

The Land Register and Mortgage in Turkish Law

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The registration of a mortgage in the land register is - beside further liens - an appropriate way to secure a claim. Therefore it is reasonable to be familiar with the main features of the Turkish land register system and the mortgage. The most important information is summarized below.

I. The Turkish land register system

Cadastral Office

For 70 years cadastre works have been conducted in Turkey. Since the enactment of the Cadastre Law Nr. 3402 from June 21st, 1987 the Cadastral Office is in charge of this duty. The Cadastral Office describes the borders and areas of the cadastral units on the real estate map and registers this data in the land register in the names of their owners.

The following cadastre documents exist:

- The real estate map describing the position of cadastral units and buildings and their ground plans;
- the graphical presentation on parcelling plans;
- registrations of changes concerning the property;
- records and their attachments.

The land register

- General information

All written information concerning the property is recorded in the land register. The Turkish land register system follows the „in rem system”. This means that every

property has its own land register folio and registration in this folio is mandatory for being allowed to purchase a real property right. Registration in the land register is the condition for acquiring a title; without registration a real property right can not be purchased (Art. 1021 of the Turkish Civil Code).

Attention should be paid to the fact that a valid legal ground for the registration has to exist. Otherwise the registration is invalid according to Art.1024 II of the Turkish BGB. Art. 1023 of the Turkish BGB provides the exception that the purchase of a third party acting in good faith is protected even in the case that the requirement of Art. 1024 II of the Turkish Civil Code for the registration in the land register was not met.

The land register is composed of the following records:

- Land register
- Condominium register
- Register for public affairs
- Supplementary files

In general a land register is held in every village of Turkey. In places without a land register so called “recording books” exist. Different from the land register these recording books are not held in each village but only in each district of Turkey. The registrations in the recording books are made in chronological order.

- The land register index

The land register index as the basis of the land register system settles the private legal relationships of real property and contains all registrations concerning the property. Each property has two pages next to each other in the land register. Every page has four sections, in which the legal and geographical data of the concerned property is listed as follows:

- Geographical data, e.g. area and size

- Ownership, real servitudes and priority notices
- Declarations
- Liens (e.g. mortgage)

According to the principle of the „publicity of the land register”, all rights over real property must be recorded in the land register. This requirement clarifies the sense and the main function of the land register.

The principle of the „publicity of the land register” defined in Art.1020 of the Turkish Civil Code does not give a general right to inspect the land register. Only persons with a legitimate interest have the right of access to the register.

The publicity of the land register is also effective for third parties. Thus nobody can cite to his lack of knowledge about a registration in the land register (compare Art. 1020 Abs. 3 of the Turkish Civil Code).

In the areas where only recording books exist the regulation in Article 1020 III of the Turkish Civil Code is not valid. In these books the registrations for real estate are not summarized on two pages as they are in the land register. They are spread in the book and thus more difficult to find.

II. The real estate as security for a loan

Registration requirement

According to Article 998 of the Turkish Civil Code the following properties and other rights have to be registered in the land register:

- Real estate
- Independent and permanent rights on property
- Ownership of an apartment

Rights in rem

Rights in rem which are able to encumber property are as follows:

- Property rights
- Usufruct
- Heritable building right
- Right of habitation
- Right to a source
- Other easements

It is still controversial whether the term „independent and permanent rights over property“ also contains further limited rights in rem. According to the current dominant opinion, this term does in any case not contain the land charge.

Mortgage

A creditor can secure his claim by mortgage without affecting the individual property of the debtor. The mortgage is a collateral security encumbering the property of the debtor and giving its holder the right of preferential satisfaction from the property. Economically the mortgage serves as security for a loan. The amount of the security has to be determined in Turkish currency.

The value of the property is the most important part of the mortgage debt. The mortgage debt also includes rent, lease, the insurance sum and the integral parts of the property including its manufactures.

The real estate owner or his representative can apply the mortgage and its registration at the land registry.

Like all collateral, the mortgage is an incidental right and therefore dependant upon the secured claim. The incidental character of the mortgage has the following effects:

- By ineffectiveness of the obligation which is basis of the secured claim the creditor does not acquire a lien.
- The mortgage has no effect on the obligation. The registration of a mortgage does not cause the accrual of a claim and is also no proof for the existence of a claim.
- The realization of an object on basis of the mortgage assumes the existence of an effective claim.
- In case of an assignment of claim, the mortgage automatically passes together with the claim.
- In compliance with the land register, a third party acting in good faith can neither acquire the claim nor the mortgage if the mortgage is created for an ineffective claim or after the cancellation of a lien.
- According to the dominant opinion, the mortgage expires automatically with the claim.

Liability of the debtor

The personal liability and the real estate ownership liability coincide in case of a mortgage. If the creditor can not be satisfied sufficiently by the realization of the mortgage, he can make a claim against the personal assets of the debtor provided that the real estate owner and the personal liable person are identical.

Liability of the new debtor after an assignment

The personal liability of a debtor does not change by assignment of the real estate. But the third person purchases the real estate ownership burdened with the lien. Different from the Turkish law of obligations, the mortgage law eases the conditions of the assumption of indebtedness for the new owner who also wants to assume personal liabilities (Art. 888, 890 of Turkish Civil Code).

Particularities

- According to the principle of publicity, the registration of a mortgage in the land register is required. For the effectiveness of the registration a legally effective purpose of the acquisition and a written notification of the real estate owner have to exist.

But the law also provides exceptions for this regulation:

For example a mortgage can accrue even if it was not recorded in the land register. In this case the registration has only the aim of a declaration. In other exceptional cases the registration is required but the reason for registration is directly provided by law. These mortgage rights give their holder a dispositive right leading to the creation of a mortgage.

- The Turkish Civil Code contains special rules protecting the creditor of building costs. The creditor of such costs (mainly craftsmen and employees) causes an increase in the value of the real estate by his work and by the use of material and receives the equivalent (in monetary form) in the majority of cases after the finishing of the construction. Therefore the law enables the creditor of building costs to create a mortgage on the real estate concerned. Beside this, the law gives the creditor of building costs - according to the amount of the increase in the value of the property – the privilege of priority next to any previously accrued rights in rem. Only if the owner of real estate has presented a sufficient security is the creditor of building costs not allowed to create a mortgage.

III. Collateral of cross-border credits

The number of mortgages created for the security of credit facilities abroad has increased in recent years. The regulations in this area are very extensive.

Credit facilities abroad can be designed in any kind and any form (e.g. currency, goods,

guarantee, etc.) and have to be recorded in the register of foreign debts of the Governmental Secretary for Treasury. The credits are:

- Credits received from abroad with a term of more than one year (foreign credits);
- Credits based on collateral security (machines, equipment) and granted by public institutes, establishments or municipalities from abroad having a term of more than one year.

By registration of a mortgage referred to a foreign credit, the land registry demands a certification about the registration in the register of foreign debts. In some exceptional cases, mortgages securing cross-border credits do not have to be registered in the register of foreign debts and the land registry records the mortgage in the land register without the written confirmation of the governmental Secretary for Treasury.

The above mentioned mortgages can be created in Turkish currency or – if the conditions are fulfilled – in foreign currency. The conditions for the creation of a mortgage in a foreign currency are as follows:

- The credit being the object of a mortgage has to be provided from abroad;
- The time limit for the repayment of the credit has to be 5 years or longer.

By credit operations of banks and financial institutions from abroad with Turkish citizens being resident abroad for more than one year, mortgages which burden the real estate of a debtor need to be registered in the Turkish Register of Foreign Debts.

IV. Extinction of a mortgage

Extinction on demand

By non-payment of the mortgage debt the mortgage creditor can demand the extinction of the mortgage from the land register. For the extinction of mortgages which were created for the benefit of legal entities such as public-law institutions, banks and insurance institutions a writ of these institutions is sufficient.

Extinction based on a court decision

If the mortgage creditor does not effect the extinction of the mortgage despite the payment by the debtor, the debtor can obtain the extinction of the mortgage in the land register via court decision. For the extinction, an effective decision has to be submitted.

Realization of real estate

In case of non-payment of the mortgage debt, the creditor can apply for an execution procedure by submitting sufficient records to the Court which is competent for the execution of civil judgments. The Court informs the debtor and demands the payment of the mortgage debt in a specified period of time. If the debtor does not settle his debts in the specified period, the Court for execution of civil judgments fixes a date for a public auction where the encumbered real estate will be sold. The parties are not authorized to agree upon another kind of sale.

In the meantime it is noted in the land register that the property is going to be put up for auction. At the same time, the priority notice in the land register effects restrictions concerning transfer and assignment of the property and the purchase of rights in rem.

The same property can be burdened with several liens for different claims. Their relationship towards each other is defined by their rank. In case of the realization of the mortgage the “priority” of the mortgage is the most important point because the mortgage has the meaning of a guarantee according to its rank in the land register. Thereby a lien of prior rank has priority over a lien of lower rank. This means that the realization of the mortgage debts happens according to their rank.