



Dipartimento di Giurisprudenza

DOTTORATO DI RICERCA IN DIRITTO ED ECONOMIA

XXIV CICLO

"TIMESHARE":

LEGAL AND ECONOMIC ANALYSIS OF THE

INSTITUTION

- ENGLISH ABSTRACT -

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Anno Accademico 2012-2013

Introduction. Timeshares: institution background its operation

With the expression “Timeshare” we usually refer to the enjoyment of a good that can be re-used over time, by a group of subjects (so-called timeshare owners) who are sometimes organized by following the outline of a condominium unit (timeshare properties), or by following the scheme of a company (timeshare ownership). Due to the various types of definitions, the term that is most commonly used to define a timeshare is that of "a practical economic result of a commercial operation "which means, in any case, that the timeshare offers its owners the perpetual or time-limited enjoyment of a good relatively referred to a portion of the calendar year”.

Such institution was first created and shaped in the U.S., where it originated in the form of timeshare resort around the beginning of 1900.

It was just later, in the '70s, that this business practice in relation to its cost-effectiveness, expanded to other businesses and began to differentiate in the form of timeshare property or realstate and timeshare ownership.

Essentially, the structure of the contract resumes the economic and social function of a lease, with a substantial difference: the seller is guaranteed a return on investment of the operation which is extremely beneficial, either for a possible sale to a single buyer, or for a lease, for which the collection of fees is still a periodic obligation (while the consideration for the sale of a timeshare is in a lump sum).

The buyer is guaranteed a secure purchasing, a permanent enjoyment, but with a lower initial investment cost, given the limitation of the enjoyment, and with the results of lower maintenance costs .

Chapter 1. Classifying the "timeshare" in the scheme of Book III of the Italian Civil Code

After the very first diffusion of this institution in Italy, it was found difficult to classify it within the categories that are inherent the statutory construction in our legal system . This has given rise to different theories.

The first theory, also in relation to the time of formulation, has tried to identify the distinguishing feature of the institution concerning the enjoyment of a property, a right that is exercisable only with the cooperation of an entrepreneur either expressed in the form of a company or hotel resort, which allows the timeshare holder to enjoy and benefit from the services related to the acquired asset. This observation allows us to easily define the right in the ambit of relative rights, such as the right of credit in any case, even when the timeshare does not just work in the form of equity or resort , but also in the form of real state. In confirmation to this is the fact that the right of the timeshare holder lacks the characteristics of immediacy, as mentioned above, and also that one of enforceability *erga omnes*, which are both the basic requirements to outline them in the context of real rights.

However, a second doctrine evaluates some assessments that are diametrically opposed and it outlines the principles absoluteness as inherent to the timeshare rights, that is the enforceability to a third party, immediacy, that is, the ability to obtain any direct benefit from the thing without the necessary and indispensable cooperation of a third party, the principle of permanency (albeit limited to a

period of the year), also combined with the hypothesized applicability to this institution of remedies meant for the defense of property and the possibility to institute some collateral with it.

The enjoyment of property is limited by the hypothecation of a good and its indivisibility, not because these bonds are an obligation for the owner but because they are limitations associated with the ownership. These elements would make the institution in question a real right, but it is not included in the numerous clauses of those rights provided by the civil code, therefore it is an atypical real right. The major criticism of this theory has been the inadmissibility of atypical real rights in our legal system, and, although there is a system of transcription capable of allowing third parties to make themselves well-acquainted of hypothecation and responsibilities on a good, it is out of the roman foundations of our third book, that deals with properties and real rights to assume further rights not prescribed by the law that can reduce or constrain the enjoyment of properties and real rights .

Another doctrine has tried with great difficulty to consider the institution in the context of temporary ownership. This type of property is viewed with particular suspicion, particularly in the case of property in the final term, given the permanence which characterises the law. It should also be said that the timeshare would be only a temporary ownership because it is relatively limited to the context of the annual cycle, but it still retains the characteristic of permanency.

A more traditional hypothesis, instead, includes the timeshare in the categories of existent real rights. A first current of thought states that it is by any means a property right which is not limited in space, but in time. Each of the timeshare holders can enjoy the thing in its time limit without arising state of communion with some other co-owners, so it is a property that is exerted on the turn (on time) , not on the portion (on space).

The proposed possibility to outline a timeshare as part of the usufruct, which appears similar to the limitation in time of a full enjoyment of the good, reflects the need of this right to contrast a bare owner and the holder of a minor real right and the necessary extinction of the right after the holder's death, a feature that does not belong to the timeshare.

It seems more consistent, also because of the operational aims of the institution, to consider it as a hypothesis of communion, as is the case in of this practice. The single timeshare holder is assumed as a purchaser of a portion of the property, becoming a timeshare holder along with other co-owners. They, therefore, prepare a common plan regulations (or take one that is already prepared) in order to determine the alternative enjoyment of the timeshare in the way they define and a hypothecation of the tourist resort that, according to the art. 1112 of the Italian Civil Code, makes goods indivisible. There are some subjects that indeed have disputed this claim in relation to the possibility that the indivisibility of the good in art. 1112 Civil Code may be conventional and not only inherent to the characteristics of the good.

Chapter 2. The first Community directive and the transposition into Italian law: issues concerning regulations and related problems

With D.Lgs. 9 November 1998 n. 427, which transposed the EU Directive 94/47/EC and the D.Lgs. 6 September 2005 n. 206 the Italian legislature was

forced to address the issue of timeshare explicitly by the need to transpose the EU directives on the matter. These guidelines essentially required the Italian legislature to obtain a result in terms of collateral for a buyer of a complex service such as a timeshare, as he was considered as "weak" compared to the power of organized companies that are responsible for the sale and administration of the business operations.

In the version of the Consumer Code of 2005, after giving an accurate explanation of the definitions used and the categories that they fall into, the article n. 69 gives an "identikit" of the minimum physical characteristics of timeshares (minimum duration of three years and the right to use the timeshare for at least one week in accordance with the calendar year) identifying it as a real right or other right concerning the enjoyment of one or more real states. Subsequently to art.72, the enjoyment of the term timeshare is only due in the case of real rights.

This apparent contradiction by legislature is justified by the prevalence of art. 72 itself: for the legislature the timeshare is a real right of property, unless the consumer collateral also for those realities, that is mostly already in place, whereas the enjoyment of property does not derive from an absolute and immediate right on the thing, but from a genuine right of credit.

This legislation requires for the conclusion of the timeshare contract, in accordance with the regulations of Community legislation, specific and stringent requirements as it concerns the form and content, in addition to the possibility of *ad nutum withdrawal* with evident purpose of defense and the obligation of a bank or insurance guarantee to carry out the performance of the contract and the nullity of differing clauses or additional agreements.

The context described, in force until the amendments of 2011 as described below, proves to be consistent with the objectives of Community legislature, but certainly it is less consistent with the Italian legal system, especially when the legislator wanted to intervene in an incisive way by classifying the timeshare as a real right with the consequences of the case.

Chapter 3. The second EU community directive and related proposals in the Italian legislation

The need to provide even greater defense for the consumer, due to the often elusive business practices of legal system, led to the adoption of Directive 122/2008, whose implementation in our country, initially scheduled for February 23 2011, saw a solution only after several consultations which were carried out in June with the enactment of Legislative Decree n. 79/2011 .

The new proposals that the Directive of reference suggested to introduce were significant in its content, but not in its procedures, as it moved in the direction of strengthening the bulk and operational instruments that were already in place in the previous draft of the Consumer Code, such as the withdrawal of defense and guarantees that are mainly intended as instruments for the basic defense of the weaker party, which have been re-assessed in terms of procedures and operability .

What we are most interested in, for the purposes of our analysis, is that the legislature has significantly revised the definition of the timeshare contract and the law related to it, stating that "*A timeshare contract is a contract for a term*

exceeding one year by which a consumer, acquires the onerous right to use one or more accommodation for overnight stay for more than one period of time". With this definition, the legislature appears smartly inspired by Solomon principles, as with the excuse to give a definition as broad as possible of the term "timeshare" in order to extend, as dictated by the Community, as much as possible the defense of all consumers with respect to such operations, eliminates any reference to the section of real right, and defines the timeshare a mere right of enjoyment. It should now be analysed with respect to this new legislation if the legislature intended to think in the direction in which a timeshare has been defined above, as a real right even if now this legal defense also extends to the compulsory figures that are comparable as it concerns its effects, or the new definition excludes the reality of the law in question. This has important implications for defense, because, as we will show next, the transfer of real property rights is already characterised by specific defenses in our system whose function may be already suitable for the defense of the consumer and would make new corrective law unnecessary.

Chapter 4. The solutions adopted and the economic efficiency

The solution adopted by the Italian legislator in the first reception of EU Directives and the first Legislative Decree n. 427/1998 and 206/2005 is an extremely protective choice, but economically inefficient. The legislator is obliged to transpose the EU directive, a standard directive and not conditioned by the peculiarities of the individual jurisdictions. The Community legislation reflects on the weak position of consumers in relation to the purchase of a timeshare that seems economically attractive, but legally insidious, therefore this fact can be seen as a potential source of deception. The first legislator requirement is that of having to reduce information asymmetries as it concerns the weaker party by placing stringent requirements on the nature and characteristics of the deal. In addition, it is expected the further corrective withdrawal provided *ad nutum* and in favour of the weaker party, which shows to be hugely effective because it gives an infinite potential to the purchaser, including the support of a hypothetical, unmotivated withdrawal (although in strict time limits). Finally, the guarantee of an economic nature, the bank guarantee, to go forward with the of the agreement of the contract are also very effective.

So far, the operability of the remedies available is theoretically consistent and compatible with economic efficiency, because the higher cost incurred by the seller of a bank guarantee or insurance and risk of paralysis of the deal in the immediate conclusion of the first period is balanced by greater economic return of the piecemeal sale of the good and the undisputed attractiveness of the purchase. However, the Italian legislator wants to do too much, and also in order to solve the above-mentioned diatribes on the identification of the legal nature of the institution in question, it goes right to define it as a real right. The choice is appropriate since the Italian civil law system, after evaluating the economic importance transfer of a real state transfer, it has undergone a strict evaluation that provides, among the salient features of the transcript concerning the purchase for certain effectiveness against third parties, the status for the conditions of a proper sale but it is completed in the necessity, of the ministry

deed, through the necessary conclusion of a public or private deed, for the necessary transcription that makes the transfer enforceable against third parties. This means that, any real right transferred, in order to be transcribed, requires the notary overlook for the conformity of the goods to the features provided by the law, which is already a sufficient guarantee for the weaker party.

Given that the deed practices have a cost to be afforded by the purchaser, though they are not relevant, the legislator has reinforced the defenses by effectively doubling the costs afforded by the consumer, who must not only bear the deed costs, but also those of a guarantee and of a withdrawal, which bumps up the final cost of the good purchased . All this is carried out in order to obtain two forms of defense that not complete each other, but in fact they overlap.

Even the new formulation of the Decree 79/2001, with the deletion of any reference to the real right, fails to deal with these perplexities. The legislative choice does not seem to take a position on the true nature of the timeshare rights, leaving the interpreter substantially with the same doubts that preceded the D.Lgs. 427/1998 and 206 /2005. And there are further aggravating due to the legislator that has absolutely not taken care of such issues, despite the chance of the amendment of the law to solve those legislative gaps which were already evident in the earlier draft of the Consumer Code. The withdrawal in fact, which aimed at eliminating the effects on the contract, collides with the purchasing system of law, which, especially if it is defined as a right real, it needs the public form of the transfer, and its transcription. In case of withdrawal, however, that also needs a transcription, it is not required any specific form, with all the associated problems of accessibility to public land registries.

In this respect, the aim of a more immediate practice of the right of withdrawing, which the legislature has carried out by an extension of the time of the practice itself and by the stringent *disclosure* obligations, whose non-compliance is heavily sanctioned, together with the predisposition of forms that are preordered by the same law to perform it, loses all values to the extent that it is not taken care of the aspect of the enforceability against a third party of this recognized right.

Chapter 5. Proposals for a regulation on timeshare that are really responsive to the Community objectives and consistent with the statutory Italian system

It is clear that the intention of the legislator is to provide an efficient defense for the consumer in relation to the timeshare contract.

The proposals carried out by the Community legislator, however, even in new amendments reveal to be balanced for legal realities that do not have their own categories and tools in our civil code. The Italian legislator, while acknowledging the final objectives of the Community, should make better use of the tools of his own sort. The enhancement of the deed overlooking, even in timeshare operations, would have significant cost savings and a corresponding defense for the consumer. Firstly, this would be because the deed overlooking on business guarantees a safe completion of that business and consequently of that deal, and not a corrective statement (guarantee) or a material one (withdrawal) in case of a possible failure of the same , and secondly because this type of control would be performed according to professional standards which

the State directly oversees and at fixed costs and measurable ex ante as they are determined on the base of the current rate while other remedies, such as bank guarantees or predictions of a withdrawal are affected by market fluctuations and traders' speculations.