

Real Estate 2020

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Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Real Estate*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Chile, Cyprus, Germany, the Netherlands and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Joseph Philip Forte of Sullivan & Worcester LLP, for his continued assistance with this volume.



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GENERAL

Legal system

- 1 | How would you explain your jurisdiction's legal system to an investor?

Based on civil law, Turkey's legal system comprises a hierarchy of codified rules, resembling the legal systems of continental Europe. The Turkish Constitution is the supreme law of the land, followed by codes issued by Parliament and decrees issued by the President, and finally secondary legislation such as regulations, by-laws and communiqués, provided that they do not conflict with a superior law in the hierarchy.

The Turkish court system functions as an inquisitorial system. It is the judge's duty to inquire and rule on the case. Judges may hear witness statements and request evidence to ensure a fair judgment. Article 2 of the Turkish Civil Code sets out the general principle of objective good-faith that the courts rely on to rule in equity.

Preliminary injunctions may be granted subject to certain conditions prescribed under the applicable legislation (eg, risk that a right might be materially endangered or become impossible to exercise).

Oral contracts are binding under Turkish law unless the law expressly states otherwise. Laws applicable to real estate are national in scope.

Land records

- 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

The Turkish land registry system is a reliable and secure system, whereby every real estate transaction is officially registered. Transfers of title must be registered at the land registry to gain effect. Similarly, all interests in real property, including mortgages, usufruct rights, rights of first refusal and rights of repurchase must be registered to ensure validity, enforceability or both. Land registry records are public; therefore the rights of third parties who acquire ownership or any form of interest in the real estate's land registry records are respected. Beyond the official ledgers, information regarding the legal status of real properties (ownership rights, rights registered in favour of third parties, encumbrances, etc) is also maintained in a computer system called Takbis. The public may not access Takbis, but property owners can view their property through their own accounts on the government's electronic database.

Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

A sale of property can only be completed at the relevant land registry with both the seller and purchaser present. At the time of the acquisition,

a title deed fee at a rate of 2 per cent is applicable over the purchase price for the buyer and seller separately, but the parties may agree otherwise. The fee must be paid to the tax office before the transaction.

VAT must be paid for the sale of real property owned by companies, real person merchants or both.

Corporations are exempt from VAT and 75 per cent of corporate tax, provided that the property is kept for two years and selling real property is not the corporation's field of business. There may also be favourable tax regimes under double taxation agreements.

Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Foreign companies established abroad are not entitled to buy real property or rights in rem in Turkey unless there is a special law allowing otherwise (such as the Petroleum Law, Law on Encouragement of Tourism or Industry Zones Law).

Turkish companies in which foreign shareholders directly or indirectly hold more than 50 per cent of the shares or management control are subject to an approval procedure (with the Governorships, General Staff, and General Directorate of Security Forces) for the acquisition of real property or limited rights in rem. If a Turkish company becomes a foreign capital company as a result of a share acquisition and such company owns real property or limited rights in rem, a similar post-closing permission process must be followed to notify the General Directorate of Foreign Investment of the share transfer.

As for foreign individuals, the President determines the countries whose citizens can acquire real estate and limited real property rights in Turkey. However, the total size of the land acquired in Turkey by a foreign individual cannot exceed 30 hectares. There is also a limitation up to 10 per cent of the total surface area of the relevant district per foreign individual.

Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Save for bank inspections, reporting requirements and anti-money laundering regulations, there are no exchange control issues. Aside from a recently introduced temporary requirement concerning Turkish entities qualifying as exporters, there are no repatriation requirements. Accordingly, exporters residing in Turkey must repatriate their export revenues into Turkey within a period of 180 days from the actual date of exportation and convert at least 80 per cent of their revenues to Turkish liras by depositing them in Turkish banks. This period may vary in accordance with the type of export transaction.

Legal liability

- 6 What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The seller has statutory defects liability for defects and deficiencies in the property. There is a defined statutory limitation period for defects liability relating to immovable property sales (one year, five years and 10 years depending on the asset type and the applicable provisions).

An owner can incur criminal, civil and administrative liability for other matters relating to the property even if the matter occurred before the property was purchased. Building owners have strict liability and whoever holds the title when the damage occurs will be held liable. A tenant can also be held liable for damage they inflict. Lenders do not bear any liability.

Protection against liability

- 7 How can owners protect themselves from liability and what types of insurance can they obtain?

To shield themselves from liability, buyers should conduct legal, technical, tax and environmental due diligence regarding the property. The parties may also regulate liability issues in the sale contract by stipulating that the buyer will be held harmless for all liability.

Property owners can obtain insurance covering damage to the property and to third parties. Earthquake insurance is obligatory for residences. The property owner may insure the property against all risks at its discretion, including theft, fires, floods, storms, etc. In principle, insuring environmental risks is not allowed or commonly used.

Choice of law

- 8 How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Under Turkish Law, the governing law for disputes related to rights in rem over properties and agreements related to real estate and the use thereof (ie, lease agreements, donation) is the law of the country the property is located. Hence, if the property is located in Turkey, the property right, rights in rem and legal transactions concerning the property (ie, formal requirements to purchase property) and agreements regarding use of the real estate must be subject to Turkish law.

Jurisdiction

- 9 Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

For real estate disputes, administrative or civil courts have jurisdiction depending on the nature of the dispute. Administrative courts of first instance have subject-matter jurisdiction over real-estate disputes concerning immovable property, such as development or zoning, expropriation, demolition, occupation, land allocation, licence or authorisation, or any rights bound to these acts or in actions concerning public domain. Civil courts of peace hear civil-law disputes including lease agreement or other agreement disputes, distribution of rights, elimination of joint ownership, protection of possession of immovable property, etc.

Under Turkish law, the plaintiff and defendant must be included in the petition to initiate a lawsuit. There is no obligation to include any third party.

Extra-jurisdictional services can be made to real persons or legal entities with foreign addresses via the international service of process rules under Turkish law, with the involvement of the Turkish Ministry of Justice.

A party does not have to be qualified to do business in Turkey to enforce remedies.

Commercial versus residential property

- 10 How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Transactions involving the acquisition of residential property and commercial property are subject to the same procedures. There are no specific laws governing real estate transfers by type of use.

Planning and land use

- 11 How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

The Code on Zoning and Construction governs construction, including zoning requirements and various licences and permits necessary to construct and occupy buildings.

In principle, municipalities are responsible for making planning decisions from a local perspective. However, the law consigns planning and zoning powers to certain ministries (eg, the Ministry of Development and Urban Planning, the Ministry of Culture and Tourism), the Housing Administration and several other governmental authorities under certain circumstances.

In principle, planning permission and variation from a zoning regime are prohibited.

Zoning plans are subject to judicial review since they are general regulatory acts of the administration related to future zoning of land. Only parties whose interests are violated may file a lawsuit to cancel zoning plans. According to Council of State precedent, bar associations, the chamber of architects, neighbours and landlords may initiate cancellation lawsuits with respect to zoning plans, since they are considered parties whose interests are violated.

Government appropriation of real estate

- 12 Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Turkish law permits expropriation for public interest reasons. The transfer can take place voluntarily or the government can initiate a lawsuit offering compensation for the private property transfer. The compensation amount must match the market price.

The right to property is guaranteed under the Constitution and the European Convention on Human Rights. Therefore, upon infringement, the damaged party may appeal to the Constitutional Court and the European Court of Human Rights under Turkish law.

Forfeiture

- 13 Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

The government may seize real property without compensation as a result of criminal investigations or actions.

Bankruptcy and insolvency

- 14 Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The creditors or the debtor itself may request the court to declare the debtor bankrupt if certain conditions are met. Involuntary bankruptcy is also possible if the debtor's liabilities exceed its assets or if the debtor is insolvent.

A bankrupt company cannot utilise disposal. The powers and authorities of a bankrupt company are transferred to a bankruptcy administration. In the bankruptcy liquidation process, the bankrupt company's assets are liquidated by the administration through public auctions, and proceeds are distributed to the creditors.

INVESTMENT VEHICLES

Investment entities

- 15 What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Generally, capital companies (joint-stock companies (JSCs) and limited liability companies (LLCs)) are formed to make investment in Turkey.

The liability of a shareholder of a JSC or LLC with regards to commercial debt is limited to the amount of share capital contributed by such shareholder. LLC shareholders and managers are personally liable for the company's public debts (such as corporate tax, employee social security premiums, income tax withheld from employees' salaries, taxes and fines owed to public authorities) that cannot be collected from these entities in proportion to their capital share. However, JSC shareholders are not personally liable for the company's public debts; liability only belongs to the JSC's board of directors for public debts that cannot be collected from the company. Hence, JSCs better shield their ultimate owners compared with LLCs.

Also, real estate investments can be made via real estate investment funds (REIFs) and real estate investment trusts (REITs). A REIT is a specific type of public company primarily focused on the real estate sector. A REIF is a fund that invests in real estate. REIFs and REITs have some tax advantages. A general corporate tax exemption is applied to both and real estate contracts on the portfolio of REIFs and REITs are also exempt from stamp tax. However, dividends or capital gains from these investments are subject to withholding tax. Withholding tax on dividends from REITs is 15 per cent whereas the rate is 10 per cent for dividends from REIFs for non-residents. The capital gain from REIT shares is taxed as ordinary share sales whereas there is a 10 per cent withholding tax on capital gains from REIFs.

Foreign investors

- 16 What forms of entity do foreign investors customarily use in your jurisdiction?

An international business that wants to operate in Turkey as a foreign investor has three main options to establish an office:

- liaison office: prohibited from engaging in commercial activities and will be permitted only to conduct market research, advertise and promote the foreign investor's business;
- branch office: does not have legal personality and is only allowed to carry out transactions in its fields of activity; and
- Turkish subsidiary: the most common forms of subsidiaries are JSCs and LLCs.

JSCs are better suited for large operations and are commonly used by foreign investors. The legal framework for corporate governance of JSCs is more developed and flexible compared with other business models.

Organisational formalities

- 17 What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The procedures for establishing a company with foreign capital are fundamentally the same for local companies. Unless the new company performs in regulated sectors, such as banking or insurance, no prior authorisation is necessary before incorporation.

LLCs and JSCs can be established with a single shareholder. JSCs and LLCs can be incorporated with a minimum share capital of 50,000 liras and 10,000 liras respectively. Both JSCs and LLPs may have a single manager or board member, who can be a private person or a legal entity.

Incorporation procedures for JSCs and LLCs are very similar and include:

- preparing the company's articles of association;
- registering the company with the relevant trade registry by submitting documents concerning its shareholders and board members or directors; and
- announcing the company in the trade registry.

Regarding tax consequences, for investments through a JSC and LLC, a 50 per cent corporate tax exemption is applied to corporations for capital gains from the sale of real estate for two years after the acquisition, provided that other conditions specified in law are met. If the real estate is acquired through a full-taxpayer company and company shares are sold two years after acquisition, the capital gain on this share sale will also be income tax-free for individuals.

ACQUISITIONS AND LEASES

Ownership and occupancy

- 18 Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Under Turkish law, the most basic category of property rights is ownership, which gives the property owner the right to permanently use, benefit from, and dispose of a piece of property.

Servitude rights are considered limited rights in rem, as they provide the rights holder more restricted power than ownership rights. The most common servitude rights are usufruct rights and construction rights. Servitude rights on real property may only be established through registering the right with the relevant land registry. As with ownership rights, servitude rights can also be enforced against third parties.

Turkish law also recognises condominium regimes, joint (common) ownership and cooperative ownership.

Owing to its scope and nature, the Turkish Code of Obligations applies to almost all commercial and residential leases regardless of whether the property is residential or commercial.

Pre-contract

19 | What are the typical pre-contractual steps?

There are two types of commonly used pre-contracts:

- letters of intent or memoranda of understanding; and
- promise-to-sell agreements.

Letters of intent or memoranda of understanding are not legally binding, but promise-to-sell agreements can be executed before a notary public making them fully binding agreements. Promise-to-sell agreements obligate the seller and the purchaser to execute a sales agreement regarding sale of the real estate in question in the future under the conditions determined in the promise-to-sell agreement.

Contract of sale

20 | What are typical provisions in a contract of sale?

Real estate sale contracts are executed as standard form contracts at the land registry. They only incorporate basic provisions regarding the identity of the purchaser and the seller; it is not possible to specifically tailor a sale contract. However, promise-to-sell agreements can be executed in more detail in line with the parties' agreed content before a notary public.

Down payments are common in practice if there is a certain time period between the preliminary agreement and closing. The down payment amount is determined by the parties as per the transaction's value. The use of an escrow account may be an option, depending on the value.

The purchaser should examine the real property's title deed records. The land registry office provides a definitive record of real estate ownership.

Typically, the landlord represents that it is the undisputed property owner, third parties do not have rights over the property, there are no encumbrances over the property, and there are no lawsuits initiated involving property.

The landlord is liable for taxes and utilities until ownership is transferred to the purchaser, unless agreed otherwise. Likewise, the landlord bears the risk of loss and the risk of loss transfers to the purchaser upon completion of the sale transaction.

Environmental clean-up

21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

The obligation to comply with environmental regulations is generally imposed on real property owners rather than the property itself. The polluter pays principle applies to environmental clean-up issues. Therefore, in principle, a real property purchaser is not responsible for any contamination that took place before assuming ownership. However, there is a statutory presumption that the current occupant caused the contamination, so the occupant may need to rebut that presumption by proving an earlier owner caused the pollution.

Parties transferring real estate are free to contractually allocate the environmental risks among themselves. The Turkish civil

courts recognise and enforce this contractual freedom. However, the contractual allocation of liability has no effect on criminal liability and administrative fines and is not binding on inspection authorities. In Turkish M&A projects, the market practice is for sellers to make adequate representations of any historic or future environmental liabilities related to the asset sold.

Lease covenants and representation

22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

The sellers generally represent that:

- the rental income in the rent roll is correct and not amended;
- the current lease agreements are valid and binding;
- the current lease agreements shall not be terminated without the purchaser's consent;
- no termination notice was sent by the tenants;
- there are no pending litigation proceedings with tenants; and
- no material amendments shall be made into the lease agreements without the purchaser's consent.

Lease agreements do not cover brokerage agreements, which are regulated separately.

Estoppel certificates are not used in Turkey.

Leases and real estate security instruments

23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

The consequences of selling real property upon foreclosure changes if the lease agreement is annotated before the land registry. This annotation will prevent the tenant's eviction (during the lease term) from the premises if and when the property is transferred to a third party.

If the lease agreement is not annotated before the land registry before registering the mortgage, upon sale of the real property, the new owner shall become party to the lease agreement.

Delivery of security deposits

24 | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Obtaining security deposits from tenants is very common in Turkey. Deposits may be given in cash or as a bank letter of guarantee. Deposit amounts generally do not exceed three months' rent and cash guarantees should be deposited to a fixed-term savings deposit account.

Leases customarily have indexation clauses. The rental adjustment may not exceed the consumer price index rate announced by the Turkish Institute of Statistics. Additionally, if the rent is determined in a foreign currency, it cannot be amended for five years as of 1 July 2020. After five years, a judge will determine the rent by taking

into consideration the status of the leased property and changes in foreign currency.

Due diligence

25 What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

When purchasing real property, purchasers generally engage lawyers for due diligence purposes. Lawyers inspect the land registry records and the usage restrictions included in the relevant zoning plans. As the land registry records are authoritative, a thorough inspection of these public records generally suffices to provide comfort to purchasers. In addition, technical consultants are appointed for environmental and technical due diligence matters, and financial advisers are appointed for share deals. Due diligence is generally conducted after executing the preliminary agreement but before closing.

Information such as land registry records, cadastral office records, municipality records, zoning plans and plan notes are reviewed during a basic real estate due diligence.

Title insurance is offered by very limited insurance companies. It is not customary to obtain government confirmation regarding the real estate.

Structural and environmental reviews

26 Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Engineering or environmental due diligence is not obligatory or common for ordinary asset purchase transactions. However, for relatively large scale transactions, purchasers usually conduct technical and environmental reviews as part of the due diligence process. It is to the purchaser's advantage to carry out environmental surveys to prove that an earlier owner caused pollution, contamination, or any other irregularity. Getting representations or indemnity is common in transactions.

Insuring environmental risks are generally not allowed or commonly used.

Review of leases

27 Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lease agreements are reviewed by lawyers for their legal aspects. Lawyers examine whether the clauses in an agreement are in compliance with the mandatory clauses of the Turkish Code of Obligations, rent increase and change of control clauses, termination clauses, maintenance and repair obligations by the lessor and the tenant, sublease and transfer of lease provisions.

Other agreements

28 What other agreements does a lawyer customarily review?

In addition to lease agreements, especially for commercial acquisitions, lawyers review:

- construction agreements;
- easement agreements;
- service agreements;
- supplier agreements;
- maintenance agreements; and
- agency agreements.

Closing preparations

29 How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

In an asset deal, signing and closing usually happen simultaneously. However, if a promise-to-sell agreement is executed, there may be some time between signing a closing depending on the fulfilment of the conditions precedents in the agreement (such as completing construction, obtaining certain licences and permits from relevant authorities, etc). Lawyers usually check and verify whether such conditions have been fulfilled and organise the parties to be present at the land registry together with the necessary documentation to transfer ownership.

There are also some post-closing actions that must be conducted by the lawyers, including notices to tenants, renewal of service agreements, etc.

Transferring a title or company shares and paying the purchase price is done on the same day, hence the funding and relevant securities (mortgage, assignment of rental, share pledge, etc) must also be completed on the same day.

Closing formalities

30 Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Parties must perform the real estate transfer and registration the same in the name of the purchaser at the land registry office with the attendance of purchaser and seller or their representatives and the land registry officers.

There are no formal requirements to execute a lease contract under Turkish law. Lease agreements and financing agreements can be executed by exchanging execution copies. However, if the parties wish to execute the agreements before a notary public for some reason, such as annotating the lease agreement without the presence of the lessor, then the parties are required to be present before the notary public. Stamp tax arises from executing these agreements.

Contract breach

31 What are the remedies for breach of a contract to sell or finance real estate?

Since asset purchase agreements and title transfers are executed at the land registry simultaneously, enforcement by the purchaser is not permitted. If the seller breaches any of its liabilities, the purchaser may request compensation for any damage or loss. However, promise-to-sell agreements are enforceable and the purchaser may file a lawsuit against the seller and request a transfer of ownership of the property and register the real property in its name.

Additionally, if there are penalty clauses in the agreement, such penalties can be requested in addition to the specific performance, compensation for damage or both.

Breach of lease terms

- 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

A lessor can terminate a lease contract:

- if the lessor has served written notice to the tenant twice in one lease term for failure to pay rent;
- if the tenant uses the premises in breach of the terms and conditions of the lease contract; or
- in the event of default due to non-payment of rent, a landlord can either give 30 days' notice to its tenant or directly commence execution proceedings with an eviction request. If the tenant does not pay the relevant amount within 30 days, the landlord can request eviction of the premises. If a landlord directly initiates execution proceedings for payment of the rent, an accelerated procedure is applicable before the execution court. Otherwise, the eviction lawsuit will be heard by the general courts.

Tenants also have a right to terminate the agreement owing to material breach of the contract by the lessor. For example, if the premises are not suitable for use in a material way, the tenant may terminate the agreement. The tenant also has the right to request compensation for any damage due to breach of contract.

Such remedies do not differ between commercial and residential leases.

FINANCING

Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Generally, investors in need of real estate-related funding use mortgages, which are registered with the land register of the relevant estate. Acquisition finance is not permitted; thus, investors cannot mortgage real property owned by a company it purchases. Other types of security granted by investors include share pledges, parent guarantees and assignment of receivables. Enforcement procedures for security differs depending on the type of security. Setting aside financial leasing companies and financing institutions, banks generally provide real estate financing in Turkey and banking activities require a local banking licence.

Leasehold financing

- 34 | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The concept of ground or head leases is not frequently employed in Turkey. Ground or head leases are subject to general rules governing a regular lease relation. Although there is nothing preventing it, financing ground or head leases is not common.

Form of security

- 35 | What is the method of creating and perfecting a security interest in real estate?

In order to duly establish a mortgage, an official mortgage deed must be executed by the parties before the relevant title deed office and the mortgage deed must be registered with the title deed registry.

Valuation

- 36 | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Real estate used as collateral to obtain financing from a bank to acquire real estate must be submitted to valuation. There are regulatory standards for appraisals set forth in the Communiqué on International Valuation Standards in Capital Markets and Turkish Accounting Standards. Accordingly, appraisals must be conducted by valuation companies authorised by either the Banking Regulation and Supervision Authority or the Capital Markets Board.

Legal requirements

- 37 | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

The lender does not have to qualify or be licensed to obtain collateral for a loan it provided as long as there is an underlying debt relationship prior to or on the date the security is established. Foreign capital Turkish companies and certain foreign companies including banks can establish mortgages on real property without permission or certification. This rule also applies to mortgage transfers from one company to another.

Parties to mortgage agreements are subject to limitations stipulated in the law and are free to agree on the content of the mortgage agreement.

Banks and financial institutions are exempt from taxes and fees arising out of securities granted over real estate.

Loan interest rates

- 38 | How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are commonly set with reference to central bank rates. The Turkish Commercial Code adopts a free interest rate regime for commercial transactions. This means there is no ceiling or cap amount applicable to interests for loans extended as part of a commercial relationship. However, courts may impose certain restrictions with respect to maximum interest rates in transactions involving non-commercial counterparts or consumers in Turkey.

Loan default and enforcement

- 39 | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

The main remedy for lenders is foreclosure in cases of default by the borrower. Lenders do not always go through a judicial procedure before the courts for enforcement, but foreclosure must always take place through the official execution offices and lasts from six to 18 months.

There is a security first rule with respect to secured loans, meaning that in principle a secured lender must first foreclose any security it possesses before having recourse to other methods of debt recovery.

Loan deficiency claims

- 40 | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

If the amount recovered in the foreclosure is not enough to satisfy the claim, lenders are entitled to utilise other methods of debt recovery.

Protection of collateral

- 41 | What actions can a lender take to protect its collateral until it has possession of the property?

Protecting collateral may be achieved through covenants made by the borrower with respect to maintaining the good condition of the property.

A creditor can request protection of the mortgaged property's value from the execution office. The Turkish Civil Code entitles the mortgagee, subject to limitations set forth thereunder, to intervene if the value of the collateral is reduced. If the value of the collateral is reduced as the fault of the owner, the creditor can request either another security or restitution of the mortgaged property from the debtor.

Recourse

- 42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

In principle, a secured lender has first recourse to the property over which a security has been established. However, if the proceeds generated after foreclosing the security are not enough to satisfy the lender, the lender may recourse to all of the borrower's assets.

Bankruptcy results from the total liquidation of a bankrupt entity's assets and the satisfaction, pro rata, of its creditors. Turkish bankruptcy rules provide that, without prejudice to claims against the bankruptcy estate for debts incurred during the administration of the bankruptcy estate that rank before the secured obligations as per the law, mortgagees are repaid first, in full, before other unsecured creditors.

Cash management and reserves

- 43 | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

In a typical transaction, lenders require a contractual cash waterfall system regulating the cash flow and the proceeds of the project. Real estate projects typically generate three types of income: rent, insurance and income generated from common areas. Cash flow is generally regulated as follows: the proceeds are first devoted to debt service reserves for capital and interest payments and taxes. If there are any proceeds left, these are transferred to repair or maintenance and dividend or cash sweep accounts. The borrower is free to use the proceeds in repair or maintenance accounts. If the borrower is entitled to any dividend payment as per the facility agreement, the proceeds in dividend or cash sweep accounts is paid back to the parent or shareholder. Otherwise, the remaining money is paid to the lender as pre-payment. Insurance proceeds are transferred directly to another account to be used as a part of the pre-payment.

Credit enhancements

- 44 | What other types of credit enhancements are common? What about forms of guarantee?

Debt service reserves accounts are commonly used credit enhancements. Borrowers are generally required to follow a certain repayment schedule and keep a minimum amount of money in the debt service reserve account equal to the amount due by the next repayment. Sponsor guarantees are another commonly used credit enhancement tool. Sponsors usually provide monetary guarantees in cases of non-payment. Net worth or liquidity requirements may be foreseen by the guarantors and the lenders usually request periodic information regarding the financial state of the guarantor. Letters of credit are uncommon because they are usually costly to procure. Performance bonds are commonly used in construction agreements.

Loan covenants

- 45 | What covenants are commonly required by the lender in loan documents?

Loan covenants are highly dependent on the type of property and the specifics of the deal. Generally, covenants will include the following:

- information covenants: the borrower is usually required to report financial statements, litigation, arbitration or administrative proceedings, and agreements exceeding a certain threshold;
- negative covenants: no substantial change in the borrower's business, no security over the borrower's revenue or property, no disposal of assets with a value exceeding a certain threshold, and share transfer restrictions; and
- general covenants: the lender has access to information and the property, complying with laws, maintaining legal status, maintaining the property's insurance, fulfilling tax obligations, and environmental compliance.

Financial covenants

- 46 | What are typical financial covenants required by lenders?

If the property generates regular income, the debt-service coverage ratio, which measures the income against the total loan amount, is commonly required by lenders. If the value of the property is at the centre of the deal, loan to value ratios, which measure the value of the property against the total loan amount, are preferred. Debt yields are usually not preferred. Financial reporting requirements are also

commonly used as part of the information covenants. Lenders may also require periodic ongoing appraisals of the property.

Secured movable (personal) property

47 What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

A pledge over movables may be established in two ways:

- pledge without possession rights over the movables requiring registration with the movable pledge registry; and
- pledge with possession rights of the pledgee not requiring pledge registration.

In the first method, perfecting security over the movable assets of a commercial entity requires executing a pledge agreement in electronic or written form, which must also be notarised, and registering the agreement with the Movable Pledges Registry as a condition of enforceability. Movable pledge agreements may be executed between:

- financing institutions (defined under the Movable Pledge Code as banks and financial institutions operating under the Banking Code, financial institutions operating under the Financial Leasing, Factoring, and Financing Companies Code, and public or private institutions providing loans and sureties); and
- merchants, tradesman or both.

According to the second method, perfecting security over movable assets requires executing a written agreement between the parties and transferring the movable property's possession to the pledgee.

A control agreement is not necessary under Turkish law.

Single purpose entity (SPE)

48 Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Borrowers are usually not required to create an SPE. There is no specific legal statute for SPEs other than the types of companies stipulated in the Turkish Commercial Code. The requirements to create an SPE differ depending on the type of company to be established. However, common requirements include contributing a minimum share capital and registering the SPE with the trade registry. There is no concept of independent directors for SPEs.



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through REIFs. We believe that the volume of investments in REIFs will increase in the upcoming months.

As per a Decree published by the President on 13 September 2018, the agreement price and any other payment obligation arising from lease agreements and real estate sale agreements executed by and between persons residing in Turkey cannot be denominated in foreign currency or be indexed to foreign currency, except in circumstances determined by the Ministry of Treasury and Finance. Accordingly, the Ministry introduced an exception that allows lease and sale agreements executed by foreign capital companies in Turkey, as tenants or purchasers, to be in or indexed to foreign currency. We believe that these restrictions will be in force for a certain period of time and agreements with Turkish citizens and companies as a tenant or purchaser will have to be executed in Turkish liras.

UPDATE AND TRENDS

International and national regulation

49 Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Capital market instruments have recently taken on an important role in the real estate sector. REIFs, lease certificates and real estate certificates have been used in certain projects. REIFs were established several years ago and have become popular very recently. These funds are purchasing distressed assets and benefiting from special incentive regimes, including tax. Banks are especially investing in to these funds via portfolio management companies. There are also private equity companies and pension funds that are keen on investing in real estate

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