

The Right of First Refusal

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The **right of first refusal** allows its holder to claim the transfer of the subject of the right with a unilateral declaration of intent. In doctrine, the right of first refusal may be described basically as an obligation to offer the subject of the right to the holder of the right before selling it to third parties. The right of first refusal may be (i) **contractual**, determined in an agreement, or (ii) **legal**, granted to a specific person by legal provisions. Accordingly, in this article, both contractual and legal rights of first refusal will be detailed and the usage of the right will be examined briefly.

Legal Rights of First Refusal

Legal rights of first refusal are regulated (i) under titles of joint ownership and annotations to land in Turkish Civil Code no. 4721 ("CC") and (ii) under titles of sale of real estate in the Turkish Commercial Code no. 818 ("TCC"). A legal right of first refusal can be used in the sale of shares of a jointly-owned property to a third party within the legal term stated in the code, three (3) months from the notification of the sale or two (2) years in all circumstances, if not withdrawn and used by legal proceedings. The three (3) month period is initiated by the delivery of a notarized notification of sale to the holder of the right and in any case, the right may not be used two (2) years after the sale.

Contractual Rights of First Refusal

Contractual rights of first refusal are contractual restrictions that give the holder the option to enter into a business transaction with the owner of something, pursuant to specified terms, before the owner may enter into that transaction with a third party. Accordingly, the shareholder's right to transfer the shares is not totally eliminated, yet the shareholder is obliged to offer the shares first to the existing shareholders. This way the other shareholders will have a privilege over third parties with regard to purchase of the shares. Although a shareholder wishing to sell his/her shares is obligated to offer the shares first to the holder of the privilege, at this step the party to whom the shares are offered may make a proposal about the sale price. In other words, if the shareholder selling his/her shares does not consider the price offered by the shareholder to whom they are offered an acceptable proposal, then he/she will be

free to consider offers from third parties, while still complying with the contractual obligation that such offers be more favorable to the seller.

Article 735 of the CC regulates the contractual right of first refusal that allows the limitation of property rights of a proprietor by legal transactions. Turkish Code of Obligations no. 6098 ("TCO"), which shall enter into force on July 1, 2012, regulates the contractual right of first refusal. According to Article 238 of the TCO, the exercise of the contractual right of first refusal may be binding for a maximum period of ten (10) years, in any event. Unless otherwise provided for under an agreement, a contractual right of first refusal may not be assigned; however, such rights may be inherited.

The contractual right of first refusal is further regulated in Article 240 of the TCO, and in accordance thereto, it may be used for real estate purchases and transactions that are economically equivalent to sale. According to Article 242 of the TCO, the terms and significant issues regarding the usage of the right are stated below. Pursuant to this article, the contractual right of first refusal:

- Must be used by the holder of right within three (3) months of the sale notification by the buyer or seller to the holder of the right;
- Must be used within two (2) years of the conclusion of the sales contract in any case;
- May only be valid between the parties of the right of refusal agreement, due to its reciprocal nature; and

- May be reserved against future proprietors by annotating the land registry, and the validation of such annotation is limited to a period of ten (10) years.

As stated below, the terms included in the CC, which are regulated for a period of three (3) months and two (2) years, are definite terms for any claim. At the end of those periods the holder of the right may not claim priority for purchase. Those periods shall be applied for contractual right of first refusal pursuant to Article 735/3 of the CC. However, parties may regulate different periods for the claim of the right and different initiating moment for the beginning of the notification period in their agreement.

In the Turkish Commercial Code, no. 6762, ("TCC"), the right of first refusal regarding sales of shares is not regulated, however, within the scope of the TCO and TCC, shareholders may be entitled to the right of first refusal by the articles of association. Pursuant to the right of refusal term in the articles of association, the holder of the contractual right of first refusal may claim his/her right against seller or buyer. If it is stated in the articles of association, the shareholder who requests to transfer his/her shares to a third party has to offer them to the founding partners, members of the board of directors or other persons who have the right. Because the right originates from the contract, the right-holding persons, to whom the sale of shares shall be offered by the seller, have to be specified in the articles of association as right-holders. According to such provisions in the articles of association, the seller, as a shareholder, has to offer the shares that will be sold to the holders of the right of first refusal. The notification may be made in various forms; however, if any conflict occurs, the notarized form will be accepted as

resolute. After the notification of offer of the shares, the holders of the right may claim use of his/her right of first refusal within the period stated in the articles of association.

The shareholders may transfer their shares independently whether they are documented or not. The independent transfer of rights is a vested right subject to interpretation. Depending on this, the transfer of shares may be limited with the consent of the shareholders. The transfer of shares may be limited by the shareholders in the articles of association and as a seller, the shareholder has to comply with those limitations. If the shareholder does not, the sale of shares shall not be binding for the company. Unless a limitation provision is regulated in the articles of association, the right of first refusal may not be used by the shareholders because of the shareholders of a joint stock company do not have a right arising from the code.

Conclusion

As mentioned above, the terms that have been regulated by laws are the periods in which such rights may be claimed. Depending on those periods, a contractual right of first refusal has to be used by the holder of the right within three (3) months of the sale notification of the holder of the right by the buyer or seller; or, it must be used within two (2) years of the conclusion of the sales contract. However, the parties may determine different terms and also agree on a different time for the beginning of the notification period. Unless the parties have a specific regulation regarding the usage periods, the terms that are stated by law shall be valid automatically.