agreements, the required documents are: (i) No liens' certificate (*certificado de tradición y libertad*) of the properties involved in the transaction; (ii) Documents of existence and legal representation of the parties; (iii) Proof of payment of property taxes of the last five years; (iv) No debts certificate issued by the applicable tax authorities in relation to the properties; (v) No debts certificate issued by the administration when the properties are subject to the condominium regime; (vi) Proof of payment of the consumption tax when the real estate exceeds the amount defined by law (applicable only until 31<sup>st</sup> December, 2019).

The deed process takes approximately 5 business days and the notary fees are regulated by decree for the entire national territory. Afterwards, the public deed must be registered at the Registration Office to which the property is linked.

## 5. Registration Aspects:

Public deeds in Colombia must be registered to considering transferred the property, because without registration there is no transfer of ownership rights. The registration offices are divided into registry circles that are distributed

according to the location of the real estate properties. The purpose of the registration is to give knowledge to everyone about the transactions and legal acts that have been done or that may affect the property. The registration process takes about 15 business days and its fees to register are set by the authorities at the national level, however, registration taxes must be paid as well, and they are set by each municipality government, so they may vary among municipalities. To register a deed, the first copy of the document issued by the Public Notary must be taken to the Registration Office of the circle to which the property belongs with the proof of payment of the applicable registration fees and registration taxes. Once the Registration Office receives the documents, it proceeds with the registration after checking that everything was made accomplishing the applicable laws, if not, the Registration Office can make return notes indicating the motifs of such return and/or those aspects that must be corrected before presenting them again for registration.

## 6. Costs related to Real Estate Property:

### 6.1 Property tax (*Impuesto Predial*):

It is a tax that municipalities charge annually to real estate properties. In general, the tax authorities set the tax amount to be paid, however, sometimes there is a form of self-assessment in which the owners declare the value of the real estate to set the property tax to be paid, and the tax authority may present or not an objection to the such value.



### 6.2 Valuation contribution (*Contribución por Valorización*):

It is a tribute that eventually the municipalities charge when they are going to carry out public works that may increase the value of a property. For the State, it is a financing mechanism and it is usually used to finance the construction of city infrastructure, among others, roads, bridges and public spaces.

### 6.3 Added value tax (*Participación en Plusvalía*):

It is a tax charged when by means a public action the municipality generates the possibility that in a property the construction index raised, the destination of the land changed to a more profitable one or, the land is incorporated from urban to urban expansion. This tax is set only once by each municipality, and the law defines when its payment become enforceable to the property owner.

### 6.4 Administration Fees:

The administration fees are the amount charged to each private property under a building or a group of buildings subject to the condominium regime. Such amount is intended to cover administration costs such as surveillance, cleaning, equipment maintenance or replacement, public utilities of the building, among others.

## 7. Brokerage:

The real estate brokerage contract has as object to put potential buyers and sellers in contact to enter a sale and purchase transaction over real estate. Brokerage is a partially regulated activity

in Colombia; however, a license is not required to operate as a real estate broker.

Commission rates are freely agreed by the parties but generally the commission is equivalent to 3% of the sale price of the property when located in urban areas and 5% when located in rural ones.

It is not necessary to have a real estate agent; it is simply an additional activity. However, real estate agents serving under this kind of transactions may help to find the best property and to save time to complete it.