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Evolutii legislative comunitare privind contractul de timesharing. Stadiul reglementarilor in Romania.

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COMMUNITARY LEGISLATIVE EVOLUTIONS CONCERNING TIME SHARING CONTRACTS. REGULATORY STATE IN ROMANIA.

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Abstract: Time – sharing concept frequently occurs in the tourist field as a holiday formula used to improve a tourist assembly's activities. As a consequence of latest contracts that envisage acquiring timeshare, long-term holiday product which have evolved and diversified, in order to enhance juridical security and protect consumers' and enterprises' interests they have imposed the need to adopt certain regulations both at European and national level. The actual doctrinal approach has in view an analysis of the reglementation level and consumers' protection means assured by the Romanian and the community legislative body.

JEL classification: K12, L83

Key words: time-sharing contract, long-term holiday product contract, protection of consumers, tourism

1. Introductory notions

As tourism has an increasingly important role both at world level and in the economies of the European Union member states, adopting certain regulations has emerged as a must to comply with the new economic and social reality. One of the sectors which have lately evolved a lot is the one of assets whose usage right is on limited term and of holiday products whose usage right is on long term which are called "time-sharing" operations and which have led to adopting some norms regulating the relationships among participants especially in the field of consumer protection. The timeshare concept began in Europe in the 1960s as an innovative way for increasing holiday choice. Today, there are 6.7 million timeshare owners worldwide, of which over one and a half million reside in Europe alone.

"Time sharing" as a notion comes from the field of informatics. Using its original meaning namely time division there has occurred an analogy in the law field with respect to the common ownership or rental of a property by two or several people in turn within a pre-established period of time. An achievement of the European touristic services operators, this type of commercial operation has been known under different names : in France -"multipropriété", "pluripropriété", "propriété spatiotemporelle", "multi-jouissance", "propriété à temps partiel (partagé)", "propriété par périodes", in England - "time sharing", while in Germany it was called "Teilzeitwohnrechte". This terminology wanted to emphasize the invention private right and not the real one. In Romania, the timeshare is a relatively new way of addressing the holidays. Although the area is governed since 2004 by the Law no. 282/2004 on the protection of purchasers in respect of certain aspects of

contracts like the right to use the limited duration of real estate, information about the concept of timeshare are still few.

A time-sharing contract is the one by which a person purchases an exclusive usage right for a pre-established period of time (called a T.S.O unit, usually for seven days or a multiple of seven days/year) of an accommodation unit (room or flat) and binds oneself to participate in paying the annual costs for the hotel management and operation. A time-sharing contract has a duration of over one year, the customer having the right to re-sell its exclusive usage right or conclude an exchange contract with another person.

Participants' contracting involvement in this type of property is done within a holiday club whose member must become a time-sharing owner, too.

This operation has several advantages and disadvantages for the participants. The main advantage consists in flexibility and attractiveness from financial point of view, providing tourists the opportunity of purchasing the right of use for a predetermined or unlimited period over an expensive property, located anywhere on the map, which cannot be otherwise purchased and maintained by an only tourist. On the other hand, timesharing represents a regional development strong potential and a dynamism source. The destination changing possibility together with exchange scholarships have offered some flexibility to timesharing operations, determining a certain expansion of the provided services. All these have changed the right of using a residence over a determined period into a real consumption product with touristic vocation.

The main disadvantage is that a time-sharing value when re-selling may decrease by even 50% of the original price.

In Romania, timesharing operations are still in an incipient stage; nevertheless, they have begun to develop lately, mainly as a consequence of real estate developers' impossibility of selling. In the year 2009 there have been on the real estate and touristic market many offers of this type, the most publicized ones referring to Maramures area - Cavnic city, Poiana Braşov, Mamaia.

2. European Directives regarding the on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

The new prospects resulting from the set-up of economic and monetary market and union as means to accomplish the priority goals of the European Community Constitution Treaty have been the basis to expand community activities and to ensure consumer protection in the following fields: advertising, information, abusive clauses, long-distance, outside trade market contracts, the compliance, security and responsibility for faulty products, guarantees of consumption products, real estate loans, contractors' protection regarding certain aspects of timeshare contracts, activities rendered as issuing community acts in the fields mentioned above as well as in the field of consumption loans in order to remove the differences among the legislations of various member states.

The concerns of community insitutions to harmonize member states' legislation in terms of consumer protection in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, all these have come true from the regulatory perspective by the European Council and Parliament's issuing two Directives, namely: Directive 94/47/CE of the European Council and Parliament of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis published in the European Union's Official Journal no.L280 of 29 October 1994, repealed by Directive 2008/122/CE on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, issued in the European Union's Official Journal no.L33/10 of 3 February 2009

Since Directive 94/47/CE was adopted, the market has grown significantly especially in terms of supplying new products, similar from the economic perspective and from the one of trading timesharing right, which has led to some gaps in the current regulations. Thus, there used to be a series of assets that were not comprised by the Directive's provisions (for example, similar products and holiday clubs with preferential tariffs) and the consumers purchasing those goods

could not benefit from the same rights and advantages (for example, the recanting right when payments beforehand are forbidden). Additionally, other types of transactions have emerged such as re-selling and exchanging which, although related to timesharing right, were not envisaged by the Directive.

In this context, it was necessary that there should be a revision of the regulations applied in these fields and Directive 94/47/CE was replaced by Directive 2008/122/CE whose objective is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States in respect of certain aspects of the marketing, sale and resale of timeshares and long-term holiday products as well as exchange contracts

According to Article 1, the Directive applies to the transactions between a trader and a consumer without affecting the national legislation referring to: the attack methods stipulated by general contracting law, listing of real estate or mobile goods and real estate assets' transfer, the conditions to set up, or the way to authorize, or the requirements to authorize, or the way to set the juridical status of the rights in the contracts regulated by the above Directive.

Unlike prior community regulations that envisaged a single type of contract applicable in these relationships, the Directive defines the four types of regulating contracts, as such:

- timeshare contract is a contract of a duration of more than one year under which a consumer, for consideration, acquires the right to use one or more overnight accommodation for more than one period of occupation

This definition of the contract is different from the previous regulation by certain elements, therefore: it herein includes the contracts concluded for less than three years and the duration to use accommodation units is no longer specified (the previous regulation provided that the usage duration should not be shorter than a week);

- long-term holiday product contracts a contract of a duration of more than one year under which a consumer, for consideration, acquires primarily the right to obtain discounts or other benefits in respect of accommodation, in isolation or together with travel or other services.

Specific for long-term holiday product contracts, payment shall be made according to a staggered payment schedule. Any payment of the price specified in the contract otherwise than in accordance with the staggered payment schedule shall be prohibited. The payments, including any membership fee, shall be divided into yearly instalments, each of which shall be of equal value. The trader shall send a written request for payment, on paper or on another durable medium, at least fourteen calendar days in advance of each due date. From the second instalment payment onwards, the consumer may terminate the contract without incurring any penalty by giving notice to the trader within fourteen calendar days of receiving the request for payment of each instalment. This right shall not affect rights to terminate the contract under existing national legislation

- the re-sale contract is a contract under which a trader, for consideration, assists a consumer to sell or buy a timeshare or a long-term holiday product;

- the exchange contract is a contract under which a consumer, for consideration, joins an exchange system which allows the consumer access to overnight accommodation or other services in exchange for granting other persons temporary access to the benefits of the rights deriving from that consumer's timeshare contract.

In order to authenticate the conclusion of these contracts, before contract conclusion or offer acceptance, in writing or in any other valid form, a trader must provide a consumer with a series of information regarding the parties, the product which is the contract object, the date from which the right obtained may be exerted, the price, services and facilities placed at consumer's disposal, the opportunity to participate in an exchange system etc., by means of a standard form provided in the Directive's annexes which are different according to the type of contract to be concluded. All this information must be drawn up according to the consumer's choice, in the language or one of the languages of the member state where the consumer resides on condition it is an official language of the Community.

Still before contract conclusion, a trader must inform a consumer about the contract unilateral denunciation right and about the interdiction of payments made beforehand, or of guarantee granting, about the explicit recognition of debts and all other payments made directly or by third parties within this term.

Concerning the necessary conditions to authenticate a contract, the Directive stipulates that it must be concluded in writing, in the language or one of the languages of the member state where the consumer resides, on condition it is an official language of the Community. After contract conclusion, a copy must be submitted to the consumer.

All the elements that have been the object of the duty to inform in advance shall have to be included in the contract's contents and they can only be amended if the parties agree obviously or if the amendments ensue from unusual, unexpected circumstances, not depending on the trader's will. Besides these elements, the contract must include the parties' names, residence places, signatures, the date and place of contract conclusion.

When signing the contract, in order to facilitate the exertion of the unilateral denunciation right, the trader must place a separate written standard denunciation form at the consumer's disposal.

As a step to protect consumers, if the Directive's provisions are not obeyed irrespective of the attack methods that can be used according to domestic law, the Directive also regulates the right to unilaterally denounce. The denunciation right may be exerted by the consumer within 14 days from contract conclusion or obligatory pre-contract conclusion, or from the date the consumer becomes an owner. In addition, as a sanction for disobeying the duty to furnish information and conclude a contract in writing, the contract denunciation terms shall be extended to three months and fourteen days in case of failure in providing information, and respectively one year and fourteen days for lack of contract conclusion in writing.

In the event in which a timesharing contract is accompanied by an exchange contract, a single unilateral denunciation term shall be applied for both contracts.

If the consumer intends to exert his/her denunciation right, he/she shall have to notify the trader about his/her intention in writing. The effect of exerting the denunciation right within the stipulated time is rendered by the cessation of parties' obligations to fulfil the contract and the consumer cannot be forced to pay any costs or services previously rendered by the trader. If the contract unilateral denunciation right is exerted regarding the timesharing, long-term holiday product contracts, all the ancillary contracts including loan contracts shall be accounted as cancelled.

Until 23 February 2011, member states should adopt and issue the legislative and administrative acts necessary to comply with the Directive, setting up the proper and efficient means to guarantee the observation of consumers' concerns.

3. National regulations of time-sharing contracts

Until 2004 the Romanian legislation had not contained specific rules for this type of contract.

The first publicized trying of introducing a new time sharing system version on the Romanian market took place in 1995, when the Autonomous Administration "National Lottery" launched a ticket issue called "The golden villa" (in the magazine „Lotoprono”no.33 of 14 August 1995). The winner was offered the right of property, for a week in one year, over a three-room apartment, furnished and equipped with electronic devices and home appliances, situated in a luxurious villa in Poiana Brasov. On the winning tickets are written the villa, the apartments as well as the property periods. The right of property can be sold, rent, assigned or sent as legacy, the apartment's maintenance being carried out for a fixed annual amount of money.

On the other hand, the lack of legal time sharing regulations has lead to conflicts, a number of commercial companies offering tourism products similar to this right of use, denaturizing the product by means of disloyal publicity or even hoaxes.

On its turn, the media has included a number of articles which made reference to tricks, where the words time sharing were included. Thus, the newspaper The Monitor of 17 November 2001 presents the situation of a commercial enterprise, Solo Marketing Ltd. which was pretending to sell the right of use, for a week every year, of a dwelling situated in Spain. After proper investigations it was clear that the enterprise had cheated a number of 62 persons, the recorded prejudice being of 1.259.962.000 lei.

Another similar situation is presented in the National newspaper of 12 December 2002, referring this time to Condominius International Ltd. commercial enterprise. The article mentions that this company's representatives were calling various people to let them know they were the happy winners of a seven-day and six-night luxury holiday, for two persons, at a five-star hotel in England, Cyprus or Spain. In order to become the holder of such a ticket the contacted persons had to take part at an international tourism offers presentation. Still, for participating at such presentations, those people had to meet a number of requirements, including the mention to own the amount of 1.300 \$ or the equivalent in the Romanian currency. During the presentation the people were persuaded to sign a contract, which contained unfair terms. The contract object was the buyer's right to use an apartment in Spain, for a certain period of time every year, for an amount of 5.000 \$, which he might not pay at once, providing 1.300 \$ in advance when signing the contract and the rest, in installments, over a period of ten years. The contract dissolution involved losing the money given in advance, the buyers being also subject to penalties.

In Romania, a time-sharing contract is regulated by the provisions of Law no.282 of 23 June 2004 regarding contractors' protection on certain timesharing contracts, issued in Official Journal, Part I, no. 580 of 30 June 2004. This law was adopted in the context where it was necessary that Romania's legislation should comply with the European one, the former receiving the provisions of Directive 94/47/CE of the European Parliament and Council of 26 October 1994 regarding the protection of consumers in respect of certain aspects of timeshare.

Article 3 of this law defines a time-sharing contract as "the contract or set of contracts concluded for 3 years at least, with payment of a global price, by which, directly or indirectly, an actual right or any other right regarding one or several real estate assets during a pre-established time of the year no shorter than a week, is made up as transfer or transfer binding".

Such a contract is concluded in writing, under the sanction of absolute nullity and it is necessarily drawn up in Romanian, and if the contractor is a foreign citizen or a resident abroad, the contract shall be also drawn up in the language or one of the official languages of the state on whose territory he/she resides or whose citizenship is held by the contractor at one's own choice, or else the seller must provide the contractor with a certified translation. The action in ascertaining the nullity can be introduced by any interested person and is solved by the competent civil instance. In addition, the law sets the compulsory information that such a contract must include, determined by the correct informing of the consumer regarding the characteristics of the estate in question and the rights and obligations that he will assume:

a) name and residence or, if necessary, name or siege of contracting parties, including specific information regarding the seller's juridical status at contract conclusion as well as owner's name and residence ;

b) the exact type of right as object of the contract and a clause stipulating the exerting conditions of this right on the state territory where the real estate asset/assets is/are and if the respective conditions have been obeyed or, if necessary, what other conditions must be obeyed ;

c) when the real estate asset is established, there shall be its exact description and location ;

d) if the real estate asset is under construction, there shall be details about its building stage, the reasonable deadline of its estimated accomplishment, then if it is a pre-established real estate asset, the details shall include the number of building authorization, the name and exact location of the issuing authority, the stage of improvement works meant to turn the real estate asset into a fully functioning one as well as the guarantee regarding any repayment made if its construction is not achieved, and the ways to implement such guarantees ;

e) the services the contractor does or shall have access to and the conditions in which he/she shall be allowed to them (electricity, water, upkeep, sanitation service) ;

f) common facilities such as : swimming pools, saunas etc. that the contractor does or shall have access to and, if necessary, in what conditions ;

g) the principles according to which the real estate asset's repairing, upkeep, management and administration shall be done ;

h) the exact time period during which the rights ensuing from the contract can be exerted and, if necessary, the contract duration ; the date the contractor may start to exert his/her contract rights ;

i) the price to be paid by the contractor for contract rights' exertion ; an estimation of the amount to be paid by the contractor for using the common facilities and services ; the basis to calculate the fee value referring to the real estate accomodation, the obligatory legal fees (fees and taxes) and administrative expenses (the management/administration, upkeep and repairing of the asset) ;

j) a clause which regulates the existence of no costs, fees or duties ensuing from the real estate asset's administration/management in addition to those stipulated in the contract ;

k) if it is or it is not possible to use or participate in a system regarding contract rights' exchange or re-selling as well as all costs that an exchange or re-sale system may comprise, organized by the seller or a third party that he/she has specified under the contract ;

l) information on the right to unilaterally cancel or denounce the contract, and indications regarding the person the contract's unilateral cancellation or denunciation shall be notified to, also mentioning the ways such notifying can be done ; precise indications of the costs' nature and value the contractor shall have to pay according to Article 6, Indentation (4) in the law if he/she exerts his/her contract unilateral denunciation right ; if necessary, information regarding the ways to cancel the loan contract related to the contract under question in the event of the latter's unilateral cancellation or denunciation ;

m) the date and place each party signed the contract.

Law no.282/2004 sets the minimum rights of contractors when they conclude a time-share contract, namely :

- the right to unilaterally denounce the contract within ten days from its being signed, for any reason and without penalty payment. The term is calculated by calendar days and begins from the date of the contract's being signed by both contracting parties, or from the date the parties signed a pre-contract (Article.6, Letter a);

- the right to require contract or pre-contract cancellation within three months from their conclusion if they do not include the information provided by Letters a)-c), Letters d) Points 1 and 2, Letters h), i), k), l) and m) when the two parties signed. If in 3 months the information have been supplied, the 10 day term in which the benefitor can denounce the contract start from the date he received the last piece of information. (Article6, Letter b).

Both the right to denounce and to require contract cancellation may be exerted according to a notification addressed to the other party in the conditions stipulated by the law, according to applicable common law:

- the seller is forbidden to require the payment of any amount of money within the ten days during which the unilateral denunciation right can be exerted (Article 7);

- if the contractor has concluded a loan contract to finance the time-share contract and has unilaterally denounced the latter within the legal period of time, then the loan contract is cancelled without specifying any reason and without paying any penalties (Article 8);

- indication of aquisition price and of any other expenses related to the use of facilities, administrative fees etc.

The law also provides that the seller should be informed about any person requiring information about the real estate asset and he/she must issue a document which, except from describing the real estate asset in general, shall furnish concise and precise details at least about the

elements provided by Letters a) - g), i) and l) of the contract, as well as about the way to get additional information.

The new Romanian Civil Code (Law no. 287/2009 regarding the Civil Code published in the Romanian Official Monitor, 1st part, No. 511 of 24 July 2009) introduces, as a new element, the regulation of periodical property and the exclusion sanction, applicable when one the owners disturbs severely the right of periodical property – the elimination including the compulsory sale of the part belonging to the eliminated person. Thus, according to article no. 687 periodical property exists when more than one person exert gradually and repeatedly the attribute of use, specific to the property right, of a movable or immovable property, at certain intervals, equal or unequal.

Research methodology

The main research methods and technical procedures used to accomplish this survey have envisaged:

1. the study of Romanian and foreign specialized literature regarding the analyzed field;
2. the study of specialized reviews and sites that provide information regarding the analyzed field;
3. the analysis of norms applicable to the contracts of timeshare, long-term holiday product, resale and exchange contracts as well as re-sale and exchange contracts;
4. the logical, historical and systematic interpretation of national and European regulations in terms of the contracts timeshare, long-term holiday product as re-sale and exchange contracts. The logical interpretation arguments (a fortiori, per a contrario, reductio ad absurdum, ubi eadem est ratio, eadem lex/ solutio esse debet) and procedures specific to the juridical field have been used;
5. the analysis of this phenomenon from an economic and social perspective ;

This combination of techniques used has taken place in order to ensure a general orientation, to avoid omissions, and to value the proper information in a pertinent way.

Conclusions

The tourism is directly and indirectly influenced by the common policies regarding transport issue, taxation, consumer protection, regional cohesion policy and environmental policy. Since tourism plays an increasingly important role in the economies of the Member States, greater growth and productivity in the timeshare and long-term holiday product industries should be encouraged by adopting certain common rules. These regulations seeking to harmonize the legislation of the Member States, enhancing legal certainty and protection of consumers contributing to the proper functioning of the internal market.

In Romania, the legal regulation, assured by adopting Law no. 282 in 23 June 2004 concerning owners' protection with a view to certain aspects of contracts whose object is gaining the right of use for a limited period of unmovable goods and, subsequently, by the Civil Code terms, has determined the consecration and regulation in the Romanian legal system of the right of use for a certain period and periodical property. Thus, it was assured, on the one hand, the national legislation harmonization with the European one. On the other hand, the existence of a legal regulation has determined avoiding those situations which has lead to a number of tricks and hoaxes and to denaturizing the time sharing concept.

The main results of the study are concerned with the analysis of the form and content conditions, necessary for an available conclusion of the contract, presenting ancillary contracts, the analysis of national and European laws regarding consumers' protection in the aimed domain, the advantages and disadvantages of concluding a time-sharing contract.

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