

Secured Lending in Turkey: Enforcing a Mortgage

Introduction

The essence of taking a mortgage security is to give the lender an assurance of having property to fall back on when the borrower fails to meet his contractual obligations. However, when it comes to forced sale, the lender usually has to encounter a number of formalities to be followed and obstacles to be overcome throughout the enforcement process.

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Under Turkish law, foreclosure of a mortgaged property can only be achieved by way of a public auction as part of a judicial enforcement procedure. In other words, non-judicial foreclosure and private sale arrangements are not allowed in Turkey. The foreclosure process is conducted by execution offices and it may involve court proceedings if the debtor objects to the claim. The provisions relating to foreclosure proceedings are regulated under the Code of Enforcement and Bankruptcy No. 2004 (“CEB”).

Applicable Procedure

The procedure to be followed in foreclosure proceedings differs depending principally on what type of mortgage has been granted to the lender. There are two types of mortgage defined under Turkish law: (i) principal mortgage, and (ii) limit mortgage. Basically, a principal mortgage secures a certain amount of loan extended to the borrower, and it constitutes an absolute and unconditional acknowledgement of debt by the borrower. A limit mortgage, on the other hand, is created to secure unspecified loans up to a certain limit which represents the maximum amount that can be collected out of the proceeds of forced sale. The limit mortgage is usually preferred to secure receivables where there is a current account or a line of credit arrangement between the lender and the borrower. Unlike the principal mortgage, the limit mortgage does not constitute an absolute and unconditional debt acknowledgement.

If the loan is secured by a principal mortgage, the procedure to be followed is called “execution on judgment”. In this procedure, the enforcement is based on a court judgment or a debt acknowledgement made before certain public authorities such as a court, notary public, or an execution office. Accordingly, a principal mortgage qualifies for execution on judgment as the official mortgage deed drawn up by the title registrar certifies the absolute and unconditional acknowledgement of debt.

If the loan is secured by a limit mortgage, the lender is required to follow the procedure called “execution without judgment”. Self-explanatory as it reads, the enforcement does not stem from a court judgment or an acknowledgement of debt made before a court/public authority. Needless to say, however, a lender holding a limit mortgage can follow the execution on judgment procedure, provided that a favorable court judgment recognizing the existence and validity of the debt or the mortgage right (or both) has been rendered prior to commencing foreclosure proceedings.

Execution on judgment is substantially a creditor-favoured procedure as the basis of the debt claim (i.e. a court judgment or an official acknowledgement of debt) represents a preponderant evidence of indebtedness. Only on a very limited number of grounds can the debtor request the suspension of the foreclosure.

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Execution without judgment, on the other hand, tends to be more time-consuming and cumbersome procedure for a creditor as the foreclosure can easily be suspended by request of the debtor. Indeed, the foreclosure process is automatically suspended if the debtor objects to the claim within the statutory period. The debtor does not necessarily need to depend on a strong legal ground, a mere objection to the claim would be sufficient to halt the foreclosure proceedings. In such a situation, the creditor has to bring an action against the debtor to set aside the suspension and proceed to the later stages of foreclosure.

However, the law provides a significant exception in favour of banks and other credit institutions. If the loan secured by a limit mortgage is extended by a credit institution, the execution on judgment procedure can be followed in place of the execution without judgment procedure. To be able to benefit from the relatively creditor-friendly nature of the execution on judgment regime, the credit institution must send a notice of nonpayment to the debtor through notary public and submit a notarized copy of the notice to the execution office at the initiation of the foreclosure proceedings. Both domestic and foreign credit institutions may enjoy this exemption for their secured loans extended in whatever form, including revolving credits, cash or non-cash loans etc.

Foreclosure Process

Step 1: Enforcement Order

Upon application to the competent execution office by the creditor, the execution office serves an enforcement order to the debtor. If the mortgage has been granted by a person other than the debtor, or the mortgaged property was later transferred from debtor to a third person, the enforcement order should be sent to the owner of the property as well.

The enforcement order requires the debtor to pay the debt within 30 days from the date of receipt. After expiration of this statutory grace period, the creditor becomes eligible to request the forced sale of the mortgage property through a public auction.

In the execution without judgment procedure, the debtor can object to the claim within 7 days after he receives the enforcement order. The objection automatically suspends the foreclosure proceedings. At this point, the creditor has two judicial options to eliminate the suspension. The first option is to file a lawsuit against the debtor at the competent court of first instance. The court decides on the merits of the dispute and any kind of evidence presented by the parties are taken into consideration during the court proceedings. In general, the burden of proof regarding the existence and validity of the debt lies with the creditor in this lawsuit. The second option is to request the revocation of suspension from the competent execution court. Although not technically deemed a lawsuit, this option provides a simplified and speedy proceedings in which the execution court does not decide on the merits of the dispute but only accepts certain type of documentary evidence prescribed in the CEB. In this regard, acceptable evidences notably include promissory notes, notarial deeds, acknowledgements of debt before a public authority, and certain credit documents (if the creditor is a credit institution).

In the execution on judgment procedure, the debtor can have the execution office halt the foreclosure proceedings by obtaining a court decision ordering the suspension of foreclosure. Such decision must be obtained from the competent execution court and must be presented to the execution office within 30 days from the receipt of enforcement order. In his application to the execution court, the debtor has to prove either: (a) that the debt was paid off, (b) that he was granted a voluntary grace period by the creditor, or (c) that the debt was time-barred.

Step 2: Forced Sale Request

If the 30-day statutory grace period passes without any objection by the debtor, or the suspension of foreclosure is lifted, the creditor becomes entitled to request

the forced sale of the mortgaged property. Once entitled, the creditor has to request the sale within one year, otherwise the foreclosure proceedings expire without result.

In preparation for the forced sale, the execution office requests the title records from the land register and zoning records from the municipality. The execution office then appoints a real estate expert to appraise the value of the property in light of the records and market conditions. The expert's appraisal report is served to the creditor, the debtor, and other concerning parties, if any. (e.g. third-party mortgagor, other mortgagees, etc.) Any concerning party can object to the appraisal value at the competent execution court within 7 days after receipt of the appraisal report. The execution court may sustain such objection and order a new appraisal, provided that fees and expenses relating to the appraisal are deposited by the petitioner. The decision of the execution court thereof is final and cannot be appealed against.

Once the appraisal value is final, the execution office issues an auction announcement. The announcement basically includes the location, estimated value and essential features of the property along with the place, date and time of the auctions. The announcement is made at least one month before the actual date of auction. In practice, the announcement is usually published in a newspaper of general circulation.

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Step 3: Public Auction

With an amendment made to CEB in 2012, electronic bidding is introduced and integrated into public auction process. In the new system, potential buyers can place their bids online by accessing the e-sale portal before the physical auction takes place. The online auction is open for bidding for 10 days preceding the date of physical auction. To be able to participate in the online auction, bidders must lodge a security in the form of cash or bank guarantee corresponding to 20% of the estimated value of the property. The security is swiftly returned upon bidder's withdrawal from the auction. The starting bid must be an amount equal to 50% of the estimated value of the property.

The physical auction is held under supervision of an execution officer on the date and at the place specified in the announcement. As is the case for online bidding, bidders must submit a security in the form of cash or bank guarantee corresponding to 20% of the estimated value of the property. The bidding starts from the highest bid received in the online bidding phase. The property is sold to the highest bidder, provided that the winning bid is not less than 50% of the estimated value of the property.

In case no bid or no sufficient bid received in the auction, a second auction will be held after at least 10 days from the first auction. The second auction is

conducted under same terms and conditions. If the property is not sold in the second auction, the forced sale request becomes obsolete and the creditor needs to renew his request for further auctions.

Step 4: Payment

The sale price is paid in cash by the winner of the bidding to the execution office. The execution office may grant the purchaser a grace period up to 10 days for payment. Any concerning party may request annulment of auction sale by applying to the competent execution court within 7 days after the date of auction. After the lapse of 7-day period, the auction sale becomes final and sale proceeds are distributed to the creditor.

If the sale proceeds are not sufficient to fully compensate the mortgage value, the creditor will be given a document called “pledge deficit certificate”. This certificate bears the characteristics of an acknowledgement of debt. With the possession of this certificate, the creditor can directly request attachment of the other assets of the debtor within one year.

Conclusion

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Foreclosure proceedings under Turkish law are highly complex and involve a great deal of challenging aspects as the debtor and other concerning parties are furnished with many objection rights. If no objections raised, the completion of foreclosure proceedings will take approximately 6-7 months, and it extends up to 2-3 years as the case may be.



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