



Two Types of Agreements for Real Estate Presales: Real Estate Presale Agreement and the Prepaid Residence Sales Agreement

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I. Introduction

Due to the rapidly growing real estate sector, the lawmaker specifically regulates contractual relationships between the parties in order to prevent any loss of right of any one of the parties. Along with the typical real estate sales agreements, preliminary sales agreements are also needed by the sellers and buyers due to many reasons (such as planning a budget for construction, speeding up the period of the construction etc.).

Under Turkish law, it is possible to execute preliminary sales agreements. Real estate presale agreements and prepaid residence sales agreements are widely used especially in the sales of real estate which are still under construction. This article briefly explains the essential terms and conditions of these agreements under Turkish law and the difference between them.

II. Real Estate Presale Agreement

According to Article 29 of the Turkish Code of Obligations No. 6098 (“TCO”), it is possible to execute a preliminary agreement promising that a sales agreement will be concluded at a later date. In this respect, sellers who wish to carry out the transactions for the transfer of the title deed at a later date or who are able to transfer the title deed only at a later date can conclude a preliminary agreement for the sale of the real estate.

A real estate presale agreement is a preliminary agreement under which the seller and the buyer undertake to conclude a real estate sales agreement and transfer the title deed at a later date, under certain terms and conditions determined under the agreement. By executing a real estate presale agreement, the buyer promises to pay the sales price and the seller promises to sell and transfer the ownership of the real estate. In case where one of the parties fails comply

with provisions stated in the agreement, the other party may claim for damages or request the competent court to render a ruling having the force of the real estate sales agreement.

According to the Article 237 of the TCO, in order for the real estate presale agreement to be valid and enforceable, the real estate presale agreement shall be executed in presence of a notary public. The real estate presale agreement which will be concluded in presence of a notary must include the following information and documents: (i) information with regards to the title deed, (ii) documents regarding the fair market value, (iii) certificate of the contractor if the seller is a contractor and (iv) photographs of the both parties. In the real estate presale agreement, the seller and buyer, the real estate, the sale price of the real estate subject to the promise of sale, the main obligations and the secondary obligations must be indicated. A real estate presale agreement can be recorded at the land registry. Once recorded, the rights arising out of the agreement can be asserted against subsequent owners and rights holders.

In line with the information given above, the real estate presale agreement can only be concluded for the real estates which are registered to the title deed. Since the performance of the agreement is not possible to the lack of registration before the land registry, the real estate presale agreement subject to the real estate which is not registered before the land registry is not valid (Decision of 14th Civil Chamber of Court of Cassation, dated 13.03.2018 and numbered 2017/5812 E. and 2018/1889 K., Decision of 14th Civil Chamber of Court of Cassation, dated 19.09.2019 and numbered 2016/14042 E. and 2019/5570 K.).

III. Prepaid Residence Sales Agreement

Prepaid residence sales agreements are executed between the seller who acts for commercial and professional purposes and the customer for the purpose of transfer of the real estate. By executing the prepaid residence sales agreement, the buyer accepts the obligation to transfer the title deed of the residence to the customer and the customer accepts to pay a part of the sale price to the residence before the transfer of the title deed.

Prepaid residence sales agreement is regulated under Consumer Protection Law No. 6502 (“CPL”). Article 40 of the CPL defines the prepaid residence sales agreement as follows: *“A prepaid residence sales agreement is an agreement where the consumer undertakes to pre-pay the sale price of the real estate in cash or in installments for purposes of housing, and where the seller undertakes to transfer or deliver the real estate to the consumer following the full or partial payment of such sale price.”*

In addition to the above, as per Article 40 of the CPL, the seller is obliged to give a preliminary information form which included information determined by the Ministry of Customs and Trade, at least one day prior to the establishment of the agreement. Article 5 of the Regulation of the Prepaid Residence Sales (“Regulation”) states that this form must be in written form and the text shall be at least 12 point-font, clean, explicit and legible. Also, same article lists the information which must be included in the form. For example; name of the seller, the delivery date of the residence, the date of building permit etc. It is important to note that the residence must be delivered to the customer before the delivery date which is

determined by the seller. According to Article 40 of the CPL, the maximum transfer or delivery period of the residence is 48 months beginning from the date of the agreement.

According to Article 41 of the CPL and Article 6 of the Regulation, the prepaid residence sales agreements can be executed in a written form with registration of the agreement before the land registry or can be issued and executed before the public notary. Without the building permit, the prepaid residence sales agreement cannot be concluded. The agreement shall be at least 12 point-font, clean, explicit and legible. Also, Article 7 of the Regulation lists the mandatory content of the prepaid residence sales agreement. Some of the information which must be included in the agreement is as follows: date of the agreement, the sale price of the residence, the prepaid amount, payment schedule, delivery date of the residence, date of the building permit etc.

Lastly, the prepaid residence sales agreements and the preliminary information form must include the right of withdrawal and the right to rescind the agreement. The consumer has the right of withdrawal from a prepaid residence sales agreement within fourteen days without giving any reason or being obliged to pay any penalties. Also, as per the Article 45 of the CPL, the consumer has a right to rescind the agreement within twenty-four months following the date of the agreement without giving any reason.

IV. Difference Between Real Estate Presale Agreements and Prepaid Residence Sales Agreements

In light of the above, the main differences between the real estate presale agreement and the prepaid residence sales agreement are as follows:

(i) As explained above, the prepaid residence sale agreement can only be executed between a buyer who is considered as “consumer” under Turkish law and the seller who acts with the professional and commercial purposes. The consumer intends to buy the residence only for housing purposes. On the other hand, with regards to the purpose of buying and the parties of the agreement, there is no limitation in the real estate presale agreement. In other words, the main differences between the real estate presale agreement and the prepaid residence sales agreement are the parties of the agreement and the purpose of establishing an agreement.

(ii) Prepaid residence sales agreement is subject to the provisions of the CPL. On the other hand, real estate presale agreement is subject to the provisions of the TCO.

(iii) The CPL has specific and mandatory provisions with regards to the delivery date of the residence. As we explained above, the maximum transfer or delivery period of the residence is 48 months beginning from the date of the agreement. On the other hand, TCO does not have a provision which regulates the delivery date of the real estate to the buyer.

(iv) It is not mandatory to provide preliminary information form to the buyer in order to execute a real estate presale agreement. However, as per the CPL, it is mandatory to provide a preliminary information form which includes all the obligatory information to the consumer.

(v) The CPL specifically regulates the consumer's the right of withdrawal and the right to rescind the agreement. These rights are given to the consumer by law and must be stated in the agreement and preliminary information form. However, this is not required in case of executing a real estate presale agreement.

V. Conclusion

The real estate presale agreement and the prepaid residence sales agreement are two types of preliminary agreements for the sale of real estate and they are specifically regulated under Turkish law. Parties may decide to execute a real estate presale agreement or a prepaid residence sales agreement based on their terms and conditions by complying with the mandatory provisions of the applicable law.

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