



Reserved Amount Mortgage (Hidden Rank Mortgage or Protected Amount Mortgage)

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ABSTRACT

A mortgage serves as a form of security for a debt obligation. As a financial term, a mortgage is established over movable or immovable property to provide security for the mortgagee. Meanwhile, it restricts the mortgagor's disposition unless it is released. In defining a mortgage, it is considered a limited real right that allows an immovable property to be pledged as security for an existing or potential future debt. If the debt is not fulfilled, the creditor is granted the right to sell the immovable property through foreclosure pursuant to the provisions of the Enforcement and Bankruptcy Law and collect their claim from the proceeds or acquire the immovable property itself in satisfaction of the debt. This debt may belong to the owner of the immovable property, or it may serve as security for a third party's obligation. In such cases, if the immovable property owner provides the mortgage as security for another person's credit or debt, it constitutes a mortgage securing another's obligation. The property owner will be jointly and severally liable up to the value of the pledged immovable property or the secured debt amount. According to the Turkish Civil Code: Article 881: A currently existing debt or a debt that has not yet arisen but is certain or likely to arise may be secured by a mortgage. The immovable property subject to the mortgage does not necessarily have to be owned by the debtor. In Turkey, there are two types of mortgages: Principal amount mortgage and limit mortgage. A principal amount mortgage is established solely for existing debts. In contrast, a limit mortgage serves as security for debts that may arise in the future. The primary focus of this study, the reserved amount mortgage (hidden rank mortgage), refers to a system where the immovable property owner determines a specific amount in Turkish Lira or foreign currency, reserves this amount and records it in the land registry for future use. The property owner has the right to establish a reserved rank mortgage. After setting aside the reserved rank, the owner may establish subsequent mortgage ranks at their discretion. The reserved amount essentially represents a portion of the mortgage limit that the property owner retains for future use. This is established through an application to the land registry office, where a registration request document is prepared and an annotation is recorded in the land registry's comments column as if a mortgage already exists. The reserved amount mortgage may be released at any time upon the property owner's request. If the owner is deceased, the heirs must first register the property in their names, after which they are not required to provide additional documentation to request the release. There is no need to discharge the inheritance and transfer tax liability since the reserved amount mortgage merely serves as a record to preserve an empty rank for future use. This study will provide a detailed analysis of different types of mortgages, their effects and specifically the reserved amount mortgage, concluding with findings and recommendations. Mortgages are guarantees that represent the security of a debt. As a financial term, mortgage secures the mortgage creditor by establishing securities or real estate. Mortgage is subject to savings restrictions unless the security of a debt is abandoned. Renting the real estate, which is the guarantee of the rightful owner, where the debts have not been fulfilled, by putting it up for sale by converting the mortgage into cash in accordance with the provisions of the enforcement and bankruptcy law and collecting the amount obtained from the sale, or purchasing the real estate and obtaining the receivables, as a limited real right. This debt is given to the real estate owner. or there may be certainty against the debt of a third party. In the contract, the real estate owner accepts this mortgage against the loan or collateral to be taken by another party. If the real estate is subject to a mortgage, it is a mortgage that is presented as collateral for the debt of the owner of the real estate. The owner of the real estate will be jointly and severally liable for the value of the real estate he has pledged as collateral or the amount of the amount. Any receivable that still exists or has not yet arisen and is certain or probable to arise together has been secured by mortgage. The real estate subject to mortgage does not have to be owned by the debtor. There are two types of mortgages in Turkey: principal mortgage and limit mortgage. Principal mortgage is the mortgage established only for debts that have arisen. Limit mortgage is the mortgage that guarantees the receivables that have arisen or will arise in the future. Our main subject, the reserved mortgage, is the real estate owner's determination of an amount in TL or foreign currency, keeping this amount reserved and recording it in the land registry for future use. The real estate owner has the right to establish a reserved degree mortgage. After the reserved degree, the next degrees he wishes are recorded. The reserved amount here is actually the mortgage amount that the real estate owner reserves for himself to benefit from in the future. While establishing this by applying to the land registry office, a registration request document is prepared and registered in the thoughts column of the registry as if there is a mortgage. The reserved amount mortgage can be canceled at any time upon the request of the owner. If the owner is dead, the heirs do not need to submit additional documents because they first transferred the immovable property and then became owners. There is no need to sever the inheritance and transfer tax relationship for cancellation, because the reserved amount mortgage is just a record that serves to keep the vacant degree in the future. In this study, the types of mortgages, their effects and our subject, the reserved amount mortgage, will be detailed and will be concluded with the conclusion and recommendations section.

INTRODUCTION

Basic Concepts and Purpose of Mortgage:

Article 881 of the Civil Code Defines the Concept of a Mortgage as Follows: A mortgage may be established to secure a claim that has already arisen or is likely to arise, whether certain or potential. A mortgage may be created as security for conditional or unconditional claims, specific or indeterminate debts, as well as obligations that may arise in the future. The secured claim does not necessarily have to be monetary., a mortgage may also serve as security for non-monetary obligations such as performing or refraining from an act^[1]. A mortgage secures the creditor's claim with the value of the immovable property or a portion thereof, without affecting the personal liability of the debtor. This feature ensures that the debt is guaranteed with financial collateral. (Oguzman M.K., Selici Ö., Özdemir-Oktay S., Esya Hukuku, 19th ed., Filiz Kitabevi, 2016, Istanbul, p. 961). A mortgage is an agreement between the owner of the immovable property and the creditor, protecting the creditor by securing the claim against the mortgaged property. If the debtor fails to pay their debt on time, the creditor is entitled to foreclose the mortgage and satisfy their claim from the sale proceeds of the immovable property in accordance with the Enforcement and Bankruptcy Law^[2]. A mortgage established for a claim with a predetermined amount is called a principal amount mortgage, while a mortgage securing an undetermined amount or future claims is called an upper limit mortgage. The maximum amount to be secured by an upper limit mortgage must be specified in the agreement. According to Article 882/1 of the Civil Code, this mortgage remains unaffected by the secured claim amount, preserving its specified amount and rank. (Oguzman, Selici, Özdemir-Oktay, op. cit., p. 961). A creditor may assign a secured claim by mortgage in accordance with Articles 162 and following of the Turkish Code of Obligations. This assignment transfers the secured claim to the new creditor without requiring any additional transaction. However, if the secured claim ceases to exist, the assignment will have no legal effect^[3]. As previously stated, a creditor may assign a claim secured by a mortgage to third parties. In such a case, the assignee cannot demand an amount exceeding the previously secured claim. Moreover, no additional real rights may be established on other properties beyond the immovable property securing the claim. The assignment of the secured claim constitutes an ancillary right. Likewise, a mortgaged property can be transferred together with all legal obligations arising from the mortgage. A mortgage does not constitute a restriction on the right of disposition over the property but rather limits the property owner's right to dispose of it only to the extent of the secured claim amount.

MATERIALS AND METHODS

Definition and Characteristics of Mortgage: A mortgage is defined as a limited real right established over a property or an asset to secure a debt obligation. It is created to ensure the fulfillment of an obligation undertaken by the debtor or a third party towards the creditor. Key characteristics of a mortgage include its nature as a limited real right, its role as security for a specific financial interest and its establishment over immovable properties. A mortgage is established through a contractual transaction between the debtor and creditor at the land registry office. The official document prepared and signed by the land registry officer is referred to as a pledge agreement or mortgage agreement. A pledge right is created upon the official registration of the contract in the land registry. A mortgage is not only established to secure the property owner's debt but may also serve as collateral for a third party's debt. The creditor may request a mortgage certificate from the land registry officer for the established mortgage. (Hatemi, Aybay, op. cit., pp. 280-281).

Mortgage Based on its Source:

Statutory Mortgage: Articles 892 and 893 of the Turkish Civil Code define statutory mortgage as a type of mortgage explicitly regulated under the Civil Code and other relevant laws. This mortgage grants creditors the right to request the establishment of a mortgage over an immovable property to secure their claims, provided they can prove their entitlement to the claim amount. This mortgage is recorded ex officio in the land registry^[4]. For a statutory mortgage to be registered, either the claim must be acknowledged by the property owner or a court decision must confirm its existence. In the registration of statutory mortgages, the ranking column in the land registry does not specify a numerical rank but is instead marked with a capital 'K.' Statutory mortgages are recorded for a specific transaction and must be requested within a prescribed period-typically three months. If not requested within this period, registration cannot be completed. Statutory mortgage cases include sales transactions, claims arising from undivided co-ownership, differences in amount and value resulting from partition or exchange transactions, claims of contractors or artisans and life care contracts requiring mortgage establishment^[5].

Statutory Mortgage Rights that do Not Require Registration: Legal pledge rights arising from expenses incurred to prevent or remedy depreciation of the mortgaged property ensure that the collateral remains intact. If the property depreciates due to the owner's

fault, the creditor is granted certain rights under Articles 855 and 856 of the Turkish Civil Code. These rights apply only to losses caused by material actions. Even if the risk of depreciation arises before an actual loss occurs, the creditor may file a preventive action. (Kaçmaz M., Tescile Tabi Olmayan Kanuni İpotek Hakları, Ankara University Journal, 2016, pp. 2896-2897). Legal pledge rights for expenses related to the ordinary maintenance and insurance of the mortgaged property ensure the creditor can claim reimbursement for these necessary costs. These expenses do not require separate registration. (Kaçmaz M., op. cit., pp. 2898-2899). Article 29 of the Foundations Law No. 2762 grants mortgage rights arising from unpaid leasehold or mukataa records that have not been canceled for ten years. If such records exist, ownership of the property passes to the possessors. The foundation's right is converted into compensation and a first-degree mortgage is established accordingly. The General Directorate may collect overdue payments from lessees' other assets under Law No. 6183 on the Collection of Public Receivables. If an installment is missed, the debt becomes due immediately and the unpaid amount is registered with a late fee in favor of the foundation. (Kaçmaz M., op. cit., p. 2900).

Voluntary Mortgage: As is known, a mortgage right can be established on immovable properties registered in the land registry. (KARDES) In the case of a risk of depreciation, although the mortgaged immovable property has not yet suffered a loss in value, the probability of depreciation is significantly high. In this case, even if the decrease in value has not yet started, the mortgagee may file a preventive action and take the necessary measures to prevent the depreciation of the mortgaged immovable property. One of the legal grounds for a mortgage may arise from statutory provisions or from a cause based on human will. A voluntary mortgage may be established through a unilateral disposition upon death, as well as through a contract based on the free will of the parties. Here, the contract refers to the mortgage agreement made between the debtor and the creditor^[6-8]. The mortgage contract is established through a declaration of will between the land registry owner of the immovable property subject to the mortgage and the creditor. With this contract, the debtor, as the land registry owner, undertakes the obligation to establish a mortgage in favor of the creditor. Based on the mortgage contract, the creditor acquires a right that can be asserted against the land registry owner. Mortgages are established based on a legal

transaction. Legal transactions are formed when multiple parties make explicit declarations of intent within legal limits^[9].

Definition and Characteristics of Reserved Amount

Mortgage: In the fixed-ranking mortgage system, the owner may leave a rank vacant while establishing a mortgage, allowing subsequent mortgages to be created in later ranks. This reserved rank can later be used for an additional mortgage, which is referred to as a reserved amount mortgage, protected amount mortgage, or hidden rank mortgage. According to Article 870/f-2 of the Turkish Civil Code, a reserved rank mortgage may be established in second or subsequent ranks by specifying the amount of the preceding mortgage. In Article 34 of the Land Registry Regulations, the phrase "protected amount" is inscribed in the mortgage column to indicate that a rank has been reserved for a future mortgage and the amount is recorded in the debt column^[10]. The terms "protected amount," "hidden rank" and "reserved rank" are used interchangeably^[11-13]. While these terms carry the same meaning, "reserved amount" or "protected amount" specifically refers to the monetary value indicated in the hidden rank. There are two methods for reserving a rank when a first-rank mortgage is already in place. The first method involves specifying an amount in the reserved rank before establishing the first mortgage, allowing subsequent mortgages to utilize the remaining ranks. The second method applies when mortgages already exist in later ranks and none of them have the right to benefit from vacant ranks. In this case, the reserved rank mortgage can be established by the cancellation of a prior mortgage. To establish a reserved rank mortgage, the property owner must submit a request to the land registry office, where a non-contractual entry is recorded. The inscription of the term "protected amount" in the reserved rank signifies that the mortgage has not yet been utilized. For reserved amount mortgages, it is mandatory to specify the mortgage's rank, interest rate and the protected amount. However, the maturity column and creditor column must remain empty. The reserved amount does not have to be used in a single instance., multiple mortgages can be created within the protected amount limit. There is no mandatory time restriction for utilizing the reserved rank, though a fixed period may be assigned if desired. If lower-ranking mortgages exist beneath the reserved rank, any newly established mortgages must not exceed the predetermined interest rate of the reserved rank mortgage^[12]. If multiple mortgages with different ranks exist on the

same property and one of them is canceled, the empty rank will not automatically advance unless a contractual right to benefit from free ranks was granted. Instead, a reserved amount mortgage can be established in place of the canceled mortgage. If the property is sold under the provisions of the Enforcement and Bankruptcy Law while a reserved amount mortgage exists, the proceeds from the sale will be distributed among the lower-ranking mortgages without considering the reserved rank mortgage. The increase in the property's value up to the reserved amount will be allocated to the property owner. Since a protected amount mortgage is not considered an active mortgage at the time of its establishment, no registry fee is collected^[12]. The property owner cannot unilaterally increase the amount of an existing reserved amount mortgage. To do so, the consent of other mortgage creditors is required. Even if a reserved amount mortgage is established after other mortgages, it benefits from the rank assigned to the hidden mortgage^[14]. The primary purpose of determining the security amount of a reserved amount mortgage upon registration is to establish a clear ranking system for future mortgages. For the ranking system to maintain certainty, the number and amount of preceding mortgages must be clearly defined. This ensures that creditors benefiting from a mortgage are aware of the protected amounts in hidden ranks^[15].

To Provide Further Clarification, Consider the Following Example: A property owner establishes a first-rank mortgage in favor of party A. Subsequently, the owner wishes to secure a debt owed to party B but prefers to reserve the second rank for future use. With party B's consent, the second rank is reserved and B's mortgage is established in the third rank. If party B had not given consent, the reserved rank mortgage could not have been established. (Erel N., op. cit., p. 44)^[16]. As demonstrated in this example, the critical aspect of utilizing the reserved amount is ensuring that the amount of the newly established mortgage does not exceed the protected amount. If the new mortgage surpasses the reserved amount, the consent of other creditors is required^[17].

Establishment of Reserved Amount Mortgage in Land Registry Offices: The conditions for establishing a reserved amount mortgage have been previously outlined. Now, the procedure for its formation in the contractual table and its registration in the land registry will be explained.

On One Side: On the Other Side: All details are stated on the back page of this official deed. The entirety of

the 88,034 m² dry farmland located in Feslegen Village, Kiziltepe District, Mardin Province, registered under Tarik Saruhan, was declared by Tarik Saruhan himself to be reserved as a first-degree mortgage with an amount of 1,000,000 (one million TL). He requested its registration as a first-degree mortgage while reserving this amount. Later, for the debt of 500,000 (five hundred thousand TL) borrowed from Rezzan Saruhan, he mortgaged the same property as a second-degree mortgage with the right to utilize free ranks, with an interest rate of twenty-five percent (25%) until its release. Rezzan Saruhan accepted this mortgage under the stated conditions and requested its registration in the land registry. This official deed was thus executed. If a second-degree mortgage had not been simultaneously established, the reserved (protected) mortgage would have been registered by simply obtaining the property owner's signature on a registration request document. Since the reserved mortgage was established along with a second mortgage, an official deed was required. The registration of this mortgage in the land registry book appears as follows: A.I. Reserved (Protected) Amount: 1,000,000 TL, Date-Journal Number The amount of the protected amount must always be recorded.

RESULTS AND DISCUSSIONS

Legal Basis of Reserved Amount Mortgage: According to the fixed-ranking system, the owner may reserve a higher rank (protected rank) when establishing a mortgage. The reserved amount mortgage is regulated under Article 870/f-2 of the Turkish Civil Code. This provision allows the property owner to establish a reserved mortgage for future mortgage transactions, specifying the amount upon registration. Additionally, Article 34 of the Land Registry Regulation regulates the future establishment of a reserved rank. If a reserved rank is planned, the term "protected amount" must be written in the column where the creditor's name should appear and the amount must be recorded in the debt column. The legal basis for the reserved amount mortgage derives from Article 870/f-2 of the Turkish Civil Code and Article 34 of the Land Registry Regulation. Contracts gain legal validity through their regulation in the Turkish Civil Code, including mortgage agreements, which must comply with the formal requirement. The formal requirement confirms the legal nature of a mortgage. Since a mortgage is a debt-creating transaction, it regulates the legal relationship between the parties. Given its relative nature, it can only be asserted against the parties to the transaction. Thus, it generates legal consequences arising from the contract. When the property owner (debtor) registers the mortgage in the land registry,

their obligation ceases^[18]. (Karakteristigine Iliskin Bir Degerlendirme, Süleyman Demirel University Law Journal, Vol. 14, Issue 2, p. 1488).

Judicial Decisions Regarding Reserved Amount Mortgage: In its decision dated April 8, 1999 (E: 2007, K: 2264), the 19th Civil Chamber of the Court of Cassation ruled that if a mortgage registered at a later date does not specify which amount was reserved in the prior ranks and if subsequent mortgage creditors did not give their consent, the prior mortgage would not gain priority over later mortgages.

The Rationale States: The Turkish Civil Code allows multiple mortgages to be established at different ranks on the same immovable property. (Former Civil Code Articles 785-786-787, as the decision was rendered while the former Civil Code was in effect). When initiating foreclosure proceedings due to non-payment of the debt, the allocation of proceeds among different mortgage ranks must be considered. A property owner may establish multiple mortgages without first establishing a mortgage in a higher rank. However, for such mortgages to be valid, the reserved amount in the higher rank must be explicitly stated and registered in the land registry. As stipulated in the Turkish Civil Code and Land Registry Regulation, if a prior reserved rank is later used to establish a mortgage for another creditor, the creditor must receive their proportional share from the reserved amount. If the owner does not specify the amount reserved in the prior rank while establishing subsequent mortgages, they will not have priority over later-ranked creditors. In this case, mortgage-related documents must be obtained from the land registry office. The court must determine whether, while registering a fourth-degree mortgage in favor of the plaintiff, the reserved rank was maintained for the defendant's mortgage. If the reserved rank was not maintained, the court must examine whether the plaintiff consented to the earlier rank. If the reserved rank was not maintained but was later vacated, the court must determine whether the defendant's mortgage was established in the vacated rank. A judgment must be rendered based on these considerations rather than issuing a ruling without such inquiries. (Yargıtay 19. HD. 8.4.1999, E: 2007, K: 2264).

CONCLUSION AND RECOMMENDATIONS

The comparison of reserved amount mortgage with other mortgage types focuses on the advantages and disadvantages of each. Reserved amount mortgage differs from other mortgage types, particularly in terms

of protecting the debtor and securing the creditor's collateral. Furthermore, practical differences exist regarding its establishment process, duration and termination compared to other mortgage types. A reserved amount mortgage allows a property owner to determine a specific amount in Turkish Lira or foreign currency and register it in the land registry as a reserved amount to be utilized under future conditions. The property owner can register subsequent ranks at their discretion. This type of mortgage is designed to provide flexibility for the property owner in creating better security conditions for future loans. If the property owner intends to establish a reserved amount mortgage along with another mortgage for a different creditor in a subsequent rank, a formal deed must be prepared by the Land Registry Office. If it is established as a stand-alone reserved amount mortgage, a registration request document is issued at the land registry. In the land registry's comments column, it is recorded as if a mortgage already exists. When the reserved amount mortgage is utilized in the future, it does not have to be used in full at once, it can be used multiple times, provided that the amount does not exceed the originally reserved value. This type of mortgage is also referred to as protected amount, hidden rank, or reserved rank. Although these terms carry the same meaning, "reserved amount" and "protected amount" specifically denote the financial value assigned to the hidden rank.

A Reserved Amount Mortgage Can be Established in Two Ways: First, it may be determined before any mortgage is registered by specifying an amount in advance. Second, it may be established when existing mortgages already occupy subsequent ranks, provided that none of them have the right to benefit from free ranks. In such cases, the consent of mortgage creditors in those ranks must be obtained. In reserved amount mortgages, it is mandatory to specify the rank, interest rate and reserved amount. There is no time restriction on the use of a reserved amount mortgage. If mortgages registered on the property are released, a reserved amount mortgage may be established in their place. If a reserved amount mortgage is in place while other ranked creditors' claims have matured and the property is sold under the provisions of the Enforcement and Bankruptcy Law, the proceeds are distributed among other mortgage creditors without considering the reserved amount mortgage. If there is a surplus after distribution, it is allocated to the reserved amount. In cases of amount increases in a reserved amount mortgage, the property owner

cannot unilaterally amend the amount, even upon request. The consent of creditors with registered mortgages in other ranks must be obtained. The fundamental reason for requiring the determination of the reserved amount upon registration is to establish a clear sequence for subsequent mortgages. Despite the existence of regulations concerning reserved amount mortgages in the Turkish Civil Code and the Land Registry Regulation, these regulations do not fully address the conditions for establishing such mortgages. Specifically, they do not provide clarity on how a property owner should obtain the consent of existing mortgage creditors when requesting a reserved amount mortgage or define the scope of such consent. Legislative amendments should be made to restrict the discretion of mortgage creditors regarding consent requirements for reserved amount mortgages. The analysis of reserved amount mortgages has revealed certain difficulties in the application of existing legal regulations. To overcome these challenges, amendments should be made to the relevant provisions of the Turkish Civil Code and the Land Registry Regulation to eliminate uncertainties. Implementing the recommendations set forth in this study will enhance the efficiency and effectiveness of reserved amount mortgage applications.

Abbreviations:

MK: Medeni Kanun

TST: Tapu sicil Tüzüğü

TMK: Türk Medeni kanunu

A.I: A ipotegi

HD: Hukuk dairesi

E: Esas

K: Karar

M: Madde

TL: Türk Lirası

M2: Metre kare

A.G.E: Adi geçen eser

S: Sayfa

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