

## **APPROVAL OF THE CONTRACT OF PURCHASE AND SALE OF REAL ESTATE**

**DADASHOV Emin Teyyub, PhD in law, Senior researcher at the Institute of  
Law and Human Rights of the Azerbaijan National Academy of Sciences**

**ORCID 0000-0002-1245-4726**

**DOI 10.32782/EP.2021.3.22**

---

*The article notes that on the basis of the legislation of the Republic of Azerbaijan, contracts on the disposal of objects of the state register of real estate must be notarized. During certification the notary or other officials authorized to perform such notarial acts in cases prescribed by law shall check the disposing party's right to dispose of the property and compliance of the contract with the law. They are responsible for the unreliability of the contract they have notarized.*

*The disposing party's right to dispose of the property shall be certified on the basis of the state register of immovable property or authorization granted by an authorized person. Such authorization shall also be notarized. Compliance of the contract with the law shall be certified by notarization. Contract for the disposal by the objects of the state register of immovable property shall be certified by a notary public or other officials authorized to perform such notarial acts in cases prescribed by law in accordance with technical characteristics of such property registered in the state register of real estate.*

*Keywords: Law, Civil Code, article, property, contract.*

One of the most important institutions of civil law is the institution of purchase and sale. As a necessary category, purchase and sale accompanies human society for nearly four thousand years. Undoubtedly, the concept of purchase and sale was not known in the archaic times, in the early stages of society. The concept of purchase and sale did not arise immediately with the emergence of «homo sapiens», that is, the first conscious human being. Thus, this concept emerged at a certain stage in the evolution of

human society, which has a centuries-old history of development. In ancient Egypt, Babylon, and Athens, contracts of purchase and sale were widely used. Even Hammurabi's laws provided the validity of this legal construction the given cases (only the subject of the contract was the current property; the seller was the legal and actual owner of the property sold; the contract was concluded in the presence of more than two witnesses). Thus, a certain history of the development of human society was necessary for the application of purchase and sale as an important and necessary form [1, p. 5].

Historically, the contract of purchase and sale was preceded by a contract of exchange - the exchange of a thing for a thing, that is, the exchange existed before the money appeared. The process of the historical continuity of these contracts is described in detail by the famous ancient Roman jurist Paulus, which was given in "Digest" (Roman law) [2, p. 440].

According to Justinian Law, the sale-purchase contract is a consensual contract. The essential elements of the sale-purchase contract are the agreement of the parties, the subject of the contract (goods) and the price of the thing sold.

The parties to the contract could be any legally capable individuals and legal entities, as well as states. Persons with limited legal capacity could independently make purchases and sales of things only with the consent of guardians and trustees.

The subject of the contract could be anything that was not withdrawn from transaction, name-

ly: corporeal and incorporeal things, the right to property, easements, claims, movable and immovable (buildings, structures, land), present and future things (products), single things and the totality of many things (inheritance), the seller's own thing and someone else's.

The sale and purchase contract was declared null and void when its subject:

- a) a thing that is not existed in the present and that is impossible in the future;
- b) is out of transaction
- c) the stolen thing, which both contracting parties knew about;
- d) a thing already owned by the buyer [3, p. 482].

In cases where the price was set pro forma, the agreement was recognized not for the sale and purchase, but for gift agreement. The gift agreement was applied in cases when an item was sold for a very low price by friendship.

Ancient Roman law regulated the seller's responsibility for the shortcomings of a thing according to ancient and later civil law. So, according to the general classical law, the seller, who deliberately concealed the shortcomings of the sold thing, was fully responsible to the buyer. Along with this, the latter, under the action of "actio redhibitoria", had the right to demand the termination of the contract and the mutual return of the thing and money. At the same time, the buyer could demand a decrease in the price of the thing without terminating the contract. The seller bore the risk of all accidental damage caused to the item while it was with the buyer. Roman law also protected the rights of the seller at the same time [3, p. 487].

D.V.Dozhdev notes that in the classical law, purchase and sale has a strictly binding effect, but at the same time, this contract is the basis for the transfer of ownership. In this regard, the idea has been developed that the payment of the price (or the provision of security) is a condition for the transfer of ownership when the thing is transferred to implement the contract of sale [4, p. 587].

Pursuant to Article 567 of the Civil Code of the Republic of Azerbaijan, entitled "Purchase Contract", effective from September 1, 2000, under the contract of sale, the seller transfers the item to the buyer, and the buyer accepts the item and in return takes responsibility to pay the specified amount (price) [5].

A separate paragraph (paragraph 5; Articles 646-650) is devoted to the regulation of purchase and sale of real estate in the Civil Code of the Republic of Azerbaijan. Article 646 of the same Code, entitled "Contract for the Purchase and Sale of Real Estate", states: "Under the contract of sale of real estate, the seller undertakes to transfer the land, house, building, facility, apartment or other real estate to the ownership of the buyer.

Unless otherwise provided by the following provisions of this paragraph of this Code, the general provisions on the purchase and sale of immovable property shall be applied accordingly".

In accordance with the legislation, the costs of notarization of the contract of sale and registration of real estate in the state register shall be made by the buyer.

Article 648 of the Civil Code of the Republic of Azerbaijan states: "In case of purchase and sale of immovable property, each party shall perform its obligation to transfer or accept the fact of transfer of property rights by carrying out what is necessary for registration in the state register of real estate.

The risks, costs and benefits associated with the goods sold pass to the buyer in case of doubt only from the moment of their inclusion in the state register of real estate. If one of the parties is to blame for the delay in registration, he/she must compensate the other party for the damage caused.

If the subject of the contract of sale is the shares on which the components of the land on which the unfinished building is located are connected, the buyer may not be obliged to pay the full purchase price of those shares before construction is completed. In this case, payments must be made in installments, taking into account the conditions provided for in Article 770-1 of this Code".

The right to property and other rights to immovable property, the restriction, formation, transfer and termination of these rights must be registered with the state. Property rights, use rights, mortgages, easements, as well as other rights to real estate must be registered in cases provided for in the Civil Code and legislation (Article 139.1 of the Civil Code of the Republic of Azerbaijan).

The requirements of Article 144 of the Civil Code of the Republic of Azerbaijan must also be strictly observed when registering officially a contract of sale of real estate. The article says: "Contracts as to disposition of objects entered in the state register of immovable property shall be notarized. During certification the notary or other officials authorized to perform such notarial acts in cases prescribed by law shall check the disposing party's right to dispose of the property and compliance of the contract with the law. They are responsible for the unreliability of the contract they have notarized.

The disposing party's right to dispose of the property shall be certified on the basis of the state register of immovable property or authorization granted by an authorized person. Such authorization shall also be notarized. Compliance of the contract with the law shall be certified by notarization. Contract for the disposal by the objects of the state register of immovable property shall be certified by a notary public or other officials authorized to perform such notarial acts in cases prescribed by law in accordance with technical characteristics of such property registered in the state register of real estate.

In order to verify the right of disposal and obligations of the controlling party, including the existing encumbrance of property in the state register of real estate, in accordance with the Law of the Republic of Azerbaijan "On Notary", should be ensured the exchange of information and documents between notaries and the state register of real estate, including direct access of notaries to the state register of immovable property electronically.

After certifying the contract for the disposal of real estate, the notary shall immediately forward it to the state register of real estate: in electronic form by means of information systems and in certified written form through registered mail. Such contract is recognized as an application for registration of the right of ownership and other real rights arising from this contract in the state register of real estate and on the basis of this contract state registration of the relevant rights is carried out.

Notarization shall not be required where a purchaser refers to a valid court decision or document equal thereto, including certified by notary.

Ownership of real estate may be divided on the basis of a division plan, which does not provide for the physical division of property, but determines the percentage of shares in the resulting common share ownership. After the approval of such a division plan drawn up by the owner in accordance with the procedure established by the relevant executive authority, the owner's right to each of the shares arising from the division shall be registered in the state register of real estate".

When registering a real estate purchase and sale contract at a notary office, the following documents must be submitted to the notary:

- 1) a document confirming the right of ownership over real estate;
- 2) a certificate issued by the State Committee for Property Issues under the Ministry of Economy of the Azerbaijan Republic on whether there is encumbrance or arrest on real estate;
- 3) if the owner of the real estate is married, his / her marriage certificate;
- 4) notarized consent of the husband (wife) of the owner of the real estate to the sale of the real estate;
- 5) certificate on the persons registered in the sold house, apartment, garden and cottage;
- 6) notarized consent of all adult family members registered in the sold house, apartment, garden and cottage.

The following persons must be present at the notarization of the real estate purchase and sale contract:

- owner (owners) of real estate or his/her (their) representative on the basis of a power of attorney approved by a notary;
- the buyer (buyers) or his/her (their) representative on the basis of a power of attorney approved by a notary.

The costs of notarization of a real estate contract, regardless of the price of real estate, are as follows:

- ✓ if the real estate is transferred to the husband (wife), children, parents, grandparents, grandchildren, brothers, sisters - 23 manats (20 manats state duty + 3 manats fee) [6];
- ✓ if the real estate is transferred to other persons under the contract:
  - if the real estate is located in Baku - 300 manats (250 manats state fee + 37.5 manats service fee + 12.5 manats bank expenses);

- if the real estate is located in Sumgayit city, Ganja city or Absheron region - 210 manats (175 manats state duty + 26.25 manats service fee + 8.75 manats bank expenses);

- if the real estate is located in other cities and regions of the Republic of Azerbaijan - 150 manats (125 manats state duty + 18.75 manats service charge + 6.25 manats bank expenses).

In addition to the above costs, the buyer of real estate pays a commission to the bank in the amount of 0.2 percent of the purchased property. Because, according to parts 4, 5 and 6 of Article 74 of the Law of the Republic of Azerbaijan dated November 26, 1999 "On Notaries": "Disposal of money registered in the official registers of real estate and movable property, donations, advance deposit and lending, as well as when notarizing contracts related to the amount paid under the initial contract, the transfer and return of funds to one of the parties shall be carried out through a deposit account opened by the notary in the bank.

Payment of funds to one of the parties in excess of the amount determined by the relevant executive authority of the Republic of Azerbaijan (that is the Cabinet of Ministers of the Republic of Azerbaijan) under notarized contracts on disposal of real estate must be made through a deposit account opened in a bank.

The notary shall certify such contracts upon a receipt for payment of the amount of money to the deposit account opened in the bank" [7].

Banks charge a 0.2 percent commission for keeping the money that the buyer will pay to the seller for the real estate in the bank account opened by the notary for only a few hours, ie 100,000 (one hundred thousand) manats - 200 (two hundred) manats.

Also, the Buyer shall pay 42 (forty two) manats for residential real estate and 132 (one hundred thirty two) for non-residential real estate for the certificate issued by the State Committee for Property Affairs under the Ministry of Economy of the Republic of Azerbaijan about encumbrance or arrest of real estate. So, the buyer has to pay 632 (six hundred and thirty two) manats for the purchase and sale contract of non-residential real estate located in Baku, valued at 100,000 (one hundred thousand) manats, 542 (five hundred forty two) manats for purchase and sale con-

tract of residential real estate. In our opinion, it is not right to charge a fee for the service and additional money for bank expenses for the notarization of the contract of purchase and sale of real estate. We believe that it would be expedient to make the relevant changes in the legislation and when notarizing the contract of purchase and sale of real estate, provide for the payment of the state duty established by the Law of the Republic of Azerbaijan "On State Duty" only.

According to Articles 11.1.3 and 11.1.4 of the Law of the Republic of Azerbaijan "On State Duty", exemptions from payment of state duty on notarial acts are provided in the following cases:

- employed persons with first-degree disabilities, including children with disabilities under the age of 18, refugees and IDPs are exempted from payment of state duty on notarial acts related to the purchase and exchange of an apartment or house (part of a house);

- Children who have lost their parents and are deprived of parental care, as well as persons among them and children under guardianship (custody), as defined by the Law of the Republic of Azerbaijan "On Social Protection of Orphans and Children Deprived of Parental Care", are exempted from payment of state duty on notarial acts related to the conclusion of civil law transactions, as well as transactions related to the purchase or exchange of housing (individual house).

But, unfortunately, private notaries refuse to notarise such contracts in cases where exemptions from the payment of state fees for notarial acts are envisaged. Individuals are required to apply to a state notary office for notarization of such contracts.

We believe that it is not right for private notaries to refuse to ratify such agreements in cases where exemptions from payment of the state fee for notarial acts are envisaged.

We consider it necessary to state that, a land is the most important property. As N.A. Syrodoev points out, "the land possesses such unique properties as immobility, indestructibility, non-re-creation. The land is truly motionless by nature. Only land, by virtue of these properties, can give other immovable objects a specific and permanent targeting.

Modern technical advances make it possible to move even monumental buildings over considerable distances without any damage to their purpose. If you follow the letter of the law, then a building moved not only to a neighboring land plot, but also to a neighboring area retains the quality of an immovable object, unless disproportionate damage has been caused to its purpose" [8, p. 92-93].

It should also be noted that modern technologies in some cases make it possible to move forests, plantings, buildings, structures without causing significant damage to their purpose. "Under certain conditions, this group of objects can be transformed, for example, the production of timber for sale, or the sale of a building for construction materials; as a result, it turns out that these objects become movable property" [9, p. 132]. In the process of transformation, they lose those characteristics by which they can be attributed to real estate.

A good example is the movement of buildings of architectural value over considerable distances. If we clearly proceed from the criterion provided by the legislation, then, due to the absence of damage during their movement, such objects do not belong to real estate [10, p. 21].

According to A.V. Shchegoleva, "real estate is an individually defined thing or other property possessing the property of immobility or strength of connection with the land, the movement of which is impossible without disproportionate damage to its purpose, significant expenditure of labor and money.

The specificity of the legal regime of real estate is not so much in the system of legal norms that establish specific permissions and prohibitions, but in the restrictions on rights in the relations that develop between legal entities regarding real estate objects" [11, p. 6].

M.V. Abramova identifies four features inherent in real estate:

1) a thing is recognized as immovable property, i.e. an object of nature or a result of labor, about which civil legal relations arise;

2) this thing must be individually defined, i.e. the presence of special, only inherent features, characteristics and qualities are necessary, it must be legally irreplaceable;

3) this thing must have such characteristics as durability and non-consumability;

4) this thing must be in a certain connection with the land [12, p. 23].

Land or a land plot is a unique classic real estate, because for objective reasons they are in an unchanging and motionless state. The most important thing is that the land allows things to be classified as real estate on the basis of the presence of a strong connection with the land. In other words, the land became the basis for the legislator to determine the main criterion of real estate, based on the natural properties of things - a strong connection with the land.

State registration of rights to real estate and transactions with it is designed to ensure the stability of real estate turnover, since the latter has not only property, but also social significance. Ensuring stability is achieved by pointing transactions and other acts with real estate outside the private interests of the parties and creating a special information system that allows all subjects of the law to receive exclusively and only reliable data on the legal status of an object.

Since real estate represents the greatest economic social value, in contrast to movable things, it often does not show a visible connection with the subject of the law to them (real estate objects are of great importance in the life and activities of individuals and legal entities, as well as in civil circulation), therefore, in most legal systems the requirement of compulsory registration of the establishment and transfer of all property rights and encumbrances in relation to real estate was formed and consolidated.

Registration is imperative and is carried out by authorized bodies. At the same time, in this case, it is used as a certain form to designate, ensure and protect public interests in the sphere of civil law. In this regard, the use of means inherent in the methods of legal regulation of various branches of law is inevitable. Therefore, it should be recognized that this is a typical act of administrative law, since it regulates relations of a managerial nature in which a public administration body participates, endowed with special competence for this purpose.

The legal norms of the institution under consideration should be internally consistent aimed at solving common problems and achieving common goals, albeit using the means inherent in the methods of legal regulation of various branches of law.

The complex legal structure of the emergence of the right to real estate is established by law. The validity of the law and real estate transactions are determined not only by the expression of the will of the parties aimed at the emergence, change or termination of civil legal relations regarding the real estate object, but also by the act of their recognition and confirmation by the state through appropriate registration.

The system of state registration of rights to real estate and transactions with it has been formed in Azerbaijan and its basic rules and procedures were determined by the Law of the Republic of Azerbaijan dated June 29, 2004 "On the State Register of Real Estate".

#### Bibliographic references

1. Allahverdiyev S.S. Azərbaycan Respublikasının mülki hüquq kursu. III cild, Xüsusi hissə. Bakı: Digesta, 2009. - 1048 s. [In Azerbaijani].
2. Памятники Римского права. Законы XII таблиц. Институции Гая. Дигесты Юстиниана - М.: Зерцало, 1997. - 608 с.
3. Яковлев В.Н. Древнеримское частное право и современное российское гражданское право: Москва: Волтерс Клувер, 2010. - 960 с.
4. Дождев Д.В. Римское частное право: Учебник. Москва: Норма, 2008.- 784 с.
5. Azərbaycan Respublikasının Mülki Məcəlləsi. <http://e-qanun.az/framework/46944> [In Azerbaijani].
6. "Dövlət rüsumu haqqında" 4 dekabr 2001-ci il tarixli Azərbaycan Respublikasının Qanunu. Bakı: Qanun. - 2021. - 14 s. [In Azerbaijani].
7. "Notariat haqqında" 26 noyabr 1999-cu il tarixli Azərbaycan Respublikasının Qanunu. <http://www.e-qanun.az/framework/107> [In Azerbaijani].
8. Сыроедов Н.А. Регистрация прав на землю и другое недвижимое имущество // Государство и право. - М.: Наука, 1998. -- № 8. - с. 90-97
9. Скворцов О.Ю. Понятие недвижимости в гражданском праве // Правоведение, 2002. № 4. - с.131-141
10. Черных А.В. Залог недвижимости в гражданском праве: Дисс. ... канд. юр. наук. Москва. - 1995. - 175 с.

11. Щеголева А.В. Правовой режим недвижимости как объекта гражданских прав: Дисс. ... канд. юр. наук. Волгоград, 2006. - 175 с.

12. Абрамова М.В. К вопросу о понятии недвижимого имущества // Нотариус. - М.: Юрист, 2003.- № 3. - с. 22-25

*Дадашов Эмин Теюб оглу - доктор филологии по праву, Старший научный сотрудник Института Права и Прав Человека Национальной Академии Наук Азербайджана*

#### УДОСТОВЕРЕНИЕ ДОГОВОРА КУПЛИ-ПРОДАЖИ НЕДВИЖИМОСТИ

В статье отмечается, что на основании законодательства Азербайджанской Республики договоры о распоряжении объектами государственного реестра недвижимого имущества должны быть нотариально удостоверены. При удостоверении нотариус или другие должностные лица, которые уполномочены совершать подобные нотариальные действия в установленных законом случаях, должны проверить право стороны, распоряжающейся вещью, на распоряжение и соответствие договора закону. Они отвечают за недостоверность удостоверенного ими договора.

Право распоряжения подтверждается наличием у распоряжающейся стороны такого права по государственному реестру недвижимого имущества или передачей ему такого полномочия надлежащим лицом. Это полномочие также должно быть нотариально удостоверено. Соответствие договора закону закрепляется удостоверением в нотариальном порядке. Договоры о распоряжении объектами государственного реестра недвижимого имущества удостоверяются нотариусом или другими должностными лицами, которые уполномочены совершать подобные нотариальные действия в установленных законом случаях, согласно техническим показателям данного имущества, зарегистрированным в государственном реестре недвижимого имущества.

**Ключевые слова:** Право, Гражданский кодекс, статья, имущество, договор.