

## Brokerage Contracts under Turkish Law

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### Introduction

Brokerage is prevalent in competitive sectors such as real estate, insurance, finance and shipping. A successful broker should have a perfect knowledge about the market and further, should have a good understanding about the client's business, needs and expectations.

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The legal nature of brokerage contract is different from commercial agency contract and commissionaire agency contract. In Turkish law, brokerage contract is regulated under the Turkish Code of Obligations (TCO). Moreover, regulations for special types of brokers such as insurance and reinsurance brokers or real estate brokers are also found in the legislation.

This article will briefly explain the rights and obligations of brokers under Turkish law.

### Form of a Brokerage Contract

A broker either prepares the ground for parties to conclude a contract or acts as intermediary between the parties to conclude a contract in exchange of a fee.

Principal and broker are the two parties to a brokerage contract. Contracts must be in the form required by law. In general, a contract is binding even if it is concluded orally. Nevertheless, some of the contracts must be in writing pursuant to TCO.

Brokerage contracts can be concluded orally but there is an exception to this rule. According to article 520/3 of the TCO, brokerage contracts on immovable property are not valid and enforceable unless they are in written form.

Therefore, a brokerage contract on purchase and sale or lease of an immovable property must be in written form. Hence, in the absence of a written contract, a broker cannot claim a fee even if a sales or rental contract of real property is concluded between the principal and a third party. On the other hand, the Court of Appeals is of the opinion that the broker may claim not the fee but the expenses for his services provided to the principal under article 20 of the Turkish Commercial Code (TCC)<sup>1</sup> even in the absence of a written contract.<sup>2</sup>

Brokerage contracts, aside from the abovementioned exception, can be concluded orally, though it is preferable for the parties to have a written contract to avoid potential disputes.

### **Obligations of the Broker**

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The broker is under obligation not to act against the interests of its principal. Furthermore, it must safeguard the interests of the principal. Protecting the interest of its principal may be a fundamental issue especially for a broker acting for both parties in a contract. In such cases, broker's duty of loyalty becomes significant. Failing to uphold the duty of loyalty may result in forfeiture of fees pursuant to article 523 of TCO.

The broker must not reveal trade secrets of the principal. Therefore, for instance, if the broker reveals the information about the poor solvency of the principal, it must compensate the damages of the principal. Moreover, broker must act with due diligence while conducting business for the principal. Thus, the broker is obliged to inform the principal if it has doubts as to the solvency of the third party.

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<sup>1</sup> Merchants have a right to demand a fee for their activities under article 20 of TCC.

<sup>2</sup> The Court of Appeals, 13<sup>th</sup> Civil Division, 20.01.1992, E. 4859 K. 445.

## Rights of the Broker

Remuneration is the main right of a broker. It is also the essential element of a brokerage contract, thus if the parties do not agree on remuneration expressly or implicitly, legal nature of the contract is not considered as brokerage but as mandate.

Pursuant to article 521 of TCO, the broker is entitled to a remuneration only if the contract is concluded between the principal and the third party introduced by the broker. In case the contract is subject to a condition precedent, the remuneration becomes due once the condition has been satisfied.

Parties may decide the amount of the brokerage fee in the contract. However, the fee shall be paid in accordance with tariffs or in the absence of such tariffs, in accordance with the custom unless it is determined in the contract. The court may reduce an excessive amount of fee to an appropriate amount upon the application of the debtor (Art. 525 of TCO). However, this rule has an exception. Pursuant to article 22 of TCC, merchants are not allowed to demand for a reduction in the excessive contractual price or contractual penalty. Therefore, if the principal is regarded as a merchant under TCC, it will not be able to request for a reduction.

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The broker has a right to claim reimbursement of the expenses if it is specified in the brokerage contract even if the contract between the principal and the third party is not concluded.

If the broker acts in favour of a third party by breaching its contractual duties or procures a promise of remuneration from third party contrary to the rule of good faith, it forfeits the right to remuneration and to any reimbursement of expenses under article 523 of TCO.

## Termination of Contract and Applicable Rules

Brokerage contracts may be concluded either for a definite term or for an indefinite term. The contracts concluded for definite term automatically ends on the expiration date whereas contracts for indefinite term ends with the execution of the contract between the principal and the third party.

Claims arising out of brokerage contract are time barred after five years.

There are limited provisions in TCO that regulates the law of brokerage. For the circumstances that fall outside the scope of these provisions, provisions governing the mandate contracts will be applicable to brokerage contracts (Article 520/2 of TCO).

### **Law of Real Estate Brokers**

Acquiring or leasing real estate might be a complex process and for this reason, foreign investors in general, consult to local real estate brokers who have experience and knowledge about the market. Thus, it is essential for the foreign investors to find a competent broker to save time and money.

The By-Law on the Real Estate Trade which regulates the principles and procedures with regards to real estate trade, came into force on 05. 06. 2018. Pursuant to the By-Law, all the trading facilities with regards to real estate shall be carried out by licenced merchants or craftsmen. Licences are granted for five years by the Provincial Directorate of Trade through Real Estate Information System.

Services that may be provided by the real estate brokers are as follows:

- Marketing facilities concerning purchase and sale or leasing of real estates whether registered or not to the land registry
- Market research and reporting services on real estate subject to trading activities
- Providing information to the principal about the market value or rental price of real estates
- Acting as intermediary for title deed transactions
- Concluding contract (on behalf of the principal) with the seller or tenant; following up the payments and subscription processes concerning the rental contract; providing maintenance and repair services to the real estate and providing information to the principal about all the processes.
- Carrying out other services related to real estate trade.

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Pursuant to article 15/1 of the By-Law, the above-mentioned services will be provided under a written agreement signed by the broker and the principle. This requirement is in line with the article 520/3 of TCO.

### **Real Estate Broker's Fee**

Limits for the brokers' fees are provided in the By-Law. Brokers' fee for purchase and sale transactions cannot be more than four percent of the sales price (excluding VAT) specified in the brokerage contract. As regards leasing transactions, the fee for the broker cannot exceed one month's rent (excluding the VAT) specified in the lease agreement. The fee of the broker shall be shared equally between the contracting parties (i.e. seller and buyer/tenant and landlord) unless otherwise agreed in writing.

## GURULKAN ÇAKIR AVUKATLIK ORTAKLIĞI

Polat İş Merkezi, Offices 28-29  
Mecidiyeköy 34387  
Istanbul, TURKEY

T +90 212 215 30 00  
M info@gurulkan.com  
W www.gurulkan.com



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