



## **The Most Preferred Security: Mortgage**

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A pledge established on real estate is referred to as either a mortgage or a hypothec (*hypotheca*). In this article, pledge on real estate as a mortgage under Turkish law is discussed as it is the kind of security most preferred by creditors to guarantee an extended loan.

### **I. Types of Mortgages**

Turkish law separates mortgages into two groups: (i) principle amount mortgages, and (ii) limited amount mortgages.

#### **(i) Principle Amount Mortgage**

A principle amount mortgage is established to secure an existing debt in a determinable amount. It also functions as a mortgage holder's acknowledgment of an unconditional debt.

Regardless of the total amount to be collected on a mortgage, a principle amount mortgage limits collectible items to the following:

- the principal amount of the receivable
- interest and default interest
- costs and expenses related with enforcement proceedings and insurance premium payments made by the creditor/mortgagee.

Other expenses and receivables not listed above are treated as unsecured claims for the creditor/mortgagee.

Additionally, in a principle amount mortgage, the amount of debt and the interest rate (if it is higher than the interest rate determined by law) should be registered with the relevant title deed registry.

#### **(ii) Limited Amount Mortgage**

A limited amount mortgage is established to secure a prospective receivable in an indefinite amount.

As opposed to the aforementioned principle amount mortgage, in a limited amount mortgage a limit is not applied to collectible items but is applied to the amount to be collected from the mortgaged asset. The limit on the collectible amount is determined by mutual agreement between the parties during establishment of the mortgage. A claimed



amount in excess of the mutually determined limit qualifies as an unsecured claim, and the creditor is treated as unsecured for that excess amount.

For an existing debt in a determinable amount, parties may choose to establish both a principle amount mortgage and a limited amount mortgage. However, for a prospective receivable in an indefinite amount, a principal amount mortgage cannot be established.

In practice, Banks as creditors establish a limited amount mortgage by defining the scope of the pledge as "receivables that have already incurred or will be incurred". This is considered contrary to the principle of "certainty of the receivable" in legal doctrine. In 2017, the Supreme Court of the Assembly of Civil Chambers ruled that a mortgage obtained in 2006 as security for a loan extended in 2007 was permissible.

## **II. Currency Denomination of Mortgage**

In principle, the amount of the mortgage should be established in Turkish Lira. The amount of a mortgage can be expressed in foreign currency only if the mortgage is established to secure a foreign currency or foreign currency indexed loan provided by a *financial institution*<sup>1</sup> conducting business within the Republic of Turkey or abroad. In this case, foreign currencies whose rates are published in the Official Gazette of the Central Bank of the Republic of Turkey on the mortgage registration date may be registered as the currency of a mortgage only. As of the date of this Article *crypto currency* cannot be included among these currencies in foreseeable future. Additionally, all mortgages in a piece of real estate's decree should be in the same currency.

## **III. Ranking System**

A debtor may divide the value of its real estate into fictional portions in the title deed registry, and may create independent security rights for each portion. During foreclosure proceedings, the first-ranked creditor/mortgagee is always paid first, even though there may be other subsequent and lower ranking mortgages granted at a later date.

A rank becomes vacant if the secured debt is fully paid or cancelled by the written consent of the creditor/mortgagee. Lower rank mortgages do not automatically move upwards, unless the parties agree otherwise on a contract registered with the title deed.

## **IV. Registration with the Title Deed**

To establish a legal and valid mortgage, an agreement prepared by the land registry officer should be signed by both parties at the title registry office and registered with the relevant land registry.

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<sup>1</sup> As defined in the Banking Law numbered 5411 and dated 19.10.2005



## **V. Spouse's Consent to Mortgage**

A mortgage established on a *matrimonial home* must be done so with the explicit consent of the spouse. The General Assembly of Civil Chambers ruled that a mortgage shall not be deemed as valid without spousal consent even if the real estate in question is not annotated as a “matrimonial home” in the title deed on the establishment date of the mortgage (*The General Assembly of Civil Chambers' ruling numbered 2015/2322 over the file numbered 2014/2096*).

## **VI. Foreclosure of a Mortgage**

A creditor/mortgagee may bring foreclosure proceedings following a debtor's default. The basic steps of the foreclosure proceeding without a final and enforceable judgement are as follows:

- (i) The creditor/mortgagee should first send an acceleration notice to the borrower and the mortgagor;
- (ii) The borrower, who receives the notice sent by the creditor/mortgagee, may object to the notice within 8 days of the date of notification,
- (iii) The creditor/mortgagee should then apply to the execution office to send a payment order to the borrower and the mortgagor.
- (iv) The mortgagor should then (a) pay the amount of the debt (with the default interest and attorney fees) within 30 days following receipt of the payment order, or (b) object to the contents of the payment order within seven days following receipt of the payment order. Otherwise, the Execution Office will appoint experts to evaluate the market value of the real estate.
- (v) If the contents of the payment order are objected to by the mortgagor, the creditor/mortgagee is required to file a lawsuit to claim annulment of the objection against the mortgagor. If the court annuls the objection, the Execution Office is then able to order an expert appraisal of the real estate. The mortgagor may also appeal this annulment, in which case proceedings at the Court of Appeal shall not suspend the Execution Office's procedures up until the sale of the real estate at a public auction. After the judgment of the court is approved by the Court of Appeal, the real estate can be sold at public auction.
- (vi) Once the Execution Office receives the expert report regarding the market value of the real estate, it will officially notify the mortgagor of the report.



The mortgagor will then have the right to object within seven days in the relevant court. In case of an objection, the relevant court will determine the market value of the real estate through judge-appointed experts. The judgment of the court in determining the market value of the real estate is also able to be appealed, and such an appeal then suspends the sale of the real estate at public auction.

- (vii) After the completion of the aforementioned proceedings, the Execution Office will specify two auction dates. If the first auction produces offers lower than 50% of the value determined by the expert report, a second auction will take place within 20 days. In this case also the 50% rate is applicable and if any bid does not reach this amount, the auction shall be cancelled and the whole process shall be repeated.

If the receivables obtained from foreclosure proceedings do not cover the entire amount of the creditor/mortgagee's receivables, a certificate for the remaining receivable "Temporary Pledge Deficit Document" is given to the creditor/mortgagee. The creditor/mortgagee may then commence execution or bankruptcy proceedings with regard to the other assets of the mortgagor based on having obtained such a certificate.

#### **References:**

Kuru, B. (2013). İcra ve İflas Hukuku, Adalet Yayınevi

Karmış, E. (2015). İcrada İflasta Tüketici Hukukunda İpotek Rehin ve Paraya Çevrilmesi, Seçkin Yayıncılık

Şıpka, Ş. (2004). Aile Konutu ile İlgili İşlemlerde Diğer Eşin Rızası, s.122