

## PLEDGE LAW

### A- GENERAL INFORMATION ON RIGHT OF PLEDGE

One of the limited real rights which are considered within the scope of Civil Code is the right of pledge. As it is known, limited real rights impose restriction on the property right of the proprietor and provide proprietor with one or both of the use and benefit authority on the property. Limited real rights, such as property right, provide direct dominance for right holder; however this dominance does not include broad content as it is stated in property right.

Right of pledge is a limited real right which is for providing assurance. Namely, the pledger takes limited responsibility when he/she put something in pledge for discharge of the debt. If a debt which is securitized by the pledge is in question, in case the debt is not discharged, right of pledge shall grant two primary authorities to the right holder creditor. First of these authorities is the authority of request for the foreclosure of pledged property. The second one is the authority for receiving claims primarily from the acquired amount. In brief, the pledge is such a limited real right which enables the creditor to collect and request its claims on a real security given by the debtor. <sup>1</sup>

Right of pledge depends on the right of claim. Namely, unless the claims arises the right of pledge shall not arise as well, when the claim terminates (no matter how the claim is discharged) the right of pledge shall automatically terminate.

As it is known, although freedom of contract principle dominates the Code of Obligations, numerus clausus principle dominates real rights. For this reason, numerus clausus principle applies to the right of pledge and pursuant to this principle, right of pledge could be applied as it is stated in the law. In Article 850 of Turkish Civil Code, types of right of pledge are regulated as real estate pledge, mortgage, mortgaged debt bond and annuity bond. Pledge of movables, apart from the exceptions regulated by the law, could be drawn up as pledge with actual delivery.

The most important feature of right of pledge is that this right cannot be divided. This indivisibility applies to both the property being subject of the pledge and the claims.<sup>2</sup> The right of pledge granted to the creditor includes all claims namely all of the claims is securitized. In this direction, unless all claims are paid the pledged property could not be returned.

Right of pledge has a bidirectional impact on the debt relation. As for the creditor, the right of pledge functions as a warranty, as for the debtor it could be considered as credit institution. The debtor proprietor could increase its credibility by way of lending anything on

---

<sup>1</sup> Esener-Güven, p. 439

<sup>2</sup> Oğuzman-Seliçi, p.886

security. For this reason, it could be exactly said that the pledge is one of irreplaceable means of capitalist economy.<sup>3</sup>

## **B- PRINCIPLES DOMINATING PLEDGE LAW**

### **1. Principle of accessoriness**

This principle is both for pledge of real estates and pledge of movables. According to this principle, right of pledge secures a claim and it will continue its existence as long as this claim exists. As a consequence, right of pledge cannot be considered as independent from the right of claim.

### **2. Principle of publicity**

Due to the fact that right of pledge is a real right, all rights and authorities being included can be asserted against everyone.

Publicity of real estate pledge could be actualized by registering at Title Deed Register. According to Article 1020/1 of Turkish Civil Code, by stating “Title deed is a matter of public record” the publicity has been explained. In the real estate pledges which are registered at Title Deed Register for publicity, exceptional situations could be discussed; legal right of pledge which is not subject to register, transferring right of pledge to the new creditor depending on assignment of claim, acquisition by inheritance, court decision etc.

The means which provides principle of publicity for pledge of movables is the possession. However, there have been exceptional situations for movables in which right of pledge is obtained without assignment of possession, publicity is provided by register. For example; pledge of motor vehicles, pledge of commercial enterprise, and pledge of vessel.<sup>4</sup>

### **3. Principle of certainty**

This principle expresses that existence of real right has to be known by everyone. The existence of real right has to be known by everyone so that it can be asserted against everybody.

We may consider the principle of certainty from two perspectives. First of all, the subject of the pledge is specified. This perspective has been revealed in terms of real estate pledge. Furthermore, article 854 of Turkish Civil Code is regulated as “*While the pledge is being established, the real estate possessing the subject has to be specified. Parcel of divided real estate shall not be the subject of the pledge unless it is separately registered at title deed registry.*” Second perspective is that the claim for which the pledge provides assurance has to be clear. In article 851 of Turkish Civil Code, it is stated that “*Real estate pledge is required to be registered for claims whose amount is Turkish Lira.*”

Principle of clarity in real estate pledges implies that the pledge can be established by way of registering the pledge at the title deed registry.

---

<sup>3</sup> Esener-Güven, p.443

<sup>4</sup> Faruk Acar, p.41

Principle of clarity in terms of pledge of movables could be occurred by the possession. Which is intended by the delivery is that the movables have been included in the possession of pledged properties. As for the pledge of movables which are not subject to the delivery, the registry, instead of delivery, provides the protection of principle of clarity.

#### **4. Principle of indivisibility of pledge**

This principle can be applicable for the pledge of movables. Namely the property being subject of the pledge establishes guarantee for the entire claim. The other perspective of this principle is that it can establish a guarantee with all of the movables. This principle is regulated under article 944/2 of Turkish Civil Code as *“Unless the creditor receives the entire claim, the creditor shall not be required to return the pledged movables or some thereof.”*

#### **5. Fixed level system**

This principle which is only applicable for the real estate pledge means that in case more than one right of pledge are established on the real estate the priority shall be determined by ranking which is agreed by the parties. The levels could only be formed by the unilateral written statement of the proprietor. Besides, the levels are independent from one another and the right of pledge could be established by empty level.

### **C- TYPES OF RIGHT OF PLEDGE**

#### **1. Difference between real estate and movables pledges**

As it is understood from the wording of Turkish Civil Code, in case of circumstance in which there has been no provision about the pledge of movables, the provisions with regard to the real estate pledge shall apply by comparison.

##### **a. The pledge of movables**

The pledge of movables is a right which is established on a property, a claim or a right belonging to the debtor or any other third party in order to procure the claim and which provides a right for foreclosure of the pledge in case the outstanding debt is not paid. The types of movables pledge regulated under Civil Code are the pledge with delivery, right of retention, pledge of livestock, pledge on claims or other rights, the pledge for those who are engaged in a lending business in consideration of the pledge and bonded debt.

In Turkish Law, the pledge with delivery is accepted for the pledge of movables as a rule; the pledge which has widest scope of application is the pledge with delivery. As a matter of fact, the general rules are regulated within the scope of the movables pledge with delivery and the provisions of the pledge with delivery, compared to other types of pledge, shall apply. However, there has not any regulation in Civil Code with regard to the movables pledge with delivery. For this reason, pursuant to the opinion accepted in the doctrine, the provisions with regard to the real estate pledge shall apply to the movables pledge by comparison.

In the movables pledge with delivery, in order for the right of pledge to originate, the possession of the movables being subject of the pledge has to be assigned. (Art. 939 of CC.). This case is a result of the principle of publicity dominating the real rights.

#### **b. The pledge of real estate**

The types of real estate pledges regulated under the Code are as follows; mortgage, mortgaged debt bond and annuity bond. Even though the real estate pledge is regulated as 3 types, the scope of application only includes the mortgage. According to Article 881 of the Civil Code, it is set forth that the mortgage could be established in order to guarantee the claim which exists or shall certainly or probably exist. Due to the fact that any special regulation with regard to how to establish the mortgage is not specified, starting from the general provisions, formal principals with regard to establishing a real right shall apply. The mortgage requires mortgage agreement which is made between the proprietor and the debtor and which grants authority to the creditor for foreclosure of real estate and collecting the claims from the value thereof in case the debt belonging to the proprietor or a third person is not paid in its due time.

Mortgage agreement, as a rule, could be drawn up for a certain claim whose amount is determined by Turkish or foreign currency. However, if the mortgage is established for a debt resulting from giving or performing the guarantee amount should be Turkish currency. If the claim being guaranteed by the mortgage is for a debt which exists or shall exist, the mortgage agreement is an upper limit mortgage.

In case the real estate pledge is established in foreign currency, the loan could be granted by credit institution through foreign currency or at the rate of foreign currency. In this case, level of the mortgage is formed by the foreign currency and the guarantee amount is shown as foreign currency. The authority for determining by which foreign currency the right of pledge is established belongs to Council of Ministers. Based on this information, it can be ensured to establish the capital mortgage through foreign currency and the upper limit mortgage could also be established in this way. Because the foreign currency mortgage is regulated pursuant to Article 851/1 of TCC, it is now possible to guarantee the foreign exchange loans which were granted or shall be granted through such a mortgage.<sup>5</sup>

As per Article 873/2 (*“If the debtor did not pay the debt, the provision regarding that the pledge should become the absolute property of the creditor shall become void*) of Turkish Civil Code, the *lex commissoria* clause shall not be inserted in a mortgage agreement.

The mortgage agreement has to be formally drawn up. “Formally” means that the bonds are required to be prepared by the title deed registry officers. On the other hand, the mortgage could only be established by way of registering.

---

<sup>5</sup> Faruk Acar p.155

## **2. Difference between the pledges based on an agreement and based on the code**

The most important matter is that the right of pledge is based on an agreement. Namely, the reason which leads to right of pledge is the party's will and accordingly the pledge agreement.<sup>6</sup> On the other hand, the pledge based on the code is an exception. The most obvious example of the pledge based on the code in the movables pledge is the right of retention. (For example; right of retention which is granted in favor of landlord, in favor of warehouse, broker, garage, car park, accommodation etc.). As for the real estate pledge, mortgage rights which are regulated by laws and subject to the register are as follow;

- Mortgage right on the sold as a guarantee of the claim amount with regard to the good that the vendor sells,
- Mortgage right in favor of heirs and other cooperation partners as a guarantee of the claims arising out of the allocation of the real estate included in the cooperation,
- Mortgage right on the real estate in order to guarantee the construction claim arising out of the construction of the creditor,
- Mortgage right on construction right of the proprietor which is stated in the separate page in the title deed as a guarantee for liability of revenue payment of the title holder,
- Mortgage right which could be registered at the same level and same order instead of right of construction left in favor of the creditor of pledge of construction right or title order of construction right if a price is determined to be paid to title holder of construction right due to the construction on the land, if this price is not paid or is not guaranteed,
- Mortgage right as a guarantee of maintenance claim on the real estate assigned by the creditor of maintenance in case of the assignment of the real estate as consideration within the framework of maintenance agreement until the death.<sup>7</sup>

## **3. Circulating and non-circulating pledge**

It could be aimed to circulate the value of the pledge. Writing the value of the pledge in a bond and circulating this bond make this pledge have a quality of circulation. In this case, the pledge has both an aim of guarantee and the quality of being circulated. Mortgaged debt bond and pledge bond are types of circulated pledge. The pledge which is established by the mortgage is not a circulating pledge.

Written by Traniece Att. Elif Memiş

Translated by Ayşecan Mantarcı

---

<sup>6</sup> Faruk Acar, p.60

<sup>7</sup> Faruk Acar, p. 63