

# YAZICILEGAL

## NEWSLETTER

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### Secondary Legislation regarding Law on Pledges over Movable Property in Commercial Transactions

Law on Pledges over Movable Property in Commercial Transactions numbered 6750 (“**Movable Pledge Law**”) had been published in the Official Gazette dated 28 October 2016 and entered into force on 1 January 2017. We had analysed the provisions of Movable Pledge Law and its possible effects on the relevant transactions in our Newsletter of November 2016. In the Official Gazette dated 31 December 2016 and numbered 29935, three regulations as the secondary legislation of the Movable Pledge Law have been published and entered into force. This Newsletter is focusing on the notable details of such secondary legislation.

#### Regulation on Establishment of Pledge in Commercial Transactions and Use of Rights after Event of Default

This regulation sets forth the rules and procedures regarding the pledge agreement, establishment of the pledge, pledge systems, registration of the pledge agreement with the Pledged Movables Registry (the “**Registry**”) and the rights and obligations of the pledgor and the pledgee following a default.

According to this regulation, in order for the establishment of the pledge, the following are necessary:

- The existence of a present or future debt which can be secured by a pledge,
- The will regarding the establishment of a pledge right over the movable asset without need to any transfer of possession, constituting the security for the payment or performance of a present or future debt,
- The preparation and execution of the pledge agreement, and

- The registration of the pledge agreement with the Registry.

The pledge agreement can be executed electronically or in written form. In the event that the agreement is electronically executed, it must be signed via secure electronic signature. In case the agreement is executed in written form, it must be signed in the presence of an officer of the Registry or a notary public certifying the signatures of the parties.

In practice, the official procedures regarding the establishment and the registration of the pledge will be performed by the notary publics through a system called TARES as explained in detail below.

It is worth noting that this regulation lists the matters which must be inserted in the pledge agreement, including without limitation:

- In case the amount of the secured receivable is determined, the amount of the debt and security,
- In case the amount of the secured receivable is not determined, the amount that is secured by the pledge,
- The currency of the pledge amount,
- The assets subject to pledge and the distinctive features of such assets,
- The pledge system adopted for the establishment of the pledge and in case that the fixed-degree system is accepted, the nominal value of the degree and the degree together with the ranking of the pledgee,
- In case a valuation is made as per the provisions of the Regulation on the Valuation of Movable Assets in Commercial Transactions (as mentioned below), the determined value of the movable asset,

- If any, the provision regarding the appropriation right in case of default,
- The party which shall be liable for the expenses made for the registration of the pledge with the Registry.

Furthermore, this regulation also highlights that the parties are prohibited to include a provision in the pledge agreement which restricts the disposal right of the pledgor on the pledged movable assets or restrict the pledgor to establish any sub-pledge or sequel pledge on such movable assets.

As a significant point, in the event that the debt amount is determined, the pledge can only be established over the movable assets, the values of which correspond to the debt amount *plus* 1/5 of such debt amount.

In case a pledge is established over the whole commercial enterprise, the movable and immovable assets allocated to the activity of such commercial enterprise as at the date of the pledge are considered to be included within the scope of the pledge. In parallel with the foregoing paragraph, the parties cannot establish a pledge over the whole commercial enterprise in a scenario where one or more of the assets subject to the pledge satisfy the debt amount *plus* 1/5 of such debt amount.

In addition, the regulation envisages that no taxes, duties, charges or paper cost will arise with respect to the registration of the pledge agreement to the Registry and the relevant procedures performed at the Registry.

In case the possessor of the pledged asset acts in a way decreasing the value of the pledged assets, the relevant parties can request the competent court to prohibit such actions. In parallel, the relevant parties may be authorized by the competent court to take necessary precautions to prevent such actions. In case of any circumstance where it is necessary to take immediate action, the relevant parties can also directly intervene. Furthermore, the relevant parties can request from the owner of the asset the expenses arising out of the performance of such necessary precautions, and such expenses are considered to be secured with an additional pledge on such pledged asset (without need to any further registration) having priority over other pledge rights on the same asset.

In case the pledged asset has depreciated in value or in case there is a depreciation risk, the pledgee can request additional security or reinstatement of the pledged asset the value of which has depreciated. If the sufficient security is

not granted within the term to be determined by the competent court, the pledgee becomes entitled to request the repayment of the debt corresponding to the security deficiency. In case the pledged asset has depreciated in value without the negligence of the possessor, the additional security that can be requested by the pledgee or the partial repayment will be limited to the amount obtained by the possessor from third parties as compensation of damages (if any).

Unless otherwise agreed by the parties, the transfer of the ownership or the possession of the pledged asset does not change the status of the security or the liability of the debtor. If the pledgor transfers a pledged movable to a new owner who assumes the current debt, the pledgee must notify the former debtor in writing within one year following the transfer in order to reserve its right to pursue such former debtor.

In parallel with the provisions stipulated in the Movable Pledge Law, this regulation also sets forth the rights of the pledgee in case of a default:

- The pledgee is entitled to request the transfer of the ownership of the pledged asset from execution offices, (with an exception to the *lex commisorio* principle under Turkish law and collateral system).
- the pledgee can transfer its receivable to the asset management companies operated under the approval of the Banking Regulation and Supervision Agency, and
- the pledgee can use the tenancy or licensing rights over assets which are not subject to the transfer of possession.

Further to the provisions contemplated under the Movable Pledge Law, this regulation sets forth the obligations of the parties following the transfer of the ownership of the pledged asset in case of default. Accordingly, if the receivables amount is higher than the value of the pledged asset determined under the expert report, the pledgee is entitled to request the transfer of ownership of the pledged asset by setting off 90% of the pledged asset's value against its receivables. Then, a pledge insufficiency certificate (*rehin açığı belgesi*) may be provided to the pledgee in order for the pledgee to continue the enforcement proceeding under the general provisions of the Enforcement and Bankruptcy Code for its remaining receivables. On the other hand, if the receivable amount is less than the pledged asset's value, the pledgee is entitled to request the ownership transfer of the pledged asset by

depositing the amount corresponding to the difference between the value of the pledged asset and the receivable amount to the account of the relevant enforcement office.

The provisions in relation to the parties of the pledge agreement, the scope of the pledge, intermingle and commingle of the pledged assets and pledge establishment systems are included in this regulation in parallel with the Movable Pledge Law.

### **Regulation on Pledged Movables Registry**

This regulation aims to ensure that pledged movables registry records are completely and accurately kept, to protect the publicity of the registry records and the legal rights of the parties arising from such registry records.

Pursuant to this regulation, the Registry is established for the registration, amendment and release of the pledge, the assignment of pledged movable assets and the pledge rights and similar operations envisaged thereunder. In this respect, the Ministry of Customs and Trade has authorized the notary publics to operate the Registry and conduct the foregoing duties and procedures through the registry system called TARES under the protocol made between the Notary Public Union and the Ministry of Customs and Trade dated 23 December 2016.

As of the date of this Newsletter, the system is operated under the website (<https://www.tares.org.tr/>) of the Notary Public Union. However, in light of the demonstration video published in TARES website regarding the procedures on the establishment of the pledge and discussions with notary publics, it is likely for the system to create several legal issues and technical difficulties that the parties may encounter in practice such as the following:

- In former transactions, the pledged items had been listed in the commercial enterprise pledge agreement and such list had been notarized by notary publics and registered to relevant trade registry. However, in TARES, each item to be pledged must be electronically registered to the system one by one with its distinctive features, thus, in case of big commercial enterprises owning thousands of movable assets, this requirement may create timing and operational difficulties.
- Currently, due to the technical problems, the system does not permit the parties to re-check the items registered to the system before the finalization of the pledge agreement; therefore, this issue may prevent the parties from correcting any mistake in

terms of the details of the pledged items before the establishment of the pledge.

Despite the fact that there are uncertainties, TARES has become operational very recently and the relevant parties are currently working to improve the system and solve the technical and operational issues.

### **Regulation on the Valuation of Movable Assets in Commercial Transactions**

This regulation sets forth the rules and procedures for the valuation of pledged movable assets, the determination and appointment of experts carrying out the relevant procedure and determination of the valuation service fees.

According to this regulation, the valuation of movable assets can be requested before the establishment of the pledge or in case of engraving, intermingle or commingle of a pledged asset with another asset or default of the debtor, after the establishment of the pledge.

The parties of the pledge agreement may freely determine the value of the assets before the establishment of the pledge without taking any valuation service. In case the parties cannot agree on the value of the asset before the establishment of the pledge, each party is entitled to request the valuation of such asset from the competent court. After the establishment of pledge and in case of engraving, intermingle or commingle of a pledged asset with another asset or default of the debtor, the pledgee can apply to the competent court in order to request the valuation of the asset. The competent court will appoint an expert which operates under the approval of the Banking Regulation and Supervision Agency in order for such expert to conduct the valuation services, within three days from the request of the relevant party.

The parties can object to the valuation conducted by the above mentioned expert within three days starting from the notification of the relevant valuation. In this case, the competent court will appoint another authorized expert within three days. The valuation made by the second expert is conclusive and same parties cannot request a new valuation of the same assets for 2 years.

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Yours faithfully,  
**YAZICI LEGAL**