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### **Modernising Iraq: A Legislative Proposal to Regulate Timesharing Agreements in Iraq**

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**Modernising Iraq: A Legislative Proposal to Regulate Timesharing  
Agreements in Iraq**

By

Dhurgham Fadhil Hussein Al-Ali, LLB, LLM (Iraq)

A thesis submitted to the University of Bangor, School of Law in fulfilment of the  
requirements for the award of degree of Doctor of Philosophy

July 2017

## Abstract

This thesis seeks to provide the Iraqi legislature with a proposal to regulate the timesharing industry in Iraq. The aim of the primary research question of the thesis is to ascertain what features of legal regimes for timeshare are likely to provide the optimal system of a timeshare operation in any jurisdiction, from which a legislative proposal for Iraq will be suggested. In answering this research question, the thesis has analysed the problems associated with the timeshare market. The analysis of the problems has been done by consulting the European Timeshare Directives, European timeshare policy documents, key cases and relevant literature. This is to establish an evaluative framework from which a set of questions has been derived. These questions have then been used to carry out a functional analysis in respect of timeshare models which are in use in the common law jurisdictions of England and Wales and some of the States in America because a significant proportion of the world's timesharing projects occur in these jurisdictions. The thesis has also considered the timeshare models which are in use in the civil law jurisdictions of France and Egypt as timeshare projects are prevalent in those countries, and also the Iraqi civil code is based upon the civil codes of France and Egypt. This is to determine the features of legal regimes which are likely to lead to the optimal system of timeshare in any jurisdiction.

Once this has been achieved, the thesis will then move to assess the extracted optimal features in terms of compatibility to Iraqi law in order to make a legislative proposal for Iraq in respect of timeshare.

This thesis is a doctrinal legal research, and it has largely used the comparative law methodology, as it is extremely useful for law reform in developing countries.

*This thesis is dedicated to my parents, my wife and my children*

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## **PART I**

### **Towards a Functional Analysis: Extracting the Optimal Features and Developing an Evaluative Framework**

This Part introduces the fundamental issue of timeshare. This is essential because it paves the way to understanding the discussion in the chapters which follow concerning the legal models that are used to regulate timeshare projects in the selected jurisdictions. Moreover, this Part analyses the problems associated with timeshare so as to establish an evaluative framework, from which a set of questions are derived. Those questions will be used in Part II to carry out a functional analysis in respect of selected timeshare models in order to determine the features of legal regimes which are likely to lead to the optimal system of timeshare in any jurisdiction.

## CHAPTER ONE: INTRODUCTION

Timeshare agreements, until relatively recently, did not attract the interest of the Iraqi legislature. The Iraqi Civil Code No.40 of 1951 makes no provision for timeshare agreements. However, there is now a need to regulate timeshare agreements in Iraq because one of the strategic goals of the Iraqi government is the development of the tourism sector in order to increase and diversify the sources of income in Iraq.<sup>1</sup> It is anticipated that the annual rate of growth in Gross Domestic Product for the years from 2013 to 2017 is 7.5% without oil revenues.<sup>2</sup> This is because of three main factors. Firstly, the favourable climate and geographical location of Iraq.<sup>3</sup> Secondly, Iraq contains a significant number of tourist sites such as Hanging Gardens of Babylon, city of Nimrud and the Islamic holy shrines of Imam Ali, Imam Hussein, Imam Abbas, Imam Kadhim, Imam Askari, peace be upon them.<sup>4</sup> Finally, the steady growth of the tourism sector in Iraq.<sup>5</sup>

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<sup>1</sup> It is believed that it is vital for the Republic of Iraq to enact a sound and well-structured legislation to regulate the timeshare industry as it is the backbone of the tourism sector across the world, as we will see in Chapter Two. In this way, we can offer a high probability that the tourists will come back to Iraq year after year because they know that there is a second home waiting for them at their favourite destination, with all the amenities of hotel accommodation.

<sup>2</sup> Ministry of Planning in Iraq 'The Iraqi Economic Development Plan for the years 2013-2017' (Baghdad 2 January 2013) 27.

<sup>3</sup> Iraq is one of the Arabic states. It is located between two Latitudes of 25/37-5/29 and Longitudes of 45-48, 45-38 in the warm section of the northern moderate area. Iraq is considered to be a ground bridge between three continents, Asia, Europe, Africa and a bridge conductor between the Indian Ocean and the Mediterranean Sea, bounded in the north by Turkey, in the east by Iran and along the western border by the Syrian Arab Republic and the Hashemite Kingdom of Jordan. In the south, it is bounded by Kingdom of Saudi Arabia, Kuwait and by the Arabian Gulf.

<sup>4</sup> Iraq is the cradle of the first civilizations, such as Sumer, Babylon, Acadian and Assyria. Moreover, Iraq is the land of the first prophets like Noah, Ibrahim, Younis, Uzayr and others. Consequently, Iraq contains many famous archaeological sites dating back thousands of years that are centres of attraction for tourists from all over the world, such as the ancient monuments of the Sumerian civilization in the south of Iraq. The ziggurat is one of the famous examples of the ancient monuments of the Sumerian civilization. It is a temple to the gods of Sumerians, built like an amphitheatre. It is composed of several layers of mud, and is situated in the Sumerian city of Ur, 17 km southeast of the city of Nasiriyah in southern Iraq. Further, there are the ancient monuments of the Babylonian civilization in central Iraq. For example, the Hanging Gardens of Babylon, a city which lies at a distance of 90 km south of Baghdad, and which is one of the Seven Wonders of the World. In addition, there are the ancient monuments of the Assyrian civilization in the north of Iraq such as the ancient city of Nimrud, which is regarded as the pearl of the Assyrian civilization. This historic city, Nimrud, is located at the banks of the Tigris River, 30 km south of Mosul, the largest city in the north of Iraq.

Moreover, Iraq has many natural tourist areas such the breath-taking views of the marshes in the south, the picturesque mountain landscapes in the north, and the scenic beaches of Tigris and Euphrates.

Ultimately, Iraq contains many religious tourist sites that are centres of attraction for the followers of Monotheistic religions from all over the world. Iraq includes the holy shrines of prophets such as Abraham, Noah and Uzayr as Iraq is the land of the first prophets. In addition, Iraq has many Islamic holy shrines. For example, the shrine of Imam Ali, peace be upon him, in Najaf, the shrines of Imam Hussein and Imam Abbas, peace be upon them, in Karbala, the shrines of Imam Kadhim, peace be upon him, and Imam Abu Hanifa, God's mercy, in Baghdad, the shrine of Imam Askari, peace be upon

The non-regulation of timeshare agreements under the Iraqi Civil Code causes the author to question whether it is possible to extract the optimal features present in the legal regimes for timeshare in the countries under discussion and then put them in a form of a legislative proposal for the benefit of the Iraqi legislature in order to regulate timeshare projects in Iraq. This is the main question which this thesis attempts to answer. The aims and objectives of this research, the research statement, the research questions, the research methodology and the structure of this work are set out within this introductory Chapter.

## 1.1 AIMS AND OBJECTIVES

This thesis will examine four legal models which are in use in four selected jurisdictions. Timesharing models in the common law jurisdictions of England and Wales and some of the States in America<sup>6</sup> will be considered along with timesharing models in the civil law jurisdictions of France and Egypt. An examination of the legal models which are used in some of the United States of America and England and Wales as common law jurisdictions is necessary because a significant proportion of the world's timesharing projects are exercised in those jurisdictions, as demonstrated in Chapters Four and Seven. Furthermore, an analysis of the legal models which are used in France and Egypt is relevant because timeshare projects are prevalent in those countries, and also the Iraqi Civil Code is based upon the civil codes of France and Egypt.

The aim behind this examination is the identification of the features of timeshare legal regimes which are likely to provide the optimal system of a timeshare operation in

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him, in Samarra and many other holy shrines in all governorates of Iraq. This is because Iraq was the capital of the Arab-Islamic Empire during the Abbasid period. Iraqi Ministry of Tourism and Antiquities, 'An overview of Iraq' <<http://www.mta.gov.iq/index.php?name=Pages&op=page&pid=100>> accessed on 1 October 2015.

<sup>5</sup> According to the statistics of the Iraqi Ministry of Planning, there is a steady increase in the number of foreign tourists as the number of tourists who came to visit only the religious sites in 2011 exceeded 1,500,000 tourists. This reflected positively on the growth of the tourism sector in Iraq as the number of hotels increased by 2.4% from 2009 to 2011, and the number of tourism companies increased by 129% from 2009 to 2011. It is also participates in boosting the Iraqi economy as the revenue earned from the tourism sector reached 98.3billion Iraqi Dinar in years 2010 and 2011. Ministry of Planning in Iraq 'The Iraqi Economic Development Plan for the years 2013-2017' (Baghdad 2 January 2013) 107-109.

<sup>6</sup> In this thesis, the American Model will be analysed in accordance with the provisions of the Timeshare Ownership Act which is adopted by the Resort Time-Sharing Council of the American Land Development Association and the National Association of Real Estate License Law Officials. This is because it has formed the backbone for many states' timeshare legislation such as Nebraska, Nevada and Tennessee. For more details, please refer to Chapter Seven.

any jurisdiction. This is crucial as these features will be suggested to the Iraqi legislature so as to be included in the legislation which is planned to be enacted to regulate the current and future timeshare projects in Iraq.

## 1.2 THE RESEARCH QUESTIONS

This thesis attempts to answer one main question and three sub-questions:

### **Main question:**

What features of legal regimes for timeshare are likely to provide the optimal system of a timeshare operation in any jurisdiction? A legislative proposal for Iraq will be suggested following this assessment.

### **Sub-questions:**

Three sub-questions need to be answered in order to answer the main question of this research. These questions are:

1. What are the essentials of timeshare? The essentials of timeshare will be extracted by analysing the definition of timeshare pursuant to the *repealed* European Timeshare Directive 94/47/EC of 1994<sup>7</sup>, the *current* European Timeshare Directive 2008/122/EC of 2009<sup>8</sup> and the related European timeshare policy documents. The answer to this question is critical as it will lead to define the concept of timeshare which is very important to distinguish it from other holiday products such as hotels.<sup>9</sup>
2. What are the optimal features? The optimal features will be extracted by analysing the problems associated with timeshare. The analysis of the problems will be done by consulting the European Timeshare Directives, European timeshare policy documents, key cases and relevant literature. The answer to this question is crucial as it will lead to establish an evaluative framework from which a set of questions will be derived.<sup>10</sup> Those questions will then be used to undertake a functional analysis to the timeshare models

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<sup>7</sup> Directive 94/47/EC of the European Parliament and the Council 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 [1994] OJ L 280/83 (hereinafter the repealed Directive).

<sup>8</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L33/10 (hereinafter the current Directive).

<sup>9</sup> Chapter Two is allocated to answer this question. See the outline of chapters.

<sup>10</sup> Chapter Three is allocated to achieve this objective. See the outline of chapters.

which are in use in the countries under consideration to determine the features which are likely lead to the optimal system of timeshare in any jurisdiction.<sup>11</sup>

3. Are the optimal features compatible with the Iraqi legal system? The answer to this question is vital as it will lead to provide the Iraqi legislature with a proposal to regulate the timesharing in Iraq in a way which is compatible with the Iraqi legal system.<sup>12</sup>

### 1.3 RESEARCH METHODOLOGY

This thesis is a doctrinal legal research. It will use the comparative law methodology as it is extremely useful for law reform in developing countries. According to Zweigert and Kotz:<sup>13</sup>

Comparative law has been proving extremely useful in the countries of Central and Eastern Europe where legislators face the need to reconstruct their legal systems after the collapse of the Soviet system. The experience of other European countries helps them choose the solution which best suits their own legal traditions, overshadowed for much of the century though they have been. Even outside Europe states which used to be Soviet republics are finding that foreign laws can be of assistance in framing domestic legislation, as have the Republic of China and many of the developing nations in Africa.

As the main objective of this thesis is the reformation of the Iraqi law by way of making a legislative proposal for the Iraq legislature in respect of timeshare, comparative law seems the best methodology to be used to meet this objective especially that Iraq, after the fall of its dictatorial regime, is looking forward to modernise its legal system so as to keep pace with the developed nations. This due to the fact that legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law.<sup>14</sup>

This thesis will concentrate only on the mature legal systems because 'it is hard to take account of everything as because experience shows that as soon as one tries to cover a wide range of legal systems the law of diminishing returns operates'.<sup>15</sup>

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<sup>11</sup> Chapters Four, Five, Six and Seven are allocated to achieve this objective. See the outline of chapters.

<sup>12</sup> Chapter Eight is allocated to achieve this objective. See the outline of chapters

<sup>13</sup> Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (3<sup>rd</sup> edn, Oxford University Press, 1998) 17.

<sup>14</sup> Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (3<sup>rd</sup> edn, Oxford University Press, 1998) 16.

<sup>15</sup> Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (3<sup>rd</sup> edn, Oxford University Press, 1998) 41.

Therefore, this thesis will examine only the timeshare systems in two common law jurisdictions, namely: England and Wales and some of the States in America along with the timeshare systems of two civil law jurisdictions, namely: France and Egypt. This is for the reasons set out in Section 1.1.

It is worth pointing out that this thesis relies on primary and secondary sources. The primary sources consist of legislation and cases which are relevant to this study. The secondary sources are varied because they include books, articles, reports, policy documents, newspapers, conference proceedings and other periodicals.

## **1.4 MAIN DIFFICULTIES**

The author faced many difficulties in undertaking this study. Most notably, there is no legal regulation of the timeshare agreements in Iraq as was highlighted at the beginning of this Chapter, and therefore a lack of scholarly works on timesharing in Iraq. Thus, this thesis is the first academic study to explore timesharing in Iraq. Moreover, the scarcity of the academic studies in Britain in respect of timesharing despite the fact that timesharing started in Britain in 1979, as we will see in detail in Chapter Two. Furthermore, the legal printed materials in respect of timesharing are out dated as the majority of the books and articles relating to timesharing were printed and published at the end of the twentieth century. In addition, the lack of co-operation of the timeshare companies. The author wrote to many timeshare companies in the jurisdictions under discussion to obtain new models of timeshare agreements. However, the vast majority of those companies did not respond to the request of the author in a positive way. Further, there is a paucity of the timeshare judgments concerning the determination of the nature of timeshare, as most of the available judgments address taxation and criminal issues. In addition, there are no sources in English which address the Iraqi legislations in general and the Iraqi Civil Code in particular. Therefore, the author has had to rely on important books and articles written in Arabic. The related content of these books and articles has had to be translated from Arabic to English by the author. Finally, there is no *official* translation (a translation of Iraqi legislations from Arabic to English performed or approved by the Ministry of Justice in Iraq) of the Iraqi legislation. Therefore, the author has had to rely on *unofficial* translation of Iraqi legislation which are related to the subject matter

of this study such as the translation which was set up by S J Quinney College of Law, at the University of Utah.

## 1.5 SCOPE OF RESEARCH

The following issues will be excluded from the scope of research:

1. Timesharing which applies to non-touristic real properties such as warehouses and stores.
2. Long-term holiday products such as holiday discount clubs, vacation exchange clubs, international travel clubs and so on. They are touristic products created, originally, to circumvent the strict legislation which has been enacted to regulate timeshare in Europe for the purpose of protecting the timeshare holders, specifically the repealed European Timeshare Directive 94/47/EC<sup>16</sup> and the other statutes which derive from it.<sup>17</sup> There are three features which make long-term holiday products appear similar to timeshare, despite the fact that they are not timeshare. First, the consumer enters a contract for the repeated usage of holiday accommodation; second, an upfront payment is requested; and third, aggressive marketing methods are used to sell these products as was the case in the timeshare market before the enactment of the repealed Directive.<sup>18</sup> According to Article 2/1/b of the current European Timeshare Directive 2008/122/EC, the main differences lie in the fact that the main goal of the long-term holiday products is to provide the vacationers *discounts or other benefits in respect of accommodation*, in isolation or together with travel services, whereas the main aim of timeshare is just giving the timeshare holders the right to use one or more overnight accommodation for more than one period of occupation during the period of contract.<sup>19</sup>

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<sup>16</sup> Directive 94/47/EC of the European Parliament and the Council 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 [1994] OJ L 280/ 83.

<sup>17</sup> Worth mentioning this legislative deficiency has been surmounted by the current Directive 2008/122/EC On the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Products, Resale and Exchange Contracts [2009] OJ L33/10 where the regulation of these sorts of products was one of its aims. However, the current Directive retains the distinction between timeshare and the other sorts of holiday products as will be seen in Section 2.4 of Chapter Two.

<sup>18</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ SUMMERAY) {COM(2006) 303 final} {SEC(2006) 743}, 17. The aggressive marketing methods are analysed in detail in Phase I of Chapter Three.

<sup>19</sup> For more details about the long-term holiday products, please refer to Chapter Two/ Section 2.4.3.3.

3. Taxation issues with regard to timeshare will be excluded from the scope of this thesis. This due to the fact that, under the Iraqi law, the regulation of tax issues fall under the umbrella of public law while this thesis is allocated to regulate timeshare issues which fall under the umbrella of private law. However, this thesis will refer to some of the tax issues insofar as these issues are related to the subject matter of the thesis.
4. Conflicts of laws. Timeshare agreements concluded in Iraq and involve foreign element may give rise to problems involving the application of a body of law known as private international law. This thesis will not explore these problems and how they can be solved. This is because the conflict of laws is already regulated by the Articles 10-34 of the Iraqi Civil Code No. 40 of 1951.

## **1.6 OUTLINE OF CHAPTERS**

There now follows a brief overview of the content of each chapter. This thesis will consist of eight chapters and an appendix as follows:

### **CHAPTER TWO: AN OVERVIEW OF TIMESHARING**

This Chapter throws some light on the timesharing business in general. It will examine the concept of timesharing taking into account its origin and growth. It will also provide an overview of the main players in the timesharing industry: its products; the function of the exchange system; its growth and future trends. This Chapter is essential because it introduces the fundamental issue of timeshare business, and it paves the way to understanding the discussion in the chapters which follow concerning the legal models that are used to regulate timeshare projects in the countries under discussion.

### **CHAPTER THREE: EXTRACTING THE OPTIMAL FEATURES**

This Chapter aims to establish an evaluative framework by identifying the features of legal regimes for timeshare that are likely to provide the optimal system of a timeshare operation in any jurisdiction. This Chapter is essential because it produces the framework which then be used to carry out a functional analysis with regard to the timeshare models in the countries under assessment so as to extract the optimal features available in the timeshare legal regimes of these countries.



## **CHAPTERS FOUR, FIVE, SIX AND SEVEN**

The aim of these Chapters is to carry out a functional analysis for the timeshare models in England and Wales, France, Egypt and some of the States in America respectively. This analysis shall be carried out by applying the evaluative framework established in Chapter Three to the timeshare legislation and legal arrangements that operate in the aforementioned jurisdictions. This analysis is crucial as it will lead to the identification of the optimal features present in the legal regimes for timeshare in above-mentioned jurisdictions that could be used to provide the optimal system of a timeshare operation in any jurisdiction.

## **CHAPTER EIGHT: THE COMPATIBILITY OF THE OPTIMAL FEATURES WITH THE IRAQI LEGAL SYSTEM**

This Chapter is allocated to examine the compatibility of the extracted optimal features with the Iraqi law in order to make a legislative proposal for Iraq in respect of timeshare.

## **APPENDIX I: THE RIGHT OF OCCUPANCY IN ROTATION AS A PROPOSED RIGHT IN REM TO REGULATE THE RELATIONSHIP BETWEEN DEVELOPERS AND TIMESHARE HOLDERS IN IRAQ**

This appendix is devoted to make a legislative proposal for Iraq in respect of timeshare in the light of the optimal features extracted from the countries under consideration.

## CHAPTER TWO

### AN OVERVIEW OF TIMESHARING

#### 2.1 INTRODUCTION

The ‘timeshare industry’ is relatively new, having begun some fifty years ago. Today timeshare, in its various forms throughout the world, is an important segment of the tourism sector<sup>1</sup> because it helps ‘in reducing seasonality in the flow of tourists, generating employment and promoting the development of regions which manage to attract timeshare-related investment’.<sup>2</sup> According to Resort Development Organization, there are approximately 20,000,000 timeshare holders distributed amongst 5,316 resorts across the world.<sup>3</sup> In the United States of America, there are more than 3,000,000 timeshare holders distributed amongst 1,600 resorts.<sup>4</sup> In Europe, there are approximately 1,500,000 timeshare holders distributed amongst 1,345 resorts. The remainder are distributed throughout the rest of world.<sup>5</sup>

This Chapter will define the basic concepts of the timeshare industry in order to contextualise the following elements of the thesis: (1) the analysis of the problems associated with timesharing. These problems will be explored and analysed in detail in Chapter Three, (2) the legal arrangements which are used to construct the timeshare projects in the countries under discussion. These arrangements will be explored and analysed in detail in Chapters Four, Five Six and Seven.

Accordingly, this chapter will be divided into seven sections. The first is the introductory section which is allocated to give the reader an overview of the content and structure of Chapter Two. Sections two and three will explore the background and history of timesharing. Section four will define and distinguish timesharing from other holiday products such as hotels. Section five will consider the role of the main players in the timesharing industry. Section six will consider the timeshare products. Section

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<sup>1</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 9.

<sup>2</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 12.

<sup>3</sup> Resort Development Organization, Media Pack (London 2016) 11.

<sup>4</sup> David A Bowen, ‘Timeshare Ownership: Regulation and Common Sense’ (2006) 18 Loyola Consumer Law Review 460.

<sup>5</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 9.

seven will highlight the most important findings and suggestions which were dealt with in detail in this Chapter.

## 2.2 THE GENERAL CONCEPT OF TIMESHARING

### 2.2.1 General Background

At the outset it is worth mentioning that timesharing takes its name and notion from the computer industry in the United States of America where it reflects the right of a computer user to access a computer, and not having to pay more than the actual time for which he uses it.<sup>6</sup> In fact, the goal behind this was to facilitate the utilisation of an expensive facility by enabling many individuals to share the cost of using it between them.<sup>7</sup> However, currently timesharing is basically a commercial notion used in the tourism sector.

The concept of tourist timesharing originated and evolved in the field of immovable properties. It refers to an interest in a ‘vacation’ accommodation in a multi-accommodation development.<sup>8</sup> Nevertheless, the concept of timesharing has recently been expanded to include movable properties such as yachts, boats and jets.<sup>9</sup> Furthermore, some of the scholars consider that the notion of timesharing can be

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<sup>6</sup> Peter Sparkes, *European Land Law* (Hart publishing, 2007) 248, Joseph M. Meier, ‘Timesharing-Oregon’s Legislation’ (1984) 20 *Willamette Law Review* 283; Karen K. Duke, ‘Timesharing: A Unique Property Concept Creates the Need for Comprehensive Legislation’ (1981) 25 *Saint Louis University Law Journal* 629; David R. Dubord, ‘Time Share Condominiums: Property’s Forth Dimension’ (1981) 32 *Maine Law Review* 181. Katherine A. McDowell, ‘Recent Developments in Florida Timesharing: Good News and Bad News for the Timeshare Consumer’ (1983-1984) 13 *Stetson Law Review* 591.

<sup>7</sup> Hilary J. MacLeod, ‘An Introduction to Timesharing’ (1984) 25 *New Zealand Valuer* 497.

<sup>8</sup> In the past, condominiums (i.e., a block of flats) in tourist areas were formed and included the vast majority of the facilities that were used for timeshare schemes. Today, timesharing includes more than this, such as hotels, vacation cottages, twin houses, resorts and even castles. According to a research conducted by Zervigon ‘condominiums constitute about sixty percent of the facilities in use for time share projects, and hotels and motels about thirty percent’. Single family vacation homes forms the rest. See, Mary Keller Zervigon, ‘Time Share: The New Vacation Home’ (1983) 29 *Loyal Law Review* 404.

<sup>9</sup> Joseph M. Meier, ‘Timesharing-Oregon’s Legislation’ (1984) 20 *Willamette Law Review* 283, Lisa Ann Schreier, *Timeshare Vacation for Dummies* (1ed Wiley Publishing Inc. 2005) 17. Ellen H. Pollack, ‘Time-Sharing or Time Is Money But Will It Sell?’ (1982) 10 *Real Estate Law Journal* 283. D W Butler, ‘Time-Shares Conferring Ownership’ [1985] *Acta Juridica* 315. These types of timesharing will not be discussed because they fall outside the scope of this thesis. For more details please refer to Chapter One, Section 1.5.

applied outside the tourist market, for example in commercial projects comprising warehouses or offices.<sup>10</sup>

## **2.2.2 The categories of timeshare legal arrangements**

Timesharing can be divided into two major categories: fee ownership and non-fee ownership.

### **2.2.2.1 Fee ownership arrangements**

Under the fee ownership arrangements, a timeshare purchaser receives an infinite possessory ownership interest, which can be sold, devised, transferred, encumbered, and mortgaged.<sup>11</sup> Fee timesharing or timeshare ownership, is based on the common law concepts of the tenancy in common and interval ownership.<sup>12</sup> Under the tenancy in common, the purchaser is given an undivided interest in the fee, coupled with an exclusive right of occupancy during a designated time period.<sup>13</sup> With the interval ownership, during the life of the project, title to a timeshare unit circulates among interval owners (timeshare holders) according to a recurring fixed schedule, vesting in each owner for a period of time until a date certain (the date of the termination of the life of the timeshare project) when title vests in all owners as tenants in common.<sup>14</sup>

The fee ownership arrangements are prevalent in the United States of America and will be discussed in detail in Chapter Seven.

### **2.2.2.2 Non fee ownership arrangements**

There are three types of non-fee ownership. The first is the right-to-use variety, which includes both timeshare licence and timeshare lease. The second is the non-ownership variety, which includes usufruct in common and usage in common. The third is the part ownership (quasi-ownership) variety, which is an arrangement to purchase stock or membership rather than an interest derived from real property.

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<sup>10</sup> D W Butler, 'Time-Shares Conferring Ownership' [1985] *Acta Juridica* 315 and the references mentioned by him in footnotes 4, 5, and 6 of his mentioned article, Tom Eastman, 'Time Share: A Primer' (1981) 57 *N.D. L. Rev.* 152.

<sup>11</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 3-14.3.

<sup>12</sup> George M. Straw, 'Representing a Purchaser of a Time Share' (1982) 11 *Colorado Law Review* 1544.

<sup>13</sup> Peter M. Gunnar, 'Regulation of Resort Time-Sharing' (1977) 57 *Oregon Law Review* 33.

<sup>14</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 3-27. The fee ownership arrangements will be explored in detail in Chapter Seven.

Right-to-use is a descriptive term in the timeshare industry used to refer to the arrangements where a purchaser acquires a contractual right to use a designated unit or type of unit in a timeshare resort for a given period of time each year for a certain number of years. With the right-to-use arrangements, *no* fee interest in real property is transferred to the purchaser and may take the form of lease or licence.<sup>15</sup> The right-to-use arrangements are prevalent in England and Wales and will be explored in detail in Chapter Four.

Under the timeshare lease, the developer retains title, while the purchaser obtains, in effect, a prepaid lease for a designated unit for fixed period each year. When the lease expires, the right to occupy revert to the developer.<sup>16</sup> A timeshare licence is little different from timeshare lease. Licence is merely a prepaid permission to use the developer's property for a fixed period each year. The interest is merely contractual, and the licensee acquires no interest in the real property itself.<sup>17</sup> Once the timeshare licence expires, so too does the timeshare holder's right.<sup>18</sup>

With the non-ownership arrangements, the developer retains the bare ownership of the timeshare complex.<sup>19</sup> However, the developer transfers to the timeshare holders one of the original real rights<sup>20</sup> which emanates from ownership right under the civil law system, namely, usufruct right<sup>21</sup> or usage right<sup>22</sup> for a limited period of time. This period usually corresponds to the estimated economic life of the timeshare complex. At the end of above-mentioned period of time, the developer, as the owner, regains

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<sup>15</sup> Diane M Messer, 'An Overview Of Time-Sharing and the Tennessee Time-Share Act: Are Purchaser Now Protected?' (1986) 53 Tennessee Law Review 780.

<sup>16</sup> Terry L. Arnold, 'Real Estate Timesharing: Construction of Non-Fee Ownership' 26 Washington University Journal of Urban and Contemporary Law 221. This arrangement will be explored in detail in Chapter Four.

<sup>17</sup> Robert E. Dady and Robert S. Freedman, 'To Deed or Not to Deed: That Is the Timeshare Question' [2001] Probate and Property 49; Michelle D. Brodie, 'Regulating of Time Sharing in South Carolina' (1986) 37 South Carolina Review 532.

<sup>18</sup> The duration of the right to use arrangements usually ranges from fifteen to forty consecutive years. See, Kathleen Conroy, 'Assessing the Fee Timeshare Property' (1984) 25 New Zealand Valuer 503.

<sup>19</sup> The bare ownership is defined as 'ownership of a piece of property without the right to use and derive profit from that property'. Collins dictionary on <<http://www.collinsdictionary.com/dictionary/english/bare-ownership>> accessed on 12/09/2015.

<sup>20</sup> Original real rights are limited property rights with real effect derived from a right of ownership of a movable or immovable thing. This concept will be explored in detail in Chapter Six.

<sup>21</sup> Usufruct right is a Civil Law term referring to the right of one individual to use the property of another person and to draw from that property all the profit, utility and advantage which it may produce, provided its substance is neither impaired nor altered. This concept will be explored in detail in Chapter Six.

<sup>22</sup> Usage right is a Civil Law term referring to the right of one individual to use the property of another person, without destroying its substance. This concept will be explored in detail in Chapter Six.

the right of usage or the usufruct right which he transferred to each timeshare holder in the project. The non-ownership arrangements are used to construct timeshare projects in Egypt and will be analysed in detail in Chapter Six.

Under part ownership form of non-fee timesharing (quasi-ownership forms), the developer forms a corporation or club consisting of persons who are interested in owning timeshare (timeshare holders). If the corporation form is used, owners purchase shares entitling them to the right to occupy a unit.<sup>23</sup> The corporation form is prevalent in France and will be analysed in detail in Chapter Five. With the club form, a trustee holds the units for the use of timeshare holders as club members. Thus, members acquire a right to use a unit managed by the club through the payment of membership and maintenance fees.<sup>24</sup> The club form is common in England and Wales and it will be analysed in detail in Chapter Four.

### 2.2.3 Patterns of use

Within the aforementioned legal forms of timesharing, there are numerous types of use patterns or timeshare products. In general, patterns of use are either built on the basis of a points system or on the basis of a time periods system.<sup>25</sup> These different forms are considered next.

#### 2.2.3.1 *The time periods system*

Under this system, the timeshare holder has the right to occupy a designated accommodation or type of accommodation in a timeshare resort for a certain period of time, usually calculated on a weekly basis, every year for certain number of years.

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<sup>23</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 273.

<sup>24</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 44.

<sup>25</sup> The products of timesharing will be addressed in detail in Section 2.6. Patterns of use can be defined as the system whereby a timeshare project is operating. It can also be defined as the way whereby the timeshare holders can occupy the accommodations of a timeshare project and use its recreational facilities.

This period of time is either fixed<sup>26</sup> or rotating<sup>27</sup>. It can also be floating during the calendar year or within a seasonal range.<sup>28</sup>

### *2.2.3.2 The points system*

Under this system, the timeshare holder purchases a membership in a club that works on a points basis instead of time periods. The membership is converted to a number of points each year which can be used to book a period or periods of time at one of the resorts operated by the Club in whole or in part.<sup>29</sup>

## **2.3 HISTORY OF TIMESHARING**

It is not an easy task to determine the precise date when the timeshare industry first began. However, there is evidence that the industry had its origins in Europe in the mid-1950s, through a tourism company called 'Eurotel'.<sup>30</sup> This company was founded so as to establish a group of hotels throughout Europe and sold the rooms in each hotel to individuals on the basis that they were entitled to a limited use of their rooms coupled with some privileges in the other hotels operated by Eurotel, such as getting more favourable rates for occupying a room or a suite.<sup>31</sup> Despite the fact that the freehold estate of the hotels' rooms were transferred from the company (i.e., Eurotel) to the timeshare holders, Eurotel retained the exclusive right of managing the hotels and stipulated a condition that the hotels' rooms had to be left open to the public at specific times each year. Nevertheless, the timeshare holders in each hotel operated by

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<sup>26</sup> According to this technique the timeshare holder has the right to occupy the same accommodation which is situated in a particular timeshare scheme for the same period of time (traditionally a period of seven days) each year and for a specific number of years. For more details, Please refer to Section 2.6.1.1.

<sup>27</sup> According to this technique, the time intervals revolve either forward or backward throughout the year calendar. For example, if the timeshare holder X started with week 15, week 16 will be allocated to him the next year and so on. The objective is to give all the timeshare holders the opportunity of enjoying the best time periods equally. For more details, Please refer to Section 2.6.1.3.

<sup>28</sup> Most modern projects adopt the floating time system, whereby the timeshare holder has the right to use a holiday accommodation for a certain period of time yearly without a fixed date being allocated to him in advance, i.e. the period during which the timeshare holder is entitled to occupy an accommodation will be specified each year either based on a first-come first-served rule, or through any other method stipulated in the rules of the management entity. For more details, Please refer to Section 2.6.1.2.

<sup>29</sup> The points system will be addressed in detail in Section 2.6.2.

<sup>30</sup> Pollack (n 9) 283. Gary D Slette, 'Buying Time in Idaho: The Need to Regulate The Timeshare Industry' (1984) 20 Idaho Law Review 103; Katherine A. McDowell, 'Recent Developments in Florida Timesharing: Good News and Bad News for the Timeshare Consumer' (1983-1984) 13 Stetson Law Review 592.

<sup>31</sup> Ellen H. Pollack, 'Time-Sharing or Time Is Money But Will It Sell?' (1982) 10 Real Estate Law Journal 283.

Eurotel shared in the profit derived from the overall rental operation on the footing that the timeshare holders owned their rooms.<sup>32</sup>

Others believe that timesharing began in Switzerland in the mid-1960s by a Swiss company called 'Hapimage' when Alexander Nette converted his hotel in Ticino into a timeshare resort.<sup>33</sup> The whole idea was to give the time-sharer a right to use the resort and its amenities on a regular basis while the company (Hapimage) retained the freehold estate of the holiday properties.<sup>34</sup>

The popular view<sup>35</sup> is that timesharing as we know it today started in the late 1960s, more specifically in 1967, when a ski resort's promoter at Superdevoluy in the French Alps developed the concept and introduced a planned program of multiple ownership of the resort accommodations as a way to help skiers in the French Alps to remain at the same resort yearly without the need to buy the entire resort. The developer of the original time share resort was a company by the name of 'Marcelia' which was marketed under the slogan, 'Do not rent the room but buy the hotel, it is cheaper'.<sup>36</sup>

Less than ten years later, timesharing industry had spread to most European countries. Around the middle of the 1970s the first UK timeshare scheme was established at Loch Rannoch in Scotland. The first to be formed in England was in 1979 in Torquay. By 1989 there were approximately 450,000 timeshare owners in Europe, about half of them in UK. In addition, 62% of timeshare holders in Spain and Portugal were from Britain. By then, there were around 500 European resorts, 77 in the UK and 270 of

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<sup>32</sup>Gary D Slette, 'Buying Time in Idaho: The Need to Regulate The Timeshare Industry' (1984) 20 Idaho Law Review 103; Ellen H. Pollack, 'Time-Sharing or Time Is Money But Will It Sell?' (1982) 10 Real Estate Law Journal 283. Please note that this project is more akin to the timeshare fee ownership concept rather than non-fee ownership timesharing because the developer (Eurotel) in this case transferred the freehold estate of the timeshare development to the timeshare holders.

<sup>33</sup> Ron Haylock 'Prospects for the European Timeshare Market' (1991) 2 Travel and Tourism Analyst 61; Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 3.

<sup>34</sup> Please note that in contrast to Eurotel, the timeshare project in this case is more akin to right-to-use timesharing rather than fee ownership timesharing because the developer did not transfer the freehold estate of the timeshare plan to the timeshare holders. Instead he retained that himself.

<sup>35</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 2; Mary Keller Zervigon, 'Time Share: The New Vacation Home' (1983) 29 Loyal Law Review 403; Hassan Abdul Baset, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle 2005) 4; Hilary J. MacLeod, 'An Introduction to Timesharing' (1984) 25 New Zealand Valuer 497; Mary Lou Savage, Colin M. Lancaster and Nicholas C. Bougopoulos, 'Time Share Regulation: The Wisconsin Model' 77 Marquette Law Review 726.

<sup>36</sup> Hassan Abdul Baset, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle 2005) 4.



them in Spain and Portugal.<sup>37</sup> In the last decade of the twentieth century, the timeshare market tripled. The number of timeshare owners in Europe has risen from 450,000 in 1990 to 1,200,000 in 1999. The number of resorts has increased from 620 in 1990 to 1,600 in 1999. In Spain for example, which is considered the second largest market in the world after the United States of America, timesharing grew dramatically with 500 resorts in operation, with annual sales of over 500,000,000 Euros with nearly 70,000 owners in 2002.<sup>38</sup> In 2011, there were an estimated 78,118 sales across Europe. The estimated total value of all sales equates to more than 750,000,000 Euros.<sup>39</sup> Today, in Europe, there are approximately 1,500,000 timeshare holders distributed amongst 1,345 resorts.<sup>40</sup>

In the meantime, timesharing migrated to America and spread throughout the various states. In the early 1970s, the state of Florida enjoyed a boom in the sales of holiday condominiums for whole ownership and developers built a large inventory for subsequent sale.<sup>41</sup> However during this period the oil crisis hit American economy

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<sup>37</sup> James Edmonds, *International Timesharing* (3ed edn, Longman Group 1991) 3; Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 6.

<sup>38</sup> Ramon Mullerat & Bernat Mullerat, 'A Self Defending Industry: Timesharing in Europe' [2002] *Business Law International* 252.

<sup>39</sup> Resort Development Organization, *Media Pack* (London 2016) 7.

<sup>40</sup> European Commission/ Directorate General for Justice and Consumers 'Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report' March 2015, 9.

<sup>41</sup> A condominium, or condo, is a form of housing tenure and other real property, where a specified part of real estate (usually an apartment in a building whether residential or commercial) is individually owned while the common areas and facilities in this real estate, such as hallways, heating system, elevators, exterior areas are jointly owned (usually as tenants in common) by all the owners of units in the building. Furthermore, the whole building is run by an association which consists of the owners of the units that established for this purpose and governed by Internal Law. In other words, a condominium may be simply defined as an "apartment" that the resident "owns" as opposed to rents. In England and Wales, the equivalent of condominium is commonhold. It is a new form of property ownership under which the owners of the flats own the 'freehold of their flats and communally own the freehold of the common parts through a commonhold association, which is responsible for the management of the development funded through commonhold assessments paid by the flat owners. The relationship of the flat owners is governed by a commonhold community statement, which binds all flat owners within the commonhold'. Ben McFarlane, Nicholas Hopkins, and Sarah Nield, *Land Law Text, Cases, and Materials* (Oxford University Press 2012) 965. It has features of the strata title and the condominium systems, which exist in Australia and the United States respectively. It was introduced by the Commonhold and Leasehold Reform Act 2002, and then regulated in more detail by the Commonhold Regulations 2004(No. 1829) as an alternative to leasehold (long lease). It was the first type of new legal estate to be introduced in English law since 1925. It is worth mentioning that according to an empirical research conducted by the researcher in cooperation with his supervisor it can be said that the commonhold system is still not common in England and Wales where the number of the commonhold titles which have been registered with the Land Registry Office not exceed 17 projects until now. For more details regarding commonholds in England and Wales and why they have not taken off and the problems associated with them, please refer to Lu Xu, 'Commonhold Developments in Practice', a paper presented at the MSPL conference in Liverpool in April 2014.

hard and as a result the sales of the holiday condominiums collapsed.<sup>42</sup> The shortage and sudden expense of fuel following the oil crisis meant that US travellers were confined to travelling close to their homes for their vacations.<sup>43</sup> As inflation dramatically increased, prices and the market for second homes was destroyed and therefore the developers were desperate to get rid of the excess supply of the condominiums.<sup>44</sup> As a result, developers looked for new and innovative ways of selling their unsold properties. They discovered timeshare and the evolution of sales and marketing techniques, and then began selling the same property fifty two times, for each week of the year.<sup>45</sup> Their success was based on the originality of the timeshare concept, which involves the distribution of the initial investment cost, operation and maintenance fees of a holiday condominium among several timeshare owners.<sup>46</sup> Since then the timeshare industry has grown rapidly in the United States of America. According to a study sponsored and published by the American Resort Development Association, the U.S. timeshare industry enjoyed strong growth over the past five years as sales volume has increased by more than 33% since 2011 at a rate of 7% annually. In 2015, sales volume increased by nearly 9% and sales revenue exceeded 8.6 billion dollars.<sup>47</sup>

Later, timesharing had spread to most countries all over the world because it was considered to be a profitable business with significant growth potential.<sup>48</sup> Latin America was the first market to develop after the US timeshare market in the late 1970s, followed by India, at the beginning of the 1990s, and Pacific and Middle East markets in the early 2000s.<sup>49</sup>

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In short, a condominium can be defined as 'A) A building or complex in which units of property, such as apartments, are owned by individuals and common parts of the property, such as the grounds and building structure, are owned jointly by the unit owners. B) A unit in such a complex'. The free dictionary, 'Condominium' <<http://www.thefreedictionary.com/condominium>> accessed on 15 October 2014. See also, Alan M. Roodhouse, 'Fractional Time Period Ownership of Recreational Condominiums' (1975) 4 Real Estate Law Journal 35.

<sup>42</sup> Ron Haylock, 'Developments in Worldwide Timeshare' (1988) 2 Travel and Tourism Analyst 53.

<sup>43</sup> Tony Peisley, 'Timeshare in Europe' (2002) 3 Travel and Tourism Analyst 36.

<sup>44</sup> Ron Haylock, 'Developments in Worldwide Timeshare' (1988) 2 Travel and Tourism Analyst 53.

<sup>45</sup> Butler D W, 'Time-Shares Conferring Ownership' [1985] Acta Juridica 316.

<sup>46</sup> Hilary J. MacLeod, 'An Introduction to Timesharing' (1984) 25 New Zealand Valuer 498.

<sup>47</sup> Ernst & Young, 'State of the Vacation Timeshare Industry: United States Study', A study Published and sponsored by the American Resort Development Association (ARDA), 2016.

<sup>48</sup> Butler D W, 'Time-Shares Conferring Ownership' [1985] Acta Juridica 317.

<sup>49</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 7.

In 1974 and 1976, the two biggest timeshare exchange companies were created in the USA: Resort Condominiums International in Indianapolis and International Interval in Miami.<sup>50</sup> Many scholars regard that as a beginning of a new era in the timesharing industry.<sup>51</sup> The reason for that was because vacation exchange networks transferred timeshare premises to tradable commodities which expanded the popularity of timesharing projects.<sup>52</sup> Nowadays, timesharing exchange companies are participating in promotion for 80% of the timeshare units that are sold across the world every year.<sup>53</sup>

The timeshare industry kept growing rapidly and made significant progress all over the world, attracting many of the famous hospitality companies into the timeshare market, such as Hyatt, Hilton and Sheraton.<sup>54</sup> This participation in the timeshare market by such hospitality companies provided the timesharing industry with credibility in the eyes of public. These larger companies developed new forms of timesharing products, such as a points system, as discussed above.<sup>55</sup> However, some unscrupulous entrepreneurs used misleading practices which resulted in financial losses for the timeshare purchasers which had an adverse effect on consumer confidence. In response to that, the need arose to enact laws to protect the interests of timeshare consumers.<sup>56</sup> Florida was the first American state which passed legislation

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<sup>50</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 277; James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 100; David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 461.

<sup>51</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 2; Michelle D. Brodie, 'Regulating of Time Sharing in South Carolina' (1986) 37 *South Carolina Review* 528; Debbie L. Jared, 'Timesharing: An Innovative Concept' (1978-1980) 1 *Mississippi Law Review* 442; Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 7.

<sup>52</sup> They are the companies who facilitate the exchange of holiday times and places among timeshare holders in various resorts. In other words, the exchange companies enable the timeshare holders to trade in their weeks or points at their designated home resort for vacation at other destinations. For example, a person who has a timeshare at a mountain resort in France can exchange his week in France for a week of the same value at a coastal resort in Spain. For more details about the exchange companies, please refer to Sections 2.5.3.

<sup>53</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 7.

<sup>54</sup> More information about the role of the hospitality companies in the industry of timesharing can be found in Section 2.5.1.

<sup>55</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 462. The timeshare holder in points' pattern buys a membership of a points club in return for a lump sum paid in advance which is converted to certain number of points that can then be transformed to intervals of accommodation, and other sorts of travel services. The points' pattern will be addressed in detail in Section 2.6.2.

<sup>56</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 8.

to organise timeshare transactions, and it did so in 1983.<sup>57</sup> A compulsory cooling-off period was given to any timeshare purchaser, which was regarded as the most significant part of the legislation. During this cooling-off period, which is 14 days, the consumer has the right to cancel the contract without any compensation.<sup>58</sup> This encouraged other nations to enact legislation to regulate timesharing, such as the European Directive which was issued in 1994<sup>59</sup> and replaced in 2009.<sup>60</sup> Furthermore, many Arab states in the Middle East, such as Egypt, passed regulations in order to ensure the rights of consumers in timeshare agreements.<sup>61</sup>

Today, timesharing, in its various variants, is an important segment of the tourism sector across the world <sup>62</sup> because it helps ‘in reducing seasonality in the flow of tourists, generating employment and promoting the development of regions which manage to attract timeshare-related investment’.<sup>63</sup>

## 2.4 THE DEFINITION OF TIMESHARE

This Section will consider the definition of timeshare in accordance with the European perspective so as to extract the essential elements of good timeshare definition. This Section will be divided into six subsections. Subsections 2.4.1 and 2.4.2 will explore the definition of timeshare pursuant to the *repealed* European Timeshare Directive 94/47/EC of 1994<sup>64</sup> and the *current* European Timeshare

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<sup>57</sup> The Florida Timesharing Act 1983.

<sup>58</sup> David A Bowen, ‘Timeshare Ownership: Regulation and Common Sense’ (2006) 18 Loyola Consumer Law Review 462.

<sup>59</sup> Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 about 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 [1994] OJ L 280/83.

<sup>60</sup> Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009 about the protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Products, Resale and Exchange Contracts [2009] OJ L33/10.

<sup>61</sup> Decree number 150 of the Egyptian Ministry of Tourism Issued on 8/3/2010 regarding the conditions and controls of the timesharing system in the hotel establishments and villages and tourist resorts. Published in the Egyptian Gazette on the April 29, 2010.

<sup>62</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 9.

<sup>63</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 12.

<sup>64</sup> Directive 94/47/EC of the European Parliament and the Council 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 [1994] OJ L 280/83(hereinafter the repealed Directive).

Directive 2008/122/EC of 2009<sup>65</sup> respectively in order to identify the distinguishing features which the European policy makers were keen to capture when defining timeshare (henceforth referred to as the repealed Directive and the current Directive). Subsection 2.4.3 will be allocated to distinguish between timeshare and the other similar tourist products. Subsections 2.4.4 and 2.4.5 will highlight the advantages and disadvantages of the European approach in defining timeshare. Subsection 2.4.6 will determine the essential elements of good timeshare definition.

### 2.4.1 The Repealed Directive

The repealed Directive defined timeshare as a contract in terms of payment of a certain global price; a right to spend a period of one week or longer in an immovable holiday property during a specified or specifiable period of the year for three years or longer.<sup>66</sup>

Consequently, the European policy makers captured five features in defining timeshare, as follows:

#### 1. Contract of 3 years or longer

Three years is the minimum period for contracts to have fallen within the scope of the Directive. This was mainly justified by concern for market stability and hence the protection granted by the Directive was not intended for purchasers seeking to buy timeshares for speculative purposes.<sup>67</sup> Consequently, all contracts for less than three years fell outside the scope of the Directive and were governed by the ordinary law of each of the Member States. Moreover, the Directive did not put an upper limit on the duration of the timeshare contract and thus all contracts for more than three years fell inside its scope.<sup>68</sup>

#### 2. Contract for consideration

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<sup>65</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L33/10 (hereinafter the current Directive).

<sup>66</sup> The first indent of Article (2) of the repealed Directive.

<sup>67</sup> EU Commission/ Directorate General Health and Consumer Protection, 'Report on the Application of the Directive 94/47/EC of the European Parliament and Council of 26 October 1994' SEC (1999) 1795 final, 24.

<sup>68</sup> EU Commission/ Directorate General Health and Consumer Protection, 'Report on the Application of the Directive 94/47/EC of the European Parliament and Council of 26 October 1994' SEC (1999) 1795 final, 10.

It is essential to obtain the right of occupancy in exchange for financial consideration, which could be for instance payment by cash, card or trade-in of a timeshare. This is can be concluded from the phrase ‘on payment of a certain global price’ stipulated in first indent of Article (2) of the repealed Directive. Two important results arise from that, as detailed hereunder:

- I. The definition covers two main types of timeshare contracts, as follows:
  - The contracts whereby the timeshare holder pays the whole consideration as a lump sum at the initial phase of the contract (i.e., the time of concluding the contract) and then pays his pro rata share of the service charges on a yearly basis.<sup>69</sup>
  - The contracts under which the timeshare holder pays an initial sum to acquire the occupancy right such as one fourth of the consideration and then pays the rest as annual instalments together with his pro rata share of the service charges.<sup>70</sup>
- II. The contracts whereby the timeshare holder acquires the occupancy right for free were not covered by the rules of the repealed Directive.

It is worth pointing out that this characteristic must be fulfilled whether at the time of the establishment of the occupancy right as when the developer sells the occupancy rights to the timeshare holders or in the future transactions as when the timeshare holder sells his right of occupancy to another person. However, if a person acquired a timeshare by way of inheritance he will not be required to pay anything in exchange for the inherited timeshare because the deceased timeshare holder has already paid when he purchased the timeshare.

### **3. Contract of using one or more immovable properties**

The occupancy rights are necessarily attached to an immovable property. This can be seen from the term ‘immovable properties’ contained in Article 2 of the Directive. In other words, the Directive only covered contracts for timeshare of immovable

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<sup>69</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007)303 final, 9. Service charges are levied by the owner of the timeshare resort to recover the costs he incurs in providing management and maintenance services to the resort. This point is covered in Section 2.5.5.

<sup>70</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007)303 final, 9.

properties and thus contracts for accommodation of movable properties such as canal boats, caravans or cruise-ships fell outside the scope of the repealed Directive. Nevertheless, the occupancy rights are *not* necessarily attached to a particular immovable property. This can be seen in the expression ‘to use one or more immovable properties’ stipulated in the aforesaid Article. Consequently, the definition, ‘does not only cover the classic timeshare in the form of real property rights with fixed or floating weeks, but also the so-called point clubs’.<sup>71</sup> This in turn provided timeshare holders with more flexibility but with less security because the point clubs depends on the reservation system which is subject to the rule of availability.<sup>72</sup>

#### **4. Contract of one week and more**

The repealed Directive required that the use of the immovable property to be for a minimum of seven days. This is can be concluded from the expression ‘which may not be less than one week’ stipulated in first indent of Article 2. Accordingly, all contracts under which the timeshare holder acquires a right to occupy an immovable property for less than seven days falls outside the scope of the Directive. However, the repealed Directive did not put an upper limit on the period of occupancy and thus all contracts which stipulated that a length of the occupancy period for more than a week fell within the scope of the repealed Directive.<sup>73</sup>

#### **5. Contract between vender and purchaser**

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<sup>71</sup> European Commission/ Health and Consumer Protection Directorate- General, ‘Review of the Timeshare Directive (94/47/EC): Impact Assessment: Questionnaire for Business Stakeholders’ SANCO/B2/GR/sm/D2006/220181, 5.

**Fixed weeks:** a pattern under which the timeshare holder has the right to occupy the same holiday accommodation which is situated in a particular timeshare resort for the same period of time (traditionally a period of seven days) each year and for a specific number of years. For more details, Please refer to Section 2.6.1.1.

**Floating weeks:** a pattern whereby the timeshare holder has the right to use a holiday accommodation for a certain period of time yearly without a fixed date or/and place being allocated to him in advance. In other words, the date or/and place of exercising the occupancy right will be specified each year by means of reservation. For more details, Please refer to Section 2.6.1.2.

**Points clubs:** a pattern whereby the timeshare holder purchases a membership in a club. The membership is converted to a number of points each year so as to be used to reserve a period of time at one of the resorts owned by the club. For more details, Please refer to Section 2.6.2.

<sup>72</sup> The lack of availability is discussed in detail in Phase II of Chapter Three.

<sup>73</sup> EU Commission/ Directorate General Health and Consumer Protection, ‘Report on the Application of the Directive 94/47/EC of the European Parliament and Council of 26 October 1994’ SEC (1999) 1795 final, 10.

The repealed Directive described timeshare holders as ‘consumers<sup>74/</sup> purchasers’<sup>75</sup> and developers as ‘vendors’<sup>76</sup>, therefore its rules only applied to trader-to-consumer timeshare transactions. Consequently, consumer-to-consumer timeshare transactions fell outside the scope of the repealed Directive. This demonstrates that the European legislature intended to:

- Protect a timeshare holder only when he was the weaker party in the transaction which in turn reflected the adhesion character of the timeshare contracts.<sup>77</sup>
- The Directive provided the timeshare holders with the rights and protection enshrined in all the European Directives with regard to consumers such as Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

In conclusion, the repealed Directive only applied when the contract was for one or more weeks’ accommodation per year, in a real estate property, and for three years or longer.

#### 2.4.2 The Current Directive

Since the adoption of the Timeshare Directive 94/47/EC in 1994, there have been major developments in the marketplace, mainly the emergence of new contracts which are economically equivalent to timeshare in the sense that there is a substantial payment upfront followed by payments linked to the later actual use of holiday accommodation.<sup>78</sup> However, the new contracts are designed by rogue traders in a way

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<sup>74</sup> Clause 14 of the preamble of the repealed Directive.

<sup>75</sup> The fourth indent of Article 2 of the repealed Directive.

<sup>76</sup> The third indent of Article 2 of the repealed Directive.

<sup>77</sup> An adhesion contract is a legally binding agreement between two parties to do certain thing, under which one party has all the bargaining power and use it to write the agreement primarily to his or her advantage. Consequently, the adhesion contract is a standardised contract form offered to consumers of goods and services on essentially take it or leave it basis without offering consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Abdul Majid Al-Hakim, Abdul Baqi Al-Bakri and Mohammad Taha Al-Bashir, *The Theory of Obligation in the Iraqi Civil Law*, Part One (Baghdad University Press 1980) 44.

<sup>78</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (SUMMERY OF THE IMPACT ASSESSMENT), COM (2006) 303 Final, 2.



which fall outside the legal definition of timeshare as stipulated in Article 2 of the repealed Directive.<sup>79</sup> Those rogue traders have done that for two reasons:<sup>80</sup>

1. To be unfettered by the obligations and restrictions which the repealed Directive placed on their shoulders for the benefit of the timeshare holders such as the prohibition of obtaining any payment from the timeshare holders during the cooling-off period.
2. To prevent the consumers from receiving the same level of security and flexibility granted by the repealed Directive, such the right of withdrawal from the timeshare contract during the cooling-off period without paying any compensation.

The new contracts which circumscribed the repealed Directive are called timeshare-like products. They can be divided into three groups, as follows:<sup>81</sup>

1. Contracts that provide for repeated stays in a holiday accommodation for less than 3 years.
2. Contracts that provide for repeated stays in a holiday accommodation for less than seven days per year.
3. Contracts that provide for repeated stays in moveable properties such as caravans, boats and vessels rather than immovable properties.

Consequently, in June 2006, the European commission started a wide-ranging consultation about the repealed Directive which led to the passing of the current Directive on 14 of January 2009 which came into force throughout the European member states on 23 February 2011.<sup>82</sup>

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<sup>79</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Consultation Paper: Review of the Timeshare Directive (94/47/EC)’, Brussels 2006, 9. For more details on how rogue developers, as fishermen, took advantage of fool's wrong focus, please refer to George A. Akerlof & Robert J. Shiller, *Phishing for Phools* (Princeton University Press 2015) 45.

<sup>80</sup> European Commission, ‘Consumers: EU steps up protection for holidaymakers for Timeshare Holidays and holiday discount clubs’, IP/07/775, Brussels 2007, 1. European Commission/ Health and Consumer Protection Directorate- General ‘Questions and Answers On Timeshare and Long-term Holiday Products’ MEMO/07/231, 1.

<sup>81</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 16.

<sup>82</sup>Article 16 of the current Directive.

The current Directive in Article 2/1/a set forth an improved definition for timesharing whereby timeshare is defined as ‘a contract of 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’.<sup>83</sup>

It is clear from this definition that European legislature kept the same distinguishing features of timeshare as originally set out in Article 2 of the repealed Directive, but with some changes in respect of the duration of the contract, the duration of the period of occupancy and the object of the contract, in the following manner:

- 1. The duration of the contract:** the definition extends the scope of the current Directive to cover short-term contracts. The repealed Directive covered contracts of 3 years or longer, but the current Directive covers, ‘a contract of duration of more than one year’ as set out in Article 2 (1)(a).
  
- 2. The duration of the occupancy period:**
  - The definition expands the scope of the current Directive to include contracts which provide the consumers with the right to use an overnight accommodation for less than one week per year. This is evident from the wording, ‘for more than one period of occupation’ as set out in the aforementioned definition. This change demonstrates that the legislature does not put a lower or upper limit on the duration of occupancy.
  - The definition points out the *repetitive* characteristic of the occupancy right. This can be seen in the expression ‘acquires the right to use...overnight accommodation *for more than one* period of occupation’ stated in the above-mentioned definition. Consequently, the consumer must use the overnight accommodation for more than one period of occupation during the duration of the timeshare contract.
  
- 3. The object of the contract:**
  - The definition covers contracts for timeshare on movable and immovable properties. Consequently, contracts for accommodation in canal boats,

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<sup>83</sup>The current Directive, Article 2 (1) (a).

caravans or cruise-ships will be within the concept of timesharing and thus covered by the rules of the current Directive.<sup>84</sup>

- Since the definition implies the term ‘accommodation’, other contracts which do not provide for accommodation, such as rental of caravan pitches and storage space for recreational crafts will *not* covered by the rules of the current Directive.<sup>85</sup>
- As the term ‘accommodation’ includes overnight stays, contracts such as seats in lounges for sports events will *not* covered by the rules of the current Directive.<sup>86</sup>

Accordingly, the current Directive has succeeded in producing a definition which covers the timeshare-like products which were developed by the rogue traders in a way that falls outside the legal definition of timeshare as contained in Article 2 of the repealed Directive. This in turn provides the consumers of all the aforesaid products (timeshare products and timeshare-like products) with the same level of flexibility and protection and thus creates a level playing field for the legitimate developers.<sup>87</sup>

### 2.4.3 Distinguishing timeshare from other similar tourist products

#### 2.4.3.1 Timeshare and hotels

Furthermore, the current Directive has produced a means of distinguishing between timeshare and multiple reservations within a hotel. This criterion can be extracted from the first part of Clause (6) of the preamble of the current Directive which reads as follows:

For the purposes of this Directive, timeshare contracts should not be understood as covering multiple reservations of accommodation, including hotel rooms, in so far as multiple reservations do not imply rights and obligations beyond those arising from separate reservations.

Accordingly, the following arrangements must not be confused with timesharing:

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<sup>84</sup> European Commission, ‘Consumers: EU steps up protection for holidaymakers for Timeshare Holidays and holiday discount clubs’, IP/07/775, Brussels 2007, 2.

<sup>85</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007) 303 final, 9.

<sup>86</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007) 303 final, 9.

<sup>87</sup> For more details regarding how free market is not just a playing field for legitimate developers but also is a playing field for rogue developers, please refer to George A. Akerlof & Robert J. Shiller, *Phishing for Phools* (Princeton University Press 2015) 163-164

1. Single and separate reservations in a hotel room fall outside the concept of timeshare. This is because one of the distinguishing features of timesharing is providing the timeshare holders with the right of ‘repeated stays in holiday accommodation’.<sup>88</sup>
2. Non-prepaid reservations of a hotel room fall outside the notion of timeshare. This is due to the fact that one of the distinguishing characteristics of timesharing is the payment of a consideration, whether wholly or partly, at the initial phase of contracting, as detailed above in Section 2.4.1. This is not available in the case of the non-prepaid reservations.
3. The prepaid accommodation in a hotel for two stays within one year fall outside the concept of timeshare due to the fact that Article 2/1/a of the current Directive stipulated that the duration of the timeshare contract must be more than one year as we saw in detail in Section 2.4.2.
4. Ultimately, multiple reservations of hotel rooms fall outside the definition of timeshare in so far as that those reservations ‘do not imply rights and obligations beyond those arising from separate reservations’.<sup>89</sup>

#### *2.4.3.2 Timeshare and lease*

The current Directive sets for a way in which a timeshare and an ordinary lease contracts can be distinguished. This may be seen from the second part of Clause 6 of the preamble of the Directive which reads as:

Nor should timeshare contracts be understood as covering ordinary lease contracts since the latter refer to one single continuous period of occupation and not to multiple periods.

Consequently, only lease contracts of multiple periods of occupation (discontinuous lease) fall within the concept of timeshare on condition that their duration is more than one year as per Article 2/1/a of the Directive of 2009.<sup>90</sup>

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<sup>88</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Consultation Paper: Review of the Timeshare Directive (94/47/EC)’, Brussels 2006, 9.

<sup>89</sup> Clause 6 of the preamble of the current Directive.

<sup>90</sup> A discontinuous lease, in general, is a special category of lease whereby the lessee is entitled to possess and occupy the demised property exclusively for a series of discontinuous periods. Thus, under the discontinuous lease, the lessee is not entitled to possess and use the demised property for a single continuous period but rather he is entitled to possess and use the demised property on certain dates every month or year and for a given number of years such as two weeks per year for ten years. See,

### 2.4.3.3 *Timeshare and long-term holiday products*

Long-term holiday products is a legal term used to describe many different types of contracts which were offered in the marketplace by rogue traders after the implementation of the repealed Directive to circumvent its rules. For example, holiday discount clubs, vacation exchange clubs, international travel clubs and sometimes have names like luxury dream holiday exchange.<sup>91</sup>

Under the long-term holiday products, consumers pay a substantial initial fee to become a member of a holiday discount club.<sup>92</sup> The benefit of the membership is access to a reservation service where they can reserve discounted holiday accommodation over a long period of time.<sup>93</sup> This can be done in conjunction with travel services such as flights and rental cars. In the marketing of these products, consumers are often promised discounts of 60% or more in luxury hotels and first-rate airways.<sup>94</sup> Nevertheless, many consumers end up being disappointed because of two main reasons, as follows:

1. The rates of discounts are not as the traders promised.<sup>95</sup> This is due to the fact that the discounts made available to consumers will depend on the trader's ability to contract good deals.<sup>96</sup> Since these traders do not generally have the financial capacity or reputation required to procure such contracts, they are often not able to honour the promises made to the club's members.<sup>97</sup>

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Roger J. Smith, *Property Law* (6th edn, Pearson Education 2009) 226. For more details concerning the discontinuous lease, please refer to Section 4.3.1 of Chapter Four.

<sup>91</sup> European Commission/ Health and Consumer Protection Directorate- General 'Questions and Answers On Timeshare and Long-term Holiday Products' MEMO/07/231, 2.

<sup>92</sup> European Commission, 'Consumers: EU steps up protection for holidaymakers for Timeshare Holidays and holiday discount clubs', IP/07/775, Brussels 2007, 2.

<sup>93</sup> European Commission, 'Consumers: EU steps up protection for holidaymakers for Timeshare Holidays and holiday discount clubs', IP/07/775, Brussels 2007, 2.

<sup>94</sup> European Commission/ Health and Consumer Protection Directorate- General 'Consultation Paper: Review of the Timeshare Directive (94/47/EC)', Brussels 2006, 10.

<sup>95</sup> European Commission/ Health and Consumer Protection Directorate- General 'Questions and Answers On Timeshare and Long-term Holiday Products' MEMO/07/231, 2.

<sup>96</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) {COM(2007) 303 final} {SEC(2007) 744}, 17.

<sup>97</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) {COM(2007) 303 final} {SEC(2007) 744}, 17.

2. The best destinations are heavily oversubscribed.<sup>98</sup>

As mentioned above, the membership of the aforesaid clubs involve substantial financial undertakings from consumers because they have to pay a considerable initial fee ranging from €6000 to €20000 to join the club. Furthermore, each consumer has to pay his pro rata share of the annual fees, which ranges from €150 to €200, for the duration of the contract. In addition, the consumers have to pay for every single holiday they want to enjoy.<sup>99</sup> Nonetheless, the contracts of these clubs do not identify the accommodation involved (other than, for instance, accommodation in five star hotels around the world) and are often not backed by underlying property assets.<sup>100</sup> This is because the trader will contract with hotels and resorts at a later stage in order to present offers to the consumers.<sup>101</sup>

It is worth pointing out that the long-term holiday products are often marketed in holiday destinations just like timeshare products, and to consumers who are usually targeted by companies that selling timeshare.<sup>102</sup>

There are three features which make long-term holiday products appear similar to timeshare, despite the fact that they are not timeshare. First, the consumer enters a contract for the repeated usage of holiday accommodation; second, an upfront payment is requested; and third, aggressive marketing methods are used to sell these products as was the case in the timeshare market before the enactment of the repealed Directive.<sup>103</sup>

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<sup>98</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Questions and Answers On Timeshare and Long-term Holiday Products’ MEMO/07/231, 2.

<sup>99</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) {COM(2007) 303 final} {SEC(2007) 744}, 17.

<sup>100</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Consultation Paper: Review of the Timeshare Directive (94/47/EC)’, Brussels 2006, 10.

<sup>101</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) {COM(2007) 303 final} {SEC(2007) 744}, 11.

<sup>102</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Consultation Paper: Review of the Timeshare Directive (94/47/EC)’, Brussels 2006, 10.

<sup>103</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term

According to Article 2/1/b of the current Directive, the main differences lie in the fact that the main goal of the long-term holiday products is to provide the vacationers *discounts or other benefits in respect of accommodation*, in isolation or together with travel services, whereas the main aim of timeshare is just giving the timeshare holders the right to use one or more overnight accommodation for more than one period of occupation during the period of contract.

#### **2.4.4 The advantages of the European approach in defining timeshare**

The following advantages can be observed:

1. The current Directive succeeds in expanding the definition of timesharing to cover the timeshare-like products and thus provides the consumers of such products with the same level of protection and flexibility provided for the timeshare holders as explained in Section 2.4.2.
2. The current Directive succeeds in producing a clear definition to distinguish timeshare from long-term holiday products as explained in Section 2.4.3.3.
3. The current Directive succeeds in producing a clear definition to distinguish between timeshare and ordinary lease contracts, as set out in detail in Section 2.4.3.2.
4. The current Directive succeeds in producing a clear definition to distinguish between timeshare and hotels, as explained in detail in Section 2.4.3.1.

#### **2.4.5 The disadvantages of the definition of the current directive**

Nevertheless, the following disadvantages can be discussed in respect of the European approach in defining timeshare.

1. The definition is silent on the legal nature of timeshare contracts. Therefore, the developers are free to use any one of the fee ownership or non-fee ownership legal arrangements which have been explained in Section 2.2.2 to construct their timeshare projects. This approach in the definition of timeshare may be accepted on the EU level because of the difficulty in the harmonisation of the laws of Member States in this regard. However, such approach is not accepted on the national level because the use of different legal arrangements to regulate the relationship between developers and timeshare holders in one

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holiday products, resale and exchange' (IMPACT ASSESSMENT/ SUMMERAY) {COM(2006) 303 final} {SEC(2006) 743}, 17.

country will lead to divergence in the levels of protection and flexibility provided for the timeshare holders as their rights and obligations will be considerably varied from a timeshare project to another in the same country. It is believed that it is of central importance that the definition determines the legal nature of timesharing as this will lead to several positive outcomes, as follows:

- The clarity in timesharing transactions. This is due to the fact the identification of the legal nature of timesharing will provide both the developers and timeshare holders with an accurate and clear understanding of the concept of timesharing as well as an adequate knowledge about their rights and obligations in the timeshare project in advance. This in turn would lead to an increase in the attractiveness and desirability of timeshare interests.
- Identifying clearly the governmental agency which is formally authorised to deal with the timeshare industry.
- Facilitating the mission of the legal practitioners to provide all the parties who are related to the timeshare industry with appropriate legal advice.
- Enabling the courts to base their decisions on a solid and clear legal foundation.

These positive outcomes will lead to further protection of the interests of both developers and timeshare holders.

2. The definition does not refer to one of the main characteristics of timesharing, namely a combination of a repeated property use and service such as managing and maintaining the timeshare property.<sup>104</sup>
3. The definition does not refer to one of the main features of timesharing which is the division of the use of each timeshare unit among several timeshare holders by allocating a specific period of time to each one of them for exercising his right of occupancy. It is believed that this point is very important for two reasons:
  - To highlight the rotating basis of using the timeshare units which is one of the distinguishing features of timesharing.

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<sup>104</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Consultation Paper: Review of the Timeshare Directive (94/47/EC)’, Brussels 2006, 11.



- To distinguish between timeshare and hotels because the use of the hotels is open to the public whereas the use of the timeshare units is restricted on the timeshare holders who are persons have already joined the timeshare project by the conclusion of a timeshare contract with the developer.

#### 2.4.6 The essential elements of timesharing

From the above analysis, it is possible to suggest that a definition of timesharing should include the following elements:

**The retained elements:** These elements are taken from the European definition without amendments.

1. The duration of the contract.
  - The definition should state that the minimum duration of a timeshare contract should be more than 12 months in order to meet the required principle of repetition as detailed in Section 2.4.2.
  - The definition should not determine the maximum limit to the duration of timeshare contracts so as to cover the fee ownership arrangements such as the time-span arrangement and the interval arrangement. However, the timeshare legislation, as far as it concerns the non-fee ownership arrangements, must include provisions to prohibit perpetual<sup>105</sup> and estate binding timeshare contracts<sup>106</sup> to avoid the problems related to such type of contracts as we will see in detail in Chapter Three.
2. It is important to not prescribe a minimum or maximum limit for the occupancy period in order to cover all timeshare products as pointed out in Section 2.4.2.
3. Timeshare should be regarded as a commercial transaction, a trader-to-consumer transaction, as shown in Section 2.4.1.

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<sup>105</sup> A perpetual contract is a contract which does not have a specified end-date and is therefore capable of continuing indefinitely, or alternatively contains a term that expressly provides for this effect. For more details, please refer to phase III of Chapter Three.

<sup>106</sup> An estate-binding contract is a contract whereby the estate of the timeshare holders continue to be liable for payment of the management and maintenance fees after their death which have had serious consequences for settling the estate and dividing its assets amongst heirs. For more details, please refer to phase III of Chapter Three.

4. The timeshare holder should pay financial consideration for the acquisition of the right of occupancy as explained in Section 2.4.1.

**The adjusted elements:** This element taken from the European definition, but with some adjustments.

5. The object of the contract.

The author agrees with the European Directive with regard to the following:

- The object of the timeshare contract must be an overnight accommodation so as to exclude from the concept of timesharing the contracts which do not provide the consumers with accommodations to exercise their rights of occupancy as detailed in Section 2.4.2.
- The definition must be drafted in a way which covers contracts for timeshare on immovable and movable properties so as to prevent the rogue developers of circumventing the rules of the timeshare legislation as detailed in Section 2.4.2.

However, the author believes that the definition must clearly stipulate that the object of the contract is a timeshare unit (an overnight accommodation) in a timeshare property (whether movable or immovable property) developed *for the sole purpose of* timeshare occupancy. This is vital to exclude hotels and self-catered tourist properties from the concept of timesharing.

## **2.5 THE MAIN PARTIES IN THE TIMESHARING INDUSTRY**

Timesharing is regarded as one of the most important and complicated businesses in the tourism sector. It consists of several players, each one of whom plays a significant role for the success of the industry. Understanding the role of these players is vital because this will facilitate the understanding of the problems associated with timeshare industry which will be analysed in the next Chapter. Below is an overview of the main players in the industry:

### 2.5.1 Developers<sup>107</sup>

The timeshare resort developer is the main player in the industry.<sup>108</sup> He is the person who plans, designs and builds a resort in a style of multi accommodation complex or buys and converts an already constructed condominium or hotel to a timeshare resort in an attractive location for tourists and recreation seekers.<sup>109</sup> The term ‘timeshare developer’ also encompasses the person who makes the essential decisions in respect of the main specifications of the resort such as the location, and the way in which the resort will be administered.<sup>110</sup> The objective behind that is to give the timeshare holders the ability to spend a holiday in an excellent quality resort during their time intervals which are derived from an ownership arrangement or a contractual arrangement, pursuant to the legal framework which is used to organise each timeshare project, and the legal system of each state as it is explained in Section 2.2 of this Chapter.<sup>111</sup>

According to a report published by the Association of Timeshare Consumers in Europe the estimated number was approximately 1100 developers in 2004. The timeshare industry is very fragmented. It has been reported that, ‘The largest 20 developers have 45% of ownership base, leaving nearly 850 developers with the remaining 55% of owners. The largest developer (Hamping) has 136,000 owners but there are many resorts with around 500 owners- the smallest identified has only 50 owners’.<sup>112</sup>

According to a report published by the Association of Timeshare Consumers in Europe, the developer’s income is derived from four sources:-

1. The revenue from the sale of new timeshare units.

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<sup>107</sup> Both the current Directive in Article 2 (e) and the U.K statute (2010 No. 2960) in Article 11 (1) which concerning consumer's protection in holiday accommodation contracts defined the developer as ‘a natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession and anyone acting in the name of or on behalf of a trader’.

<sup>108</sup> Timeshare Consumer Association, ‘Timeshare in Europe 2004: An Industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 8.

<sup>109</sup> Tomas A Dickerson, ‘Resort Timesharing: The Consumer’s Rights and Remedies in the US’ [2001] *International Travel Law Journal* 40-52; Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 29.

<sup>110</sup> Spyros Pantazis, ‘The Role of Information Communication Technologies in the Greek Timesharing Industry’ (MSc thesis, University of Surry 2003) 8.

<sup>111</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 29.

<sup>112</sup> Timeshare Consumer Association, ‘Timeshare in Europe 2004: An Industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 8.

2. The fee of the resort's management in cases where the developer retains the management of the resort development.
3. The incomes that arise from travel services in view of the fact that some developers offer holiday packages when they sell their resort accommodations on a timeshare basis.
4. The commission received from helping the beneficiary to sell his timeshare at the end of the timeshare arrangement.<sup>113</sup>

Other income can be generated from restaurants, swimming pools, golf courses, cars rentals, and the other services provided to the timeshare holders at the given resort as some timeshare project impose charges in exchange for supplying the timeshare holders with such services.<sup>114</sup>

A successful developer needs to employ competent staff and use qualified experts who have good experience and skill in several areas such as property law, human resources, association management, financial management, consumer financing and resort management. In addition to the traditional developers, the big hotel chains or lodgings companies such as Marriott, Hilton, Hyatt and Disney entered the timesharing industry during the 1980s and 1990s.<sup>115</sup> There are two main reasons behind the involvement of the hotel chains in this area. Firstly, they have all realised that timesharing is an important element of the leisure industry and also the fact that hotel companies have great experience in the leisure industry<sup>116</sup> Secondly, they all need a new way to expand their market-share and income, because the hospitality industry grows and expands by a mere 2% per year.<sup>117</sup> There is no doubt that the entry of well-known hospitality companies into this market has had a positive effect and increased the confidence of timeshare holders in the timeshare product because it gives more credibility to this industry in the eyes of the public through enhancing the

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<sup>113</sup> This point will be addressed in detail in Phase III of Chapter Three.

<sup>114</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 10.

<sup>115</sup> Tim Bourne, 'Is Timeshare Coming Of Age?' [1998] *International Travel Law Journal* 68; Ron Haylock, 'Developments in the Global Timeshare Market' (1995) 4 *Travel and Tourism Analyst* 50; Tomas A Dickerson, 'Resort Timesharing: The Consumer's Rights and Remedies in the US' [2001] *International Travel Law Journal* 42.

<sup>116</sup> Tim Bourne, 'Is Timeshare Coming Of Age?' [1998] *International Travel Law Journal* 68.

<sup>117</sup> Tomas A Dickerson, 'Resort Timesharing: The Consumer's Rights and Remedies in the US' [2001] *International Travel Law Journal* 42.

quality of services, sticking to strict rules in management, and adherence to strong business ethics.<sup>118</sup>

### 2.5.2 Sales and marketing

The selling agent is the party who performs a task of a commercial nature represented by promoting and selling the timeshares in a resort to the potential timeshare holders.<sup>119</sup> The selling agent might be an individual, however, this task is often undertaken by specialist companies, organisations and agents. The marketing process is performed, in the main, by companies formed and managed by the developers themselves, or by independent companies with whom the developers have contracted for the purpose of carrying out the task of marketing their resorts that work on a timeshare basis.<sup>120</sup>

The marketing of a timeshare project is an expensive and complex process. This is for two main reasons.

1. Each timeshare unit has to be sold for about fifty different people who will use the timeshare on a weekly basis.<sup>121</sup>
2. The process of marketing needs highly trained staff and herculean efforts to convince the potential timeshare holders to join the timeshare project. This is because the timeshare products are somewhat complicated in comparison with conventional vacation packages,<sup>122</sup> the consideration of timeshare as being one of the 'unsought' products and therefore there is no natural demand for timesharing.<sup>123</sup>

As a result of this, some unscrupulous selling agents have used aggressive marketing techniques to stimulate the demand for timeshare products which resulted in financial

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<sup>118</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 9.

<sup>119</sup> Tomas A Dickerson, 'Resort Timesharing: The Consumer's Rights and Remedies in the US' [2001] *International Travel Law Journal* 42.

<sup>120</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 9.

<sup>121</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 10.

<sup>122</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 8. Timeshare products are explored in detail in Section 2.6.

<sup>123</sup> Unsought products are the goods that the consumer does not know anything about and does not normally think of buying such as the classic example of encyclopaedias and life insurance. See, Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 15.

losses for the timeshare purchasers that had an adverse effect on confidence in the timeshare industry. This has necessitated the enactment of timeshare laws to curb such anti-consumer behaviour and thus provided the timeshare industry with credibility in the eyes of public as we will see in Chapter Three.

In any case, there are three main types of marketing which are not entirely mutually exclusive. They can be summarised as follows:

1. 'Try before you buy'. Under this method prospective customers visit the resort under the subject of the promotion, for a short period (typically one week or week-end break) for a low cost, on the condition that they attend a sales presentation. The invitation is usually sent via post, e-mails, telephone or through any other means of mass communication which usually occurs in crowded areas, such as supermarkets, parks or trading centres. Due to the fact that the cost of this marketing technique is higher than the other methods, the promoters tend to invite financially well-heeled customers, because they are more likely to enter into a timeshare agreement than the other target categories.<sup>124</sup>

2. The second type of marketing tactic, which is more common than the first type in the trade environment, is called 'public guidance'. This is the means used by promoters to inform the various segments of society about the essence of timesharing as well as discussing its benefits and merits in comparison with the traditional methods of spending holidays. It is worth mentioning that there are several advertising methods that are used under this type of marketing, such as postal handouts, websites and television advertisements.<sup>125</sup>

3. Finally, the most common marketing method is by way of sales presentations. Target groups are asked to attend these types of presentation, by means of direct mail, telemarketing, and by way of verbal invitations made by the promotional teams

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<sup>124</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 12; Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 8.

<sup>125</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 16.

interacting in busy areas. Target groups are enticed to attend such presentations with the promise of free gifts or a free holiday given to those who attend.<sup>126</sup>

It is worth mentioning that these sale presentations are held either inside the resort to give the prospective purchasers the ability to examine the product on the ground, or outside the resort where they usually take place in hotels, leisure centres or golf clubs.

### 2.5.3 The Timeshare Exchange Companies

The basic concept of timeshare is to entitle the purchaser of a period of time to take holidays in the same apartment or other lodging, at the same time of the year for the duration of his agreement with the developer.<sup>127</sup> The one drawback of the basic idea is its *inflexibility*. This is because the concept on its own means that the timeshare holder is obliged to spend his holidays at the same place, in the same sized apartment, at the same time of year every year. Thus, if the occupancy period cannot be used at that time, it is lost.<sup>128</sup>

One solution is the exchange system which allows the purchaser of a timeshare unit week at one resort to exchange it for another week owned by someone else at another time and/or place.<sup>129</sup> The success of the timeshare industry is partly due to the existence of holiday exchange companies. The relationship between the holiday timeshare product and exchange service is one of mutual reliance: one could not exist without the other.<sup>130</sup> This is because exchange adds an extra dimension to the timeshare and addresses the question often asked by prospective timeshare holders: ‘what if I do not want to come back to the same resort, or at the same time year after year?’<sup>131</sup>

There are two major exchange companies operating worldwide, both with their Headquarters in the United States of America. The two companies are Resort

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<sup>126</sup> Tomas A Dickerson, ‘Resort Timesharing: The Consumer’s Rights and Remedies in the US’ [2001] International Travel Law Journal 50; Timeshare Consumer Association, ‘Timeshare in Europe 2004: An Industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 12.

<sup>127</sup> For more details concerning the concept of timesharing, please refer to Section 2.4.

<sup>128</sup> Stephany A Madsen, ‘Exchange Networks’ 125, in Timesharing II issued by The Urban Land Institute, Washington, D. C. 1982.

<sup>129</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 2-15.

<sup>130</sup> World Tourism Organization, *Timeshare: The New Force in Tourism* (1st ed World Tourism Organization 1996) 33.

<sup>131</sup> Stephany A Madsen, ‘Exchange Networks’ 125, in Timesharing II issued by The Urban Land Institute, Washington, D. C. 1982.

Condominium International (RCI) and Interval International (II).<sup>132</sup> Together they share approximately 95% of the global market.<sup>133</sup> The following figures will demonstrate the size of the two big exchange companies. According to II, it has about 3000 member resorts in more than 80 countries, with approximately 2,000,000 family members worldwide.<sup>134</sup> In 2015, it has confirmed 871,869 vacation exchange.<sup>135</sup> On the other hand, the RCI has approximately 4,500 member resorts in more than 100 states,<sup>136</sup> with around 3,800,000 family members living around the world.<sup>137</sup>

There are two types of exchange: internal and external. An internal exchange takes place when a timeshare holder exchanges a week at his home resort for another week at the same resort.<sup>138</sup> An external exchange occurs when a timeshare holder exchanges the week at the home resort for a week at a different resort with which the timeshare holder has no direct connection.<sup>139</sup> The exchange companies operate both internal and external exchanges, but the latter are the major part of the operation of the exchange companies.<sup>140</sup>

With each of the aforesaid exchange companies, a developer of a timeshare project must arrange to become a member of the company by filling an application, paying a membership fee and submitting to an inspection by officials of the chosen company. Once the timeshare project has been included as a member resort, it will be listed in the directory of the exchange company. From that moment, any timeshare holder at that project is eligible to become an individual member of the exchange company. The timeshare holder has to fill a membership application and pay an annual

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<sup>132</sup> George Leposky, 'Timeshare Basics' (Timeshare Today) <[www.tstoday.com](http://www.tstoday.com)> accessed on 5 of September 2016, 9.

<sup>133</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 20.

<sup>134</sup> Interval International on <<http://www.intervalworld.com/web/cs?a=60&p=about>> accessed on 5 of September 2016.

<sup>135</sup> Interval International, *Buyers' Guide to the Interval International Exchange Program* (Interval International 2016) 57.

<sup>136</sup> Resort Condominium International on <<http://www.rciaffiliates.com/europe/developer-services/rci-weeks>> 5 of September 2016.

<sup>137</sup> Resort Condominium International on < <http://rciaffiliates.com/europe/en-uk/discover-rci/unparalleled-exchange/>> accessed on 5 of September 2016.

<sup>138</sup> George Leposky, 'Timeshare Basics' (Timeshare Today) <[www.tstoday.com](http://www.tstoday.com)> accessed on 5 of September 2016, 9.

<sup>139</sup> World Tourism Organization, *Timeshare: The New Force in Tourism* (1st ed World Tourism Organization 1996) 34.

<sup>140</sup> World Tourism Organization, *Timeshare: The New Force in Tourism* (1st ed World Tourism Organization 1996) 34.



membership fee to become a member in the exchange company. Once this is accomplished, the timeshare holder may use the exchange service.<sup>141</sup>

The existing exchange companies use the ‘deposit, withdraw’ method within the matching process,<sup>142</sup> whereby a timeshare holder desiring an exchange simply places his time period into a pool of available time periods and locations. The depositor is credited with the right to withdraw *equivalent* or *less* time period from the pool in the future.<sup>143</sup> The depositor may immediately withdraw his new period or he may decide to wait and make his withdrawal at a later date. Hence, the exchange company will have an obligation towards the depositor who in turn has a credit to his name.

The exchange companies are considered as the link which gathers all the parties of the timesharing industry together because they generally have a firm relationship with all other players and with the developers, marketers, and timeshare holders in particular.<sup>144</sup>

The exchange companies support the commercial needs of developers and marketers through conducting annual conferences and regular regional meetings to encourage communications between industry players, and providing a forum for debate of industry issues, both positive and negative.<sup>145</sup>

Furthermore, the exchange companies play a fundamental role in guaranteeing and raising the level of quality in timeshare resorts by carrying out a rating and inspection system in all of the affiliated resorts, which ensures that they enjoy the same quality standard.<sup>146</sup> As for the resorts which fail to maintain the required quality, they are

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<sup>141</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 20.

<sup>142</sup> For more details concerning the modus operandi of RCI and II please refer to: Interval International, *Buyers’ Guide to the Interval International Exchange Program* (Interval International 2016); Resort Condominium International, *RCI Weeks’ Disclosure Guide 2015-2016* (RCI 2016).

<sup>143</sup> The determination of the value of a time period depends on many factors, such as the popularity of the resort area, the quality of the resort, the popularity of the time period/season and the size of the accommodation. By combining these factors, the exchange company is able to evaluate the value of any deposited time period in respect of an exchange request. See Peter Sparkes, *European Land Law* (Hart Publishing 2007) 277.

<sup>144</sup> Spyros Pantazis, ‘The Role of Information Communication Technologies in the Greek Timesharing Industry’ (MSc thesis, University of Surry 2003) 9.

<sup>145</sup> World Tourism Organization, *Timeshare: The New Force in Tourism* (1st ed World Tourism Organization 1996) 37.

<sup>146</sup> Tim Bourne, ‘Is Timeshare Coming Of Age?’ [1998] *International Travel Law Journal* 68.

precluded from taking part in the exchange system by the exchange company itself.<sup>147</sup> The two big exchange companies RCI and II have established a rating system to measure the resort quality in respect of buildings, designs, furniture, and services.

These systems categorise resorts depending on many factors relating to the standard of amenities and services such as

the ease of guest flow, presence of private sleeping area, bathrooms that are accessible without walking throughout the bedroom, kitchen amenities based on the size of unit, and other amenities considered mandatory (e.g., partial or full kitchen, with a coffeemaker, small refrigerator, microwave, oven, and four burner stove). Additional, particulars are wet bars, larger televisions, or VCRs, depending on the unit and market.<sup>148</sup>

In summary, the higher the level of services and amenities available, the higher a resort will feature in the classification system. The rating system offers the timeshare holders tremendous benefits. The most important of which are enhancing the quality of the timeshare product, and providing a prospective timeshare holder with the ability to evaluate the level and quality of that resort based on objective standards relating to the quality of amenities and services provided by that resort. For the exchange purposes, intervals (typically weeks) are evaluated depending on different norms, such as the quality of the resort, location, the size of the accommodation, season and duration of occupation. Further, the exchange companies use computer technology to match supply and demand.<sup>149</sup> Ultimately, both the major exchange networks provide many discounted travel services via their widespread clubs, to the public such as insurance, flights, car rentals etc, plus the exchange services.<sup>150</sup>

#### **2.5.4 Time-sharers' Associations or Clubs**

This Section will discuss how the managing body will be controlled. In most cases, this will be determined by whether the project is being marketed as right-to-use, non-ownership, quasi-ownership or fee ownership timeshare interest, as follows:

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<sup>147</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003)10.

<sup>148</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 13.

<sup>149</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 10.

<sup>150</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 9.

#### *2.5.4.1 Management in a right-to-use and non-ownership setting*

Under the right-to-use variations and non-ownership variations, the developer is the person who has the right to exercise general control over the timeshare project and of making decisions concerning the key issues of the management of the timeshare resort due to the fact that they retain ownership of the development.<sup>151</sup>

The developer typically employs a professional resort management company to deal with the day-to-day management issues of the timeshare project. In some cases, the developer gives limited power to the timeshare holders to participate in some of the decision-making process such as the determination of the annual management and maintenance fees. Nevertheless, the true control remains in the developer's hands as he retains ownership of the development.<sup>152</sup>

#### *2.5.4.2 Management in a quasi-ownership setting*

Under a quasi-ownership setting, the developer forms a corporation or club consisting of the timeshare holders.

#### *Club plans*

With the timesharing club plans, the clubs predominantly take the form of unincorporated members' clubs.<sup>153</sup>

A members' club does not have legal personality independent from its constituent members.<sup>154</sup> The structure most usually adopted is for the developer and his representatives to establish a club and become its founder members. Then, the founder members will form the first committee<sup>155</sup> and approve the first constitution of the club.<sup>156</sup> The first committee will, on behalf of the club, enter into arrangements for the appointment of a trustee to hold the timeshare property (land and buildings) for the

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<sup>151</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 2-15.

<sup>152</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 19, 20 and 53.

<sup>153</sup> These clubs are located predominantly in countries which adopt the common law system, specifically England and Wales. More details can be found in Chapter Four, Section 4.2.

<sup>154</sup> The club is 'an unincorporated association whose members agree to be bound by a common set of rules and who together elect a committee to represent their interests'. See, James Edmonds, 'The Club/Trustee System' (1987) 19 Law Society Gazette 1

<sup>155</sup> The members of the club are usually represented by an elected committee according to the conditions and terms of the club's constitution. Nevertheless, the first committee is often exempted from the rule of election because it represents the interests of the developer, and because the timeshare holders have not been appointed in the club as original members yet. See, James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 46.

<sup>156</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 46.

benefit of club members<sup>157</sup> as well as contracts with a management company.<sup>158</sup> The management company will be responsible for the management of the timeshare project until the election of the second committee who represents the timeshare holders. The election will take place once a sufficient number of timeshare holders are appointed in the club as original members by the developer as a founder member. After the election, the management powers will be passed to the elected committee and the management company will be responsible for the daily administration issues of the timeshare project.<sup>159</sup>

### Company plans

This method is prevalent in France whereby the body of timeshare holders formed into a company with limited liability known as *Société Civil Immobilière*, one interval (typically one week) represented by one share.<sup>160</sup> Each share entitles the shareholder (timeshare holder) to enjoy the right to use and occupation of a defined part of the company's property (timeshare development) for a designated period of time as set out in the memorandum and articles of association. Most decisions about the timeshare development are made by a simple majority vote, but a manager has day-to-day control. According to this method, the internal management is controlled by the document setting up the timeshare development (memorandum and articles of association) which describes use-rights and rights over common parts and which also allocates maintenance costs and the service charge. Non-payment can in extremis lead to seizure and sale the share of the defaulter.<sup>161</sup> This method is discussed in detail in Chapter Five.

#### 2.5.4.3 Management where the developer does not retain ownership

In the timeshare resorts which are constructed on the basis of one of the fee ownership arrangements such as time-span ownership,<sup>162</sup> a mechanism should be established for

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<sup>157</sup> In the case of timesharing projects, the trustee usually takes the form of an independent trust corporation such as 'those operated by the clearing banks or one of the trust corporations which specialise in providing such a service in the field of timesharing schemes, such as Holiday Property Trustee Ltd or Timeshare Trustee (International) Ltd.' See, James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 45. More details can be found in Chapter Four, Section 4.2.

<sup>158</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 47.

<sup>159</sup> More details about these types of clubs are available in Chapter Four, Section 4.2.

<sup>160</sup> European Commission, 'Report from the Commission to the European Parliament and the Council in respect of the Evaluation of the Directive 2008/122/EC' COM (2015) final, 66.

<sup>161</sup> Hassan Abdul Baset, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle 2005) 14.

<sup>162</sup> Time-span ownership is 'an undivided interest in fee simple in a designated parcel of real estate together with the exclusive right of occupancy in that parcel of real estate for a designated recurring

the practice of general control over the timeshare project and making the decisions concerning the key issues of the management of the timeshare resort due to the fact that under the fee ownership arrangements the full ownership of the timeshare project is transferred by the developer to the timeshare holders.<sup>163</sup> In most timeshare projects, a form of time-sharer's association is used. This association is in charge of setting the policies and making the important decisions concerning the timeshare project. It is also in charge of discussing and approving the annual fees which are calculated by the management company in respect of the management and maintenance of the timeshare project. The time-sharer's association invariably employs a professional resort management company to deal with the daily operation of the timeshare project. The management company works under the supervision of the time-sharer's association.<sup>164</sup>

### 2.5.5 Resort Management Companies

As mentioned in Section 2.5.4, the daily management operations are usually carried out by a resort management company which is employed by the party who is under a duty of exercising a general control over the timeshare project and making decisions concerning the key issues of the management of the timeshare resort (developer, time-sharer's association or club depending on the legal structure of the timeshare project).

The management company should have prior experience at timeshare resort management because without professional management the timeshare resort may quickly deteriorate, leading to dissatisfaction on the part of the timeshare holders as we will see in detail in the next Chapter.<sup>165</sup> Consequently, the management company should be capable of performing such chores as bookkeeping, mailing out newsletters and notices, keeping track of ownership records, paying the timeshare complex bills, cleaning, performing regular maintenance, operating vending machine services, receiving, recording and billing phone calls, collecting assessments, and preparing suggested annual operation budget,<sup>166</sup> including the annual fees that must be paid by

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period of time'. Hilary J. MacLeod, 'An Introduction to Timesharing' (1984) 25 New Zealand Valuer 497. More details about time-span ownership are available in Chapter Seven, Section 7.2.3.

<sup>163</sup> The ownership timeshare arrangements will be addressed in detail in Chapter Seven.

<sup>164</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6-5.

<sup>165</sup> This issue is analysed in detail in Phase II of Chapter Three.

<sup>166</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6-7.

the timeshare holders so as to cover the charges of operating and maintaining the timeshare complex such as the charges of upkeep and cleaning; utility bills; insurance premium; security charges; taxes and so forth.<sup>167</sup> Additionally, a certain sum should be included each year to be placed in a reserve fund to pay for major replacements essential after a lapse of time such as new carpets and major items of furniture. However, it must not be forgotten that the developer has to pay the annual management and maintenance fee himself in respect of unsold units/ weeks.<sup>168</sup>

The annual fees are usually calculated on an annual basis, and then apportioned among the timeshare holders in order to determine the proportion of the costs payable by each one of them. The proportion of the timeshare holder of the fees is usually commensurate with the duration of occupancy as well as the quality and size of the occupied accommodation.<sup>169</sup> Thus, the greater the duration of the occupation the greater proportion of the fees that must be paid by the timeshare holder, as well as, the higher the quality and the size of the occupied accommodation, the greater proportion of the fees that must be paid by the timeshare holder.

The continual increment in annual fees and the lack of transparency about how these fees are spent is one of the major problems faced by the timeshare holders in the timeshare industry. Many complaints have been presented to the European Consumer Centres regarding the increase in annual fees above a reasonable rate after short period of the life of the timeshare project.<sup>170</sup> According to the Timeshare Consumers Association the management fees has increased two to three times more than the inflation rate.<sup>171</sup> The treatment used by the European legislature to solve this problem will be discussed in detail in Chapter Three. However, it may be helpful to suggest in this regard either to hold the management fees on trust in the countries that adopt the trusteeship system such as the United Kingdom, or giving the timeshare holders the right to oblige the management companies to submit a detailed annual report about

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<sup>167</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 10.

<sup>168</sup> English Tourist Board, *Holiday Home Development* (English Tourist Board 1977) 13.

<sup>169</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 279.

<sup>170</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 22.

<sup>171</sup> Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007)14.

the administration and maintenance fees certified by a reliable auditing company in order to safeguard the interests of the timeshare holders.<sup>172</sup>

### **2.5.6 Resale Companies**

Resale companies are specialised organisations or divisions of the developer entities who sell on timeshares which have previously been purchased by individuals who subsequently wish to sell.<sup>173</sup> There are many consumer complaints about resale contracts. Timeshare holders are often approached by agents offering to re-sell their timeshare at a good price. If the timeshare holder is interested in selling, the agent may request a fee which may take the form of a percentage of the resale price, or a flat fee. Many timeshare holders have complained that after they have paid the fee, the agent either disappears or fails to make the resale. In either case, the interest of the timeshare holder is harmed as he has no way to get his money back.<sup>174</sup> The resale issues will be explored in detail in Chapter Three.

### **2.5.7 Specialists in sectors related to timeshare industry**

Specialists include lawyers, banking institutions, auditors and consultants. While professional expertise in timeshare industry appears to be widespread, in reality there are few advisers who actually have the required professional experience.<sup>175</sup>

## **2.6 TIMESHARE PRODUCTS (PATTERNS OF USE).**

As mentioned in Section 2.2.3, timeshare products are either presented on the basis of a points system or on the basis of a time period system. This position can be conveniently set out diagrammatically as follows:<sup>176</sup>

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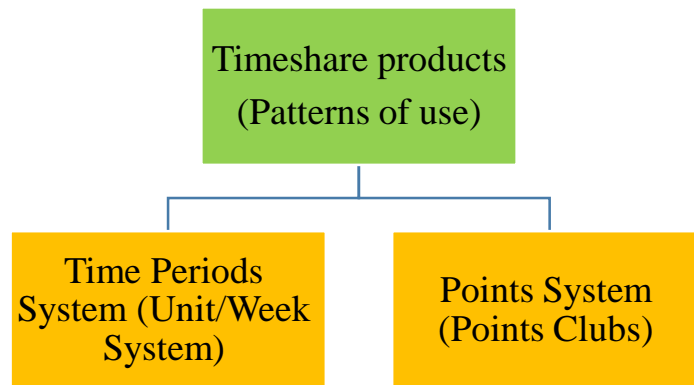
<sup>172</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 279.

<sup>173</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 11; Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004)10.

<sup>174</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 19.

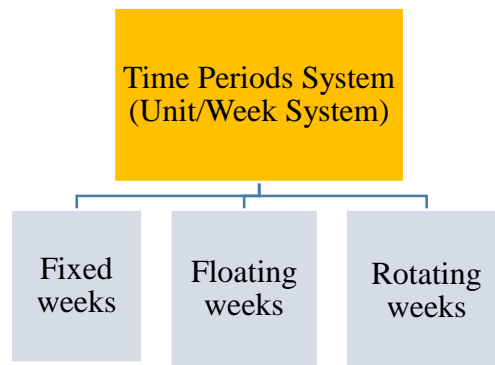
<sup>175</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 11.

<sup>176</sup> Source of diagram: the author.



### 2.6.1. Time Periods System (Unit/ Week System).

There are three main timeshare products, namely: fixed weeks, floating weeks and rotating weeks. This position can be conveniently set out diagrammatically as follows:<sup>177</sup>



#### 2.6.1.1 Fixed weeks

The fixed week's pattern is the earliest and simplest format of timesharing and was started in the 1960s.<sup>178</sup> It is simply a method that entitles many individuals (timeshare holders), one after the other, to occupy the same piece of property for a fixed period of time and for the length of the agreement, on condition that the timeshare holder must pay a lump sum in advance and then keeps paying the annual fees.<sup>179</sup> Accordingly, this technique gives the timeshare holder the right of occupancy at the same apartment which is situated in a particular timeshare scheme, for the same period of time (traditionally one week) every year. Thus, if the timeshare holder buys week 5 at unit (12) of the resort (y), he will acquire the right to use this unit in that

<sup>177</sup> Source of diagram: the author.

<sup>178</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 3.

<sup>179</sup> Ralph E. Stone, 'The Federal Trade Commission and Timeshare Resale Companies' (1990) 24 *Suffolk University Law Review* 49; David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 465.



resort at week 5 for a certain number of years as stipulated in the timeshare agreement. The main benefit of the fixed week pattern is that it provides the timeshare holder with a guarantee of spending his vacation in the chosen place and time every year. Furthermore, if a timeshare holder wants to use another week and/or another resort, he can swap his “week” in any year through an exchange company.<sup>180</sup> The fixed week timeshare pattern is still in existence but is not as common as it was in the 1960s and 1970s, due to the fact that this kind of timesharing does not provide the required flexibility for the timeshare holders.<sup>181</sup> This fact has led to bring into being more flexible products of timesharing, namely: floating weeks, rotating weeks, and the points system.<sup>182</sup>

### *2.6.1.2 Floating pattern*

From the beginning of the 1970s until the end of 1980s the most the modern projects adopted new patterns of timesharing embodied by the floating time system in order to comply with the growing demand of timeshare holders seeking more flexibility in timeshare products.<sup>183</sup>

Three main kinds of floating pattern can be identified.<sup>184</sup> The first one entitles the timeshare holder to occupy a designated accommodation at a specified resort but the week is floated throughout the year, or during a given season. The second type grants the timeshare holder the right of occupancy during the same week every year in an accommodation at the resort which will be identified at a later date (i.e., the unit will be floated throughout the same resort, or the within a range of resorts). This is unlike the previous two types discussed. The third offers the timeshare holder the right of occupancy of a unit at a resort for a time period (week), both of them will be

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<sup>180</sup> Timeshare Consumer Association, ‘Timeshare in Europe 2004: An Industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 4.

<sup>181</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 255.

<sup>182</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 4.

<sup>183</sup> D W Butler, ‘Time-Shares Conferring Ownership’ [1985] *Acta Juridica* 315. For more details concerning the tension between the flexibility and security with regard the use of the floating pattern please refer to Section 2.4.1.

<sup>184</sup> Nuria Rodriguez Murillo, ‘The Reversion of the Timeshare Directive’ (2007) *International Travel Law Journal* 83; Susan Marks, *Paradise Lost: CAB Clients' Experience of Timeshare and Timeshare-like Products Evidence report* (National Association of Citizens Advice Bureaux 2003) 5; David A Bowen, ‘Timeshare Ownership: Regulation and Common Sense’ (2006) 18 *Loyola Consumer Law Review* 465; George Leposky, ‘Timeshare Basics’ (Timeshare Today) <www.tstoday.com> accessed on 13 September 2016; Hilary J MacLeod, ‘An Introduction to Timesharing’ (1984) 25 *New Zealand Valuer* 497; D W Butler, ‘Time-Shares Conferring Ownership’ [1985] *Acta Juridica* 315.

determined at a later date (in this case, both the location and the time period are floated).<sup>185</sup>

The main benefit of the floating pattern is that it offers the timeshare holders a higher degree of flexibility in choosing the week or the unit which is not available under the fixed pattern.<sup>186</sup> This in turn gives the developers the ability to sell more weeks due to the belief of timeshare holders that they will obtain the desirable week and/ or the unit automatically.<sup>187</sup> Nevertheless the floating pattern does not guarantee the procurement of the desired unit and/ or week every year because the right of timeshare holders is not attached to a specified unit or week. Additionally, this pattern depends on the booking system with all its inherent weakness, specifically, it serves only timeshare holders who their circumstances enable them to plan their vacation well in advance.<sup>188</sup> All this has led to dissatisfaction from the timeshare holders, especially those who are not sure when and where they can enjoy their vacation because of their work, family or health circumstances.<sup>189</sup>

It is worth pointing out that the timeshare businesses developed other forms of use patterns under the floating time periods system, as follows:

#### The split week

This pattern of use gives the timeshare holder the right to use an accommodation in a resort for a period of less than one week. In other words, the developer sells to the timeshare holder a right to occupy an accommodation in a resort for three or four days of each year, at a cost equivalent to about half the cost of the occupancy for a full week.<sup>190</sup> The benefit of this method is reflected in the fact that it makes timesharing

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<sup>185</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 4. These patterns of use (floating weeks' variations) do not transfer an interest in real property to the timeshare holders because their rights of occupancy are not attached to a specified unit or week. Therefore, they will not be able to get use of the protection means and remedies of property law.

<sup>186</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 465.

<sup>187</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 4.

<sup>188</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 11. Booking system can be defined as an arrangement to have an accommodation held for the use of a timeshare holder.

<sup>189</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 4. This point (lack of availability) are analysed in more detail in Phase II of Chapter Three.

<sup>190</sup> Tomas A Dickerson, 'Resort Timesharing: The Consumer's Rights and Remedies in the US' [2001] *International Travel Law Journal* 40.

an accessible product to everyone. This, in turn, increases the chances of developers to market all their timeshare resorts, and to make a healthy profit.

### **The Fractional Ownership Timeshare or Private Residence Clubs (PRC)**

This is a modified version of the floating week's pattern but allowing the timeshare holders longer periods of occupancy each year, such as a month or a multiple of month.<sup>191</sup> Thus, the timeshare holder in this modified system is entitled to occupy the resort's accommodation for a quarter, one-sixth, one-eighth of the year, for example, taking into consideration the fact that these intervals of occupancy can be enjoyed either intermittently or continuously across the year.<sup>192</sup> The current resorts which operate on a fractional timeshare basis are characterised by a larger units of accommodation, and contain luxurious types of furniture and equipment, recreational amenities which are on par with those available in five-star hotels. Therefore, this type of timeshare product attracts the affluent because it provides them with a carefree and high quality accommodation without the potential problems of owning a second home.<sup>193</sup>

#### **2.6.1.3 Rotating weeks**

Some of the schemes are marketing their timeshare units on the basis of rotating time in order to give all the timeshare holders an opportunity to enjoy the best time periods equally. According to the rotating pattern, the time intervals (typically a week) revolve either forward or backwards through the calendar year. For example, if a given timeshare holder started with week 15, week 16 will be allocated to him the next year and so on.<sup>194</sup> Although this method is less flexible than the floating pattern, it divides the time periods among the timeshare holders fairly.

It is worth mentioning that most timeshares are sold in either annual or biennial usage. Annual usage is the most common formula. It refers to a timeshare arrangement under which the timeshare holder has the right to occupy an accommodation in a timeshare resort every year. By way of contrast, biennial usage refers to a timeshare arrangement whereby the timeshare holder has the right to

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<sup>191</sup> Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 6.

<sup>192</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surrey 2003) 12.

<sup>193</sup> Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 6.

<sup>194</sup> D W Butler, 'Time-Shares Conferring Ownership' [1985] Acta Juridica 315.

occupy an accommodation in a timeshare resort every other year. Biennial owners (timeshare holder) would 'have only one-half of a vote and pay only one-half of the maintenance fee charged to Annual timeshare owners.'<sup>195</sup>

### 2.6.2 Points Clubs (Points System)

The points system was used in the timeshare industry many years ago. This began in Europe when Hapimag,<sup>196</sup> which is a holding company situated in Switzerland, launched this new pattern of timesharing through the establishment of a large group of resorts throughout Europe operating on a points basis.<sup>197</sup>

In the United States, this began with Disney, in 1992, which started this new form of timeshare that does not depend on weekly patterns (whether fixed or floating), but enables the timeshare holders to buy points within Disney's vacation club.<sup>198</sup> Afterwards, many developers in South Africa have based their timeshare business on a points system and many others, worldwide, have followed suit.<sup>199</sup>

In contrast with fixed and floating periods, the timeshare holder in a points' system buys a membership of a points club which is converted to a certain number of points that can then be transformed to intervals of accommodation, and other sorts of travel services.<sup>200</sup> Thus, this technique confers the timeshare holder the right to access different resorts, different categories of accommodations, and amenities, all within an identified resorts group, along with many other travel-related services such as car rentals and airline tickets.<sup>201</sup> In addition, the timeshare holder as a club member must pay annual fees for management and maintenance. However, its calculation is uncertain as the right of the timeshare holder in occupancy is not linked to a specific accommodation.<sup>202</sup>

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<sup>195</sup> Tomas A Dickerson, 'Resort Timesharing: The Consumer's Rights and Remedies in the US' [2001] *International Travel Law Journal* 40.

<sup>196</sup> This word is an abbreviation for 'hotel und appartementhaus immobilien anlage' which in English mean: 'hotel and apartment house real estate investment'

<sup>197</sup> Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>.

<sup>198</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 4.

<sup>199</sup> Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>.

<sup>200</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 255.

<sup>201</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 467.

<sup>202</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 256.

Consequently, points-based timeshares provides the timeshare holder with freedom to stay at a wide range of luxury suites, without being fixed to a certain season or the same resort. There are many factors that influence the ability to use points at a resort. Some of these include: <sup>203</sup>

- Season of the year: the high season requires points more than intermediate and low seasons.
- Popularity of resort: popular resorts require more points than unpopular resorts.
- Size of the room: a large room require more points than a small room.
- The length of stay: the longer the duration of stay, the more points required.
- The specific nights requested: weekends and national holidays usually require more points.

#### *2.6.2.1 The types of points clubs*

There are three types of clubs which operate based on points:- <sup>204</sup>

1. A pure points club which does not confer the members (timeshare holders) any direct legal rights on its affiliated resorts.
2. Ceded points club, in this case, the members of the club lend their owned timeshare week(s), whether fixed or floating, to the points clubs temporarily.
3. Mixed points club, which is a mixture between the pure and ceded.

#### *2.6.2.2 The Benefits of Points Club Membership*

A points' club system provides to its beneficiaries many benefits. The main ones are listed below:

1. The points system provides timeshare holders with the flexibility they need to plan their own vacations as it gives them the ability to obtain longer periods in low season (perhaps two or three weeks) and shorter periods in high season (maybe a single week or less), by using the same number of points. They may also have longer periods in

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<sup>203</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surrey 2003) 12.

<sup>204</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 5; Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 6.

smaller units or shorter periods in larger units.<sup>205</sup> Furthermore, the timeshare holder can purchase the number of points which enables him to get the type of product which satisfies his requirements. Thus, the club member can buy a specific number of points sufficient to get a one-bedroom accommodation, two-bedroom accommodation, suite, apartment or villa for a fixed number of days.<sup>206</sup>

2. Some clubs give its members the ability to convert all or some of their points to purchase other services along with the occupancy of resorts' units, such as flights, cruise, hotel accommodations, golf packages, and many other attractive recreational services.<sup>207</sup>

3. Some clubs enable timeshare holders to start their membership through buying a small number of points by paying a small amount of money and then increasing the number of points by additional payments in subsequent years.<sup>208</sup>

4. Like the conventional timeshare,<sup>209</sup> points clubs, in general, provides the member the ability to save the points in one year by not using them and lending them either to the club or to another member in exchange for extra points in a future year. This option is called 'saving' and 'borrowing'.<sup>210</sup>

### ***2.6.2.3 The disadvantages of Points Club Membership***

However, the points' club system has many drawbacks, the most important of which can be summarised as follows:

1. The main drawback of this pattern is that it depends on the booking system which means first come first served. That, in turn, may lead to loss, by the club member, of the guarantee to get the week's accommodation, and the resort which they want each

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<sup>205</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 Loyola Consumer Law Review 467; Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>.

<sup>206</sup> Randall Upchurch & Conrad Lashley, *Timeshare Resort operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006) 5.

<sup>207</sup> Schreier (n 9) 38.

<sup>208</sup> Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>.

<sup>209</sup> The Conventional timeshare products include all products that not based on points' systems.

<sup>210</sup> Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>.

year or any year.<sup>211</sup> This will occur unless the week was ceded, or the booking was done well in advance, which does not happen in most cases.<sup>212</sup>

2. The fee to be a member in a points' club, together with the annual charges (i.e., the fees of maintenance and management), may not make the points' club good value in comparison with buying any of the traditional timeshare products (i.e., week - unit products), especially if the timeshare is bought from the secondary market (i.e., from a timeshare holder who wants to sell his time share, and not from the developer).<sup>213</sup>

3. Some clubs points raise the value of points required to obtain a defined week and/or specific resort, and ask the members to pay additional capital (i.e., to buy more points) to enable them to continue to use that week and/ or resort.<sup>214</sup>

4. The potential club member may be subject to the risk of misleading and confusion which is conducted by the marketing organisation because of the great complexity of many points clubs.<sup>215</sup>

5. The club member cannot benefit from the remedies of property law because his right is purely contractual.<sup>216</sup>

6. The deficiency of most clubs which operate on points based system is that the value of the points may not be protected against inflation.<sup>217</sup>

7. Last but not least, as with traditional timeshare products, the resale of points when they are no longer required may be a problem, because the price of reselling the points will be far less than the price which the club member was paid to purchase them.<sup>218</sup>

This point will be explored in more detail in Chapter Three.

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<sup>211</sup> This drawback is highlighted under Section 2.6.1.2 (floating weeks). It also will be analysed in detail in Phase II of Chapter Three.

<sup>212</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 12; Peter Sparkes, *European Land Law* (Hart Publishing 2007) 256.

<sup>213</sup> Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>.

<sup>214</sup> Lisa Ann Schreier, *Timeshare Vacation for Dummies* (1ed Wiley Publishing Inc. 2005) 21.

<sup>215</sup> Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>. The problem of using aggressive marketing techniques are analysed in detail in Phase I of Chapter Three.

<sup>216</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 467.

<sup>217</sup> Lisa Ann Schreier, *Timeshare Vacation for Dummies* (1ed Wiley Publishing Inc. 2005) 38.

<sup>218</sup> Lisa Ann Schreier, *Timeshare Vacation for Dummies* (1ed Wiley Publishing Inc. 2005) 38.



#### *2.6.2.4 The key differences between unit/week system and points system*

1. Under the unit/week system, time periods serves as a currency to allocate timeshare accommodations according to location, unit size and demand which relies on days of the week and seasonality whereas points are employed as a currency to reserve timeshare accommodations of various sizes, during different seasons, and for varying lengths of time pursuant to the points system.
2. Under the points system, timeshare holders are entitled to employ all or some of their points to get travel and leisure-services along with the occupancy of resorts' units, such as car rentals, airline tickets, cruise, hotel accommodations and golf packages. Such services are not available under the unit/week system.

## **2.7 CONCLUSION**

The above discussion has demonstrated that the timeshare projects are not regulated based on one legal approach whether at the national or international level. This fact led to the diversity of the legal approaches which are used to regulate the timeshare projects and thus the diversity, and sometimes uncertainty, of the legal nature of the right of the timeshare holder in occupancy. In turn, this led to the variation of the rights and obligations of the timeshare holders from a timeshare project to another as each legal approach provides the timeshare holders with a different type of legal rights. It is believed that all the timeshare projects in Iraq should be regulated based on one legal approach as this will result in attaining several positive outcomes. The problems associated with timeshare will now be analysed in order to create an evaluative framework. This framework will be applied to several legal models which regulate timeshare around the world in order to identify optimal features, against which an optimal timeshare system for Iraq will be proposed.



## **CHAPTER THREE**

### **EXTRACTING THE OPTIMAL FEATURES**

#### **INTRODUCTION**

The aim of this Chapter is to establish an evaluative framework by identifying the features of legal regimes for timeshare that are likely to provide the optimal system of a timeshare operation in any jurisdiction. This framework can then be used to carry out a functional analysis in respect of timeshare models in various jurisdictions. Once this has been achieved, Chapters 4, 5, 6, and 7, will then move to make a legislative proposal for Iraq in respect of timeshare.

The optimal features will be extracted by analysing the problems associated with timeshare. The analysis of the problems will be done by consulting the European Timeshare Directives, European timeshare policy documents, key cases and relevant literature. Therefore, the domestic legislation of the countries under discussion will not be consulted in this chapter, however very brief references to domestic legislation will be made when analysing leading cases.

The concept of a timeshare cycle has been used to provide the structure of this Chapter in the following manner:

#### **Phase I: Problems associated with the initial sale and purchase of timeshare**

This section will discuss the problems which arise during the buying process.

#### **Phase II: Problems associated with ownership**

This section will examine the problems which arise during the ownership of timeshare.

#### **Phase III: Problems associated with the secondary market and termination by individual timeshare holders**

This section will assess the problems which arise during resale of a timeshare, and restrictions placed in agreements which prevent individuals terminating their agreements.

## **Phase IV: Collective action problems**

This section will analyse the problems which relate to the management and termination of the timeshare project in its entirety. This is a particular issue within legal arrangements when the developer transfers the full ownership of the project to the timeshare holders, such as the fee ownership arrangements and quasi-ownership arrangements.

It should be noted that these problems are not stand-alone issues; they are interrelated and have a knock-on effect. For instance, the lack of disclosure with regard to the restrictions on exercising the right of occupancy under the floating-weeks' pattern, points pattern and exchange system has led timeshare holders being dissatisfied due to the lack of availability of the promised product. This has other consequences for the timeshare industry. For example, it is one reason why some people distrust timeshares and are unwilling to buy on the secondary market, which in turn resulted in the lack of secondary market.

## **Phase I) Problems associated with the initial sale and purchase of timeshare**

The history of timeshare is full of complaints about the common problems associated with the purchase and selling of timeshare, namely *aggressive marketing techniques*, *lack of disclosure* and *verbal misrepresentation*.<sup>1</sup> However, these problems were largely dealt with through the enactment of the repealed European Timeshare Directive of 1994<sup>2</sup> and the current 2009 Directive<sup>3</sup> respectively as we will see in the following subsections (herein referred to as the repealed Directive and the current Directive).

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<sup>1</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 16; Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 13.

<sup>2</sup> Directive 94/47/EC of the European Parliament and the Council 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 [1994] OJ L 280/83(hereinafter referred to as the repealed Directive).

<sup>3</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L33/10 (hereinafter referred to as the current Directive).

### *Aggressive marketing techniques*

The process of marketing the timeshare is regarded as one of the major difficulties faced by developers and marketing companies. This is because of two main reasons:

(a) The seasonality of the holiday market leads to much of the timeshare accommodations remaining unsold in the off-peak season and therefore aggressive selling techniques are systematically used to attract new timeshare purchasers.<sup>4</sup>

(b) Timeshare is considered to be one of the 'unsought products'. According to Pantazis unsought products are 'the goods that the consumer does not know anything about and does not normally think of buying like the classic example of encyclopaedias and life insurance'.<sup>5</sup> Hence, it can be easily assumed that there is no natural demand for timesharing either because of the lack of knowledge of the concept of this product, or seeing timesharing as an unnecessary luxury.<sup>6</sup> Since there is no natural demand on timesharing, marketing companies and promoters use aggressive marketing techniques to stimulate the demand for timesharing products.<sup>7</sup>

Consequently, potential timeshare purchasers often endure hard-sale and other unscrupulous sales techniques when purchasing a timeshare. Timeshare marketers frequently use the same-day pressure techniques so as to get the prospective purchasers to sign the timeshare contract on the spot. This is due to the fact that marketers believe that the chance of a sale diminishes significantly once the prospective purchaser walks away.<sup>8</sup> One of these techniques is taking the credit card of the purchaser on the pretext that checking his credit rating. The card is then held for several hours so as to provide the sales personnel enough time to 'break the purchaser's defences to persuasive sales talk'.<sup>9</sup>

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<sup>4</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 251.

<sup>5</sup> Spyros Pantazis 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 15.

<sup>6</sup> Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 8.

<sup>7</sup> Nuria Rodriguez Murillo, 'The Reversion of the Timeshare Directive' (2007) *International Travel Law Journal* 84; Ron Haylock, 'Developments in the Global Timeshare Market' (1995) 4 *Travel and Tourism Analyst* 43.

<sup>8</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 *Loyola Consumer Law Review* 469.

<sup>9</sup> Diane M Messer, 'An Overview Of Time-Sharing and the Tennessee Time-Share Act: Are Purchaser Now Protected?' (1986) 53 *Tennessee Law Review* 791.

The use of these harsh marketing techniques led to damaging the image of timesharing and harmed its reputation in the minds of the general public.<sup>10</sup>

### Protection provided by the Repealed Directive

The cumulative effect of all this bad publicity brought timeshare to the attention of the authorities of the European Union in Brussels. The possibility of the enactment of a Directive to regulate the sale of timeshare was first discussed in 1987 when aggressive sales tactics in the Canary Islands were causing much adverse publicity in the UK, Belgium, Netherlands and Germany.<sup>11</sup> Complaints from the timeshare holders in Europe reached the ears of the politicians and organisations concerned with consumer protection. Therefore, several members of the European Parliament pressed for European legislation to tackle the timeshare problem as they realised that this problem could not be solved by national governments.<sup>12</sup> Eventually, an EU Directive was issued in 1994<sup>13</sup> which required member states to enact specific legislation to regulate certain aspects of timeshare.<sup>14</sup>

To tackle the aggressive selling problem, the repealed Directive provided the purchaser (timeshare holder) with a ten-day cooling-off period during which he was entitled to rescind the timeshare contract without incurring a penalty. This was provided for in Article (5/1 and 4) which read as follow:

1. In addition to the possibilities available to the purchaser under national laws on the nullity of contracts, the purchaser shall have the right:
  - To withdraw without giving any reason within 10 calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract. If the 10th day is a public holiday, the period shall be extended to the first working day thereafter.
4. Where the purchaser exercises the right of cancellation provided for in the second indent of paragraph 1 he shall not be required to make any defrayal.

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<sup>10</sup> Ramon Mullerat & Bernat Mullerat, 'A Self Defending Industry: Timesharing in Europe' [2002] Business Law International 252,260; Spyros Pantazis 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 15.

<sup>11</sup> Ron Haylock, 'Market Segments: Developments in the Global Timeshare Market' (1995) 4 Travel and Tourism Analyst 43.

<sup>12</sup> Ron Haylock, 'Market Segments: Developments in the Global Timeshare Market' (1995) 4 Travel and Tourism Analyst 43.

<sup>13</sup> Directive 94/47/EC of the European Parliament and the Council 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 [1994] OJ L 280/83(hereinafter the repealed Directive).

<sup>14</sup> Article 12 of the repealed Directive.

However, the purchaser may have been required to defray the administrative costs when he exercised his right of withdrawal. This was enshrined in paragraph (3) of Article 5 which read as

3. Where the purchaser exercises the right provided for in the first indent of paragraph 1, he may be required to defray, where appropriate, only those expenses which, in accordance with national law, are incurred as a result of the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the period referred to in the first indent of paragraph 1. Such expenses shall be expressly mentioned in the contract.

In addition, the repealed Directive banned the collection of advanced payments during the cooling-off period. Article 6 provided for that by stating ‘The Member States shall make provision in their legislation to prohibit any advance payments by a purchaser before the end of the period during which he may exercise the right of withdrawal’. This was to guarantee the purchaser’s right of rescission without pressure and to avoid practical problems associated with reimbursement of advance payments.<sup>15</sup>

Furthermore, the repealed Directive provided for the cancellation of the credit arrangements without any financial consequence in the case of the exercise of the right of withdrawal during the cooling-off period so as to facilitate the exercise of the right of withdrawal. This was stipulated in Article 7 which stated:

The Member States shall make provision in their legislation to ensure that:

- If the price is fully or partly covered by credit granted by the vendor, or - if the price is fully or partly covered by credit granted to the purchaser by a third party on the basis of an agreement between the third party and the vendor, the credit agreement shall be cancelled, without any penalty, if the purchaser exercises his right to cancel or withdraw from the contract as provided for in Article 5.
- The Member States shall lay down detailed arrangements to govern the cancellation of credit agreements.

### [The Current Directive: Refining the Protection Further](#)

After the adoption of the repealed Directive, new tourist products which are equivalent to timeshare have appeared on the market such as the timeshare-like products and the long-term holiday products. The new products were designed by the

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<sup>15</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 22.

rogue traders in a way that fell outside the scope of the repealed Directive so as to deprive the consumers of the protection provided.<sup>16</sup> In response to this, the European Union passed the current Directive 2008/122/EC<sup>17</sup> on 14 of January 2009 which came into force throughout the European member states on 23 February 2011.<sup>18</sup>

The European legislature retained the same protection measures stipulated in the repealed Directive, but with some changes in respect of the target group, the duration of the cooling-off period, the administrative costs and the ancillary contracts, as follows

**The expanded targeted group:**

The current Directive extends the scope of its rules to include the consumers of the time-share like products, the long-term holiday products, the exchange contracts, the resale contracts as well as the timeshare products. Consequently, the consumers of the aforesaid products will enjoy the same protection level provided for the timeshare holders such as the cooling-off period.

**The cooling-off period extended:**

The current Directive lengthened the cooling-off period by making it 14 days from the day of the conclusion of the contract or of any binding preliminary contract rather than 10 days under the repealed Directive. Article 6/1 provides for that by stating:

In addition to the remedies available to the consumer under national law in the event of breach of the provisions of this Directive, Member States shall ensure that the consumer is given a period of 14 calendar days to withdraw from the timeshare, long-term holiday product, resale or exchange contract, without giving any reason.

The reason for this amendment is that the original withdrawal period of 10 days was considered by the majority of the stakeholders to be too short, especially for the purchasers who conclude a contract during their holiday because they cannot properly assess the actual consequences of their purchase until they return to their

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<sup>16</sup> For more details, please refer to Section 2.4 of Chapter Two.

<sup>17</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L33/10 (hereinafter the current Directive).

<sup>18</sup> Article 16 of the current Directive.

place of residence, by which time it might be too late to exercise the right of withdrawal from the contract.<sup>19</sup>

### **Administrative costs removed**

Unlike repealed Directive the current Directive prohibits the collection of administrative costs from the purchaser when he exercises his right of withdrawal. This is because of two reasons; first, these costs are not excessively onerous as confirmed by the public consultation conducted by the European Commission before the enactment of the current Directive; second, to fulfil the consumer protection objectives stipulated in the Treaty establishing the European Community.<sup>20</sup>

### **Ancillary contracts: Scope expanded**

The current Directive expands the scope of the contracts which will be terminated automatically when the purchaser exercises his right of withdrawal during the cooling-off period in order to facilitate the exercise of the right of withdrawal. This is provided for in Article 11 which states that:

1. Member States shall ensure that, where the consumer exercises the right to withdraw from the timeshare or long-term holiday product contract, any exchange contract ancillary to it or any other ancillary contract is automatically terminated, at no cost to the consumer.
2. Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (1), where the price is fully or partly covered by a credit granted to the consumer by the trader, or by a third party on the basis of an arrangement between the third party and the trader, the credit agreement shall be terminated, at no cost to the consumer, where the consumer exercises the right to withdraw from the timeshare, long-term holiday product, resale or exchange contract.

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<sup>19</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 21.

<sup>20</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 22.

## Extracting the Optimal Aspects of Timeshare: Protection against Aggressive Selling Techniques

The implementation of the aforementioned protection measures has led to the reduction of aggressive selling techniques in the European timeshare market. Sparkes has referred to this outcome by saying, '[i]t is greatly to the credit of the European Commission that the Timeshare Directive 1994 has swept the continent clear of timeshare blaggers and spivs'.<sup>21</sup> Sparkes has attributed that to the 'important rights ...conferred on consumers, information rights and the right to a cooling-off period during which a potential purchaser can change his mind and withdraw'.<sup>22</sup>

Therefore, it is believed that one of the optimal features of robust timeshare legislation is to provide the consumers with the right of reflection before the timeshare, exchange or resale contract become binding. This includes:

- (1) Providing the consumers with a cooling-off period, during which a potential consumer can change his mind and withdraw without any charges or justification.
- (2) Prohibiting the collection of any payment before the end of the cooling-off period with regard to the timeshare and exchange contract. In the case of a resale contract, this feature would prohibit collection of any payment prior to the actual sale taking place.
- (3) Where the right of withdrawal is exercised, the feature would provide the automatic termination of all the ancillary contracts.

### *Lack of Disclosure*

According to the European Commission some purchasers (timeshare holders) have fallen prey to fraudulent transactions and some forms of misconduct or they have been misled by timeshare sellers (developers and marketing companies).<sup>23</sup> Most notably, not providing the timeshare holders with what they need by way of information to make an informed decision with regard to the purchase of the timeshare, such as the legal nature of the right of occupancy; the way in which the

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<sup>21</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 252.

<sup>22</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 252.

<sup>23</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term holiday Products' MEMO/07/231, 3; Curtis J Berger, 'Timeshare in the United States' (1990) 38 *American Journal of Comparative Law* 140.



timeshare project will be managed, and the mechanism of decision-making.<sup>24</sup> The result is that purchasers are misled into entering timeshare contracts without sufficient information or understanding about what they are buying.<sup>25</sup> This has led to adverse media coverage in respect of timesharing, which in turn reflected negatively on its reputation in the minds of the general public.<sup>26</sup>

### Protection provided by the repealed Directive

The repealed Directive placed an obligation on the developer to provide the potential purchaser with a minimum level of information before the conclusion of the timeshare contract so as to resolve the problem of lack of disclosure.<sup>27</sup> According to Article 3/1 of the repealed Directive, the developer was required to provide the prospective timeshare purchaser with a document containing relevant information. The information that the document had to include varied depending on the stage of development of the timeshare complex, as set out below:

Information to be provided upon the completion of the timeshare complex

The document had to include the following information if the construction of the timeshare complex was complete:<sup>28</sup>

- i) The identities and domiciles of the parties, the developer's legal status at the time of the conclusion of the contract and the identity and domicile of the owner.
- ii) The precise right which was the subject of the contract, including any conditions.
- iii) The location of the timeshare property and an accurate description of that property.

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<sup>24</sup> European Commission/ Health and Consumer Protection Directorate- General 'Consultation Paper: Review of the Timeshare Directive (94/47/EC)', Brussels 2006, 13; Nuria Rodriguez, 'Timeshare in Europe' a paper presented in the workshop on the review of the Timeshare Directive 94/47/EC which organised by the European Commission 19 July 2006, 1; Ellen R Peirce, 'Timeshare Interests in Real Estate: A Critical Evaluation of the Regulatory Environment' (1984) 59 Notre Dame Law Review 29.

<sup>25</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 22.

<sup>26</sup> Ron Haylock, 'Developments in Worldwide Timeshare' (1988) 2 Travel and Tourism Analyst 63.

<sup>27</sup> Clause (7) of the preamble of the repealed Directive.

<sup>28</sup> Points (a) to (g), (i) and (l) of the Annex of the repealed Directive. Please note that the other points are dealt with below.

iv) The services (lighting, water, maintenance, refuse collection) to which the purchaser would have access and on what conditions.

v) The common facilities, such as swimming pool or sauna, to which the purchaser may have access, and on what conditions.

vi) The principles governing maintenance, repairs, administration and management of the timeshare property.

vii) The costs: the price to be paid by the purchaser to obtain and exercise the occupancy right; an estimate of the charges to be paid by the purchaser for the use of common facilities and services; the basis for the calculation of the service charges, any mandatory statutory charges such as taxes or fees; and the administrative overheads for management, maintenance and repairs.

viii) The right to cancel the timeshare contract and the method of exercising this, meaning the person to whom any letter of cancellation should be sent, and the cost of cancellation; also arrangements for the cancellation of any credit agreement linked to the timeshare contract in the case of its cancellation.

Information to be provided prior to the completion of the timeshare complex

If construction of the timeshare complex was still incomplete, the information document had to include the following additional information:<sup>29</sup>

i) The state of completion.

ii) A reasonable estimate of the deadline for completion of the timeshare property.

iii) The number of the building permit and details of the competent authorities.

iv) The state of completion of the services such as gas, electricity, water and telephone connections.

v) A guarantee regarding completion of the timeshare property or a guarantee regarding reimbursement of any payment made if the property is not completed and the conditions governing the operation of those guarantees.

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<sup>29</sup> Point d of the Annex of the repealed Directive.

Moreover, the repealed Directive required that any advertising material had to indicate the possibility and means of getting the aforesaid information document. Thus, any prospectus had to give full and accurate information, including a general description of the timeshare property and how further information could be obtained. This was stipulated in Article 3/3 which read as follow:

3. Any advertising referring to the immovable property concerned shall indicate the possibility of obtaining the document referred to in paragraph 1 and where it may be obtained.

Furthermore, the repealed Directive required repetition of the pre-contract information in the final sale contract, but with changes limited to those agreed or those beyond the vender's control all of which had to be mentioned expressly.<sup>30</sup> Consequently, the timeshare contract needed to include the following additional information:<sup>31</sup>

- i) The exact cooling-off period.
- ii) When the purchaser may start to exercise his right of occupancy.
- iii) Reaffirmation that there were no unstated costs, fees and obligations.
- iv) Details of any exchange or resale schemes and their costs.
- v) The date and place of signature by each party.

Additionally, the repealed Directive necessitated that the timeshare contracts had to be in writing.<sup>32</sup> The information document and the timeshare contract had to be written in a language understandable by the timeshare holders. Consequently, the consumer had the right to obtain the information in the language of his country of residence or the country of nationality - of his choosing – and also the language of the location of the timeshare complex.<sup>33</sup>

It is also worth pointing out that the consequences of the failure to provide the timeshare purchasers with comprehensive contractual information were left to be

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<sup>30</sup> Article 3/2 of the repealed Directive.

<sup>31</sup> Points h, j, k and m of the Annex of the repealed Directive.

<sup>32</sup> First paragraph of Article 4 of the repealed Directive.

<sup>33</sup> Paragraphs 2 and 3 of Article 4 of the repealed Directive.

regulated by the domestic laws of Member States.<sup>34</sup> This is due to the fact that the European legislature believed that ‘national legislation should be used to deal with the internal aspects which are already covered by legislation and traditions firmly rooted in the member states’.<sup>35</sup> This, in turn, reflects that the legislative policy of the European Union is based on the regulation of the cross-border aspects which are not regulated by the national laws of Member States in order to ‘enhance consumer protection as well as to help consumers and traders to take as much advantage as possible of the Internal Market in a sector where contracts often are of a cross-border nature’.<sup>36</sup>

On the whole, it can be said that the repealed Directive ‘worked well within its own limits’<sup>37</sup> because the complaints related to timeshare which were reported by the consumers to European Consumer Centres declined to only 5% in 2003.<sup>38</sup> Put another way, 95% of complaints recorded by European Consumer Centres in 2003 related to products that were not regulated by the repealed Directive, such as the long-term holiday products, resale contracts and exchange contracts.

#### [The current Directive: Refining the Protection Further](#)

On 14 January 2009, The European Union passed the current Directive 2008/122/EC. This was in part to regulate the tourist contracts which were outside the scope of the repealed Directive such as the exchange contracts and the resale contracts.

The European legislature retained the obligation whereby the developers and marketing companies had to provide the consumers with accurate and comprehensive contractual information in an understandable language, as required by the repealed Directive.<sup>39</sup> However, the current Directive updated the information which must be given to the consumers of the timeshare contracts. In addition, it expanded the scope

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<sup>34</sup> Article 10 of the repealed Directive.

<sup>35</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007)303 final, 7.

<sup>36</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007)303 final, 7.

<sup>37</sup> European Commission, ‘Consumers: EU steps up protection for holidaymakers for Timeshare Holidays and holiday discount clubs’, IP/07/775, Brussels 2007, 1.

<sup>38</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 26.

<sup>39</sup> Articles 3, 4/1 and 5 of the current Directive.

of this obligation to cover the exchange and resale contracts because a large proportion of the complaints reported to the European Consumer Centres related to these contracts has been highlighted above. Further details are set out below:

#### **(A) Pre-contractual information: clarified and updated provisions**

Pursuant to the current Directive, the timeshare sellers (developers, promoters and marketing companies) are committed to provide the consumers with the same information detailed under the repealed Directive. Nevertheless, the current Directive clarifies and updates the provisions concerning pre-contractual information and the contract ‘in order to give consumers the possibility to acquaint themselves with the information before the conclusion of the contract’,<sup>40</sup> as follows:

##### **Sales events**

The current Directive places an obligation on timeshare sellers to inform consumers about the commercial purpose of invitations to timeshare events in order to avoid any form of misinformation.<sup>41</sup> The consumers, in general, have little knowledge or understanding about timeshare products and therefore, they have no natural desire to buy these products which has led the sellers to offer the consumers false incentives such as free gifts and travelling vouchers so as to induce them to visit the sale point and then be able to push them to conclude the timeshare contracts by using one of the aggressive selling techniques. Therefore, this provision has been added to ensure that the consumer’s attention is drawn to the real purpose of timeshare invitations, the sale of a timeshare product to the invited consumer.<sup>42</sup>

##### **The means of providing the pre-contractual information**

The current Directive places the developer under the obligation to provide consumers with the pre-contractual information by means of the standard information form as set out in Annex I of the Directive.<sup>43</sup> This is for two main reasons; first, to harmonise the

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<sup>40</sup> Clause 9 of the preamble of the current Directive.

<sup>41</sup> Clause 9 of the preamble of the current Directive.

<sup>42</sup> Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ COM(2007)303 final, 10; World Tourism Organization, *Timeshare – the New Force in Tourism* ( Madrid 1996) 89; Timeshare Consumer Association, ‘Timeshare in Europe 2004: An Industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 13.

<sup>43</sup> Article 4/1 of the current Directive.

laws of the Member States in respect of the ways in which timeshare consumers are informed; second, to provide the timeshare consumers with accurate and sufficient information in a clear and comprehensible manner.<sup>44</sup>

### **Additional information**

The current Directive necessitates that the information document and the timeshare contract include the following information in addition to the information which have been detailed under the repealed Directive:<sup>45</sup>

- i) The exact period within which the right which is the subject of the contract may be exercised and its duration.
- ii) Whether or not the trader has signed a code of conduct and where it can be found.
- iii) The right of the timeshare holder to withdraw from the timeshare contract without giving any reason or incurring any penalty within 14 days from the conclusion of the contract or any binding preliminary contract or receipt of those contracts if that occurs later.
- iv) The prohibition of obtaining advance payments from the timeshare holder during the cooling-off period.
- v) The possibility of governing the timeshare contract by a law other than the law of the Member State in which the timeshare holder is resident in accordance with the principles of the international private law.
- vi) Information on restrictions on consumer's ability to use any accommodation in the pool at any time where the contract provides right to occupy accommodation to be selected from a pool of accommodations.
- vii) Information with regard to any charges, mortgages, encumbrances or any other liens recorded against title to the accommodation.
- viii) Information (conditions and restrictions) on the arrangement for the termination of timeshare contracts and the consequences of such termination.

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<sup>44</sup> Articles 1 and 4/1 of the current Directive.

<sup>45</sup> Articles 4/1 and 5 of the current Directive; Annex I of the current Directive.

ix) Information on the arrangement for the termination of ancillary contracts and the consequences of such termination.

x) Information on how timeshare holders may influence and participate in the management and repair of the timeshare property.

xi) The possibility for out-of-court dispute resolution.

xii) Information regarding the available language(s) to communicate with the developer.

Accordingly, it can be said that the position of the timeshare holder under the current Directive is better than the position under the repealed Directive because it updates and clarifies the information which must be provided to the timeshare holders, as detailed above. The additional information is added to the information document and the timeshare contract so as to tackle some of the after-sale problems which were identified during the application of the repealed Directive.<sup>46</sup> For example, the Directive requires the provision of information on the role of the timeshare holders in the management of the timeshare project which is important in solving the problems associated with the declining of resorts' standards and the excessive increase in the service charges. These problems will be analysed when exploring the after-sale problems when dealing with Phases II and III within this chapter.

It is worth pointing out that the current Directive prohibits the alteration of the information provided to the consumer by means of the information form 'unless the parties expressly agree otherwise or the changes result from unusual and unforeseeable circumstances beyond the trader's control'.<sup>47</sup> In such a case, the developer is committed to inform the consumer about these alterations before the timeshare contract is concluded and to mention them expressly in the timeshare contract.<sup>48</sup> This is to avoid any form of misrepresentation and to enable the consumer to make an informed decision concerning the purchase of the timeshare.

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<sup>46</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 41.

<sup>47</sup> Article 5/2 of the current Directive.

<sup>48</sup> Article 5/2 of the current Directive.

Moreover, the current Directive places an obligation on the developer to draw the attention of the consumer, in an explicit way, to the existence of the right of withdrawal, the length of the withdrawal period, and the ban on advance payments during the withdrawal period. This must be done before the conclusion of the timeshare contract<sup>49</sup> so as to ensure the compliance of the developers to the requirement of informing the timeshare consumers about these essential rights, as 76% of consumers were not properly informed about their statutory rights in general and the cooling-off right in particular before the current Directive.<sup>50</sup>

Furthermore, the current Directive requires that the timeshare contract contain a separate standard withdrawal form (available at Annex V of the Directive). This is for two reasons; first, to harmonise the modes of exercising the withdrawal right throughout the Member States;<sup>51</sup> second, to facilitate the exercise of the right of withdrawal.<sup>52</sup>

Ultimately, the current Directive necessitates providing the consumer with a copy or copies of the timeshare contract at the time of its conclusion in order to enable the consumer to reconsider the terms and conditions of the timeshare contract and to seek advice during the cooling-off period.<sup>53</sup>

### **(B) The regulation of resale contracts**

Resale mediation contracts (a contract whereby a resale agent, for consideration, assists a timeshare holder to resell his timeshare rights) are not covered by the repealed Directive.<sup>54</sup> However, there are many complaints about these contracts made by consumers to European Consumer Centres, consumer organisations, the European Commission and the enforcement authorities in the Member States.<sup>55</sup> These complaints indicate that people who own timeshare are often approached by agents offering to re-sell their timeshare at a good price (typically upfront flat fee). However,

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<sup>49</sup> Article 5/4 of the current Directive.

<sup>50</sup> European Commission, 'Report from the Commission to the European Parliament and the Council in respect of the Evaluation of the Directive 2008/122/EC' COM (2015) final, 5.

<sup>51</sup> Clause 11 of the preamble of the current Directive.

<sup>52</sup> Article 5/4 of the current Directive.

<sup>53</sup> Article 5/4 of the current Directive.

<sup>54</sup> For more explanation in respect of the resale companies, please refer to Chapter Tow/ Section 2.5.6.

<sup>55</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 19.



the agent either disappears or fails to make the sale. In either case, the consumer ends up with no way of regaining his money because he paid the resale fee in advance.<sup>56</sup>

The current Directive deals with the resale contracts. Pursuant to this Directive, deposits are prohibited and consumers are entitled to a cooling-off period as discussed above in relation to aggressive marketing techniques. Further, the resale agents are obliged to provide good pre-contractual information in the consumer's language. This is provided for in Article 4/1/c which reads as follows:

1) In good time before the consumer is bound by any contract or offer, the trader shall provide the consumer, in a clear and comprehensible manner, with accurate and sufficient information, as follows:

...

c) In the case of a resale contract: by means of the standard information form as set out in Annex III and information as listed in Part 3 of that form;

Consequently, the resale agent has to provide the consumer with the following information:

- i) The identity, domicile, and the legal status of the trader who will be party to the contract.
- ii) Short description of the services.
- iii) Duration of the contract.
- iv) The price to be paid by the consumer to obtain the services.
- v) Whether or not the trader has signed a code of conduct and where it can be found.
- vi) The right of the consumer to withdraw from the contract without giving any reason or incurring any penalty within 14 days from the conclusion of the contract or any binding preliminary contract or receipt of those contracts if that takes place later.
- vii) The prohibition of obtaining advance payments from the timeshare holder until the actual sale has taken place or the resale contract otherwise is terminated.

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<sup>56</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term holiday Products' MEMO/07/231, 2. This problem is analysed in detail under the resale problems.

ix) The possibility of governing the contract by a law other than the law of the Member State in which the consumer is resident in accordance with the principles of the international private law.

x) The consumer shall not bear any costs other than those stipulated in the resale contract.

xi) Conditions for terminating the resale contract and the consequences of the termination.

xii) The possibility for out-of-court dispute resolution.

xiii) Information regarding the available language(s) to communicate with the trader.

Accordingly, it can be said that the resale consumer is in a strong position under the current Directive because the Directive provides the consumer with the same level of protection provided to timeshare consumers. Furthermore, the resale consumer is protected against any form of misinformation because the resale agent is under an obligation to provide the consumer with accurate and comprehensive information in both pre-contractual and contractual phases, as detailed above. Moreover, the resale consumer will not lose any money because the current Directive prevents the procurement of any type of advance payments from the consumer until the actual sale has taken place. The prohibition concerns any consideration, including payment, provision of guarantees, reservation of money on accounts, explicit acknowledgment of debt and so forth.<sup>57</sup> This in turn will boost consumer confidence, and thereby increase the chances of resale.<sup>58</sup>

### **(C) The regulation of exchange contracts**

Exchange service can be defined as a contract whereby ‘a consumer, for consideration, joins a system that allows him to enjoy overnight accommodation or

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<sup>57</sup> Article 9/2 of the current Directive.

<sup>58</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 41.

other services in exchange for granting others, on a temporary basis, access to the benefits of the rights arising from his own timeshare contract.<sup>59</sup>

The repealed Directive did not regulate the exchange schemes and therefore the consumers of such services were not covered by the basic protection measures such the right to information. Nevertheless, the current Directive regulates the exchange contracts as there were complaints related to these contracts reported to European Consumer Centres, consumer organisations, the European Commission and the enforcement authorities in the Member States.<sup>60</sup> The complaints focus on the overselling of exchange schemes. Therefore, consumers are disappointed when they find out that the options are more limited than they told. Since the flexibility provided by the exchange schemes constitutes the reason to purchase the timeshare for approximately 80% of consumers,<sup>61</sup> the current Directive provides consumers of exchange services with same level of protection provided for the consumers of timeshare contracts. Consequently, deposits are prohibited and consumers are entitled to a cooling-off period as demonstrated when discussing the aggressive marketing techniques. Furthermore, the trader is obliged to provide good pre-contractual information in the consumer's language. This is provided for in Article 4/1/d which reads as follows:

1) In good time before the consumer is bound by any contract or offer, the trader shall provide the consumer, in a clear and comprehensible manner, with accurate and sufficient information, as follows:

...

d) in the case of an exchange contract: by means of the standard information form as set out in Annex IV and information as listed in Part 3 of that form.

Accordingly, the trader has to provide the consumer with the following information:

i) The identity, domicile, and the legal status of the trader who will be party to the contract.

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<sup>59</sup> European Commission, 'Report from the Commission to the European Parliament and the Council in respect of the Evaluation of the Directive 2008/122/EC' COM (2015) final, 5. For more details with regard to the exchange schemes, please refer to Section 2.5.3 of Chapter Two.

<sup>60</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 20.

<sup>61</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term holiday Products' MEMO/07/231, 3.

- ii) Short description of the product (exact nature and content of the rights).
- iii) Exact period within which the right which is the subject of the contract may be exercised and the duration of the contract.
- iv) Date on which the consumer may start to exercise his contractual right.
- v) The price to be paid by the consumer for exchange membership fee and any other fees.
- vi) Summary of the key services available to the consumer.
- vii) Whether or not the trader has signed a code of conduct and where it can be found.
- viii) The right of the consumer to withdraw from the contract without giving any reason or incurring any penalty within 14 days from the conclusion of the contract or any binding preliminary contract or receipt of those contracts if that takes place later.
- ix) The prohibition of obtaining advance payments from the timeshare holder during the withdrawal period.
- x) The possibility of governing the contract by a law other than the law of the Member State in which the consumer is resident in accordance with the principles of the international private law.
- xi) The consumer shall not bear any costs other than those stipulated in the exchange contract.
- xii) Explanation of how the exchange system works and possibilities and ways in which an exchange can take place.
- xiii) Limitations of exchange.
- xiv) Conditions for terminating the exchange contract and the consequences of the termination.
- xv) The possibility for out-of-court dispute resolution.
- xvi) Information regarding the available language(s) to communicate with the trader.

Accordingly, it can be said that the consumers of exchange services are in a better position under the current Directive. This is because the Directive provides them with the same level of protection provided to the consumers of timeshare products. For example, consumers entering into exchange scheme contracts are now protected against any form of misinformation because the trader is obligated to provide them with accurate and comprehensive contractual information. Most importantly, how the exchange system works, modes for exchange, limitations of exchange and the fee which should be paid in return for the exchange service. This will provide the consumers with a clear view with regard to the possibilities of the exchange scheme and thus protect them against any kind of disappointment in the future.<sup>62</sup> Furthermore, this protection will push the rouge traders out of the market. This in turn will boost the consumer confidence and thus increase the chances of a successful timeshare industry, as the exchange system plays main role in this industry.<sup>63</sup>

It is worth pointing out that the consequences of the failure to provide the consumers of any of the aforementioned contracts with comprehensive information as detailed above were left to be regulated by the domestic laws of Member States as the case under the repealed Directive.<sup>64</sup>

#### Extracting the Optimal Aspects of Timeshare: Protection against lack of disclosure

Consequently, pre-contractual information requirements are considered as fundamental element of consumer protection in the industry of timesharing due to four main reasons. First, the complexity of the products and the substantial financial obligations involved.<sup>65</sup> Second, it helps to a large extent in preventing the timeshare holders from falling prey to fraudulent transactions and misrepresentations that are usually exercised by developers and promoters as detailed above. Third, it squeezes

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<sup>62</sup> Commission of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 41. This problem is explored in detail under Phase II of this Chapter/ Alleged Availability and Flexibility.

<sup>63</sup> Commission of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 42.

<sup>64</sup> Article 15 of the current Directive. For more details, please refer to page 67 of this Chapter.

<sup>65</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 19.

the rogue developers out of the timeshare marketplace and thus creates a level playing field for the legitimate developers.<sup>66</sup> Finally, it boosts the confidence of the timeshare holders which in turn reflects positively on the reputation of the timeshare industry, thereby increasing the chances of a successful timeshare industry, as detailed above.

Therefore, it is believed that one of the optimal features of robust timeshare legislation is to provide the consumers of timeshare, resale and exchange contracts with written; accurate and comprehensive information, on paper or other durable medium, which is easily accessible to the consumer, in understandable language at both of pre-contractual stage and contractual stage. Moreover, the legislation should stipulate that all the information provided to the prospective consumers at the pre-contractual stage form an integral part of the timeshare, exchange and resale contract.<sup>67</sup> This is to ensure compliance by traders to provide correct and accurate information to the prospective consumers.

### *Verbal Misrepresentation*

Verbal misrepresentations are the ‘the principle weapon in the salesman’s armoury’ so as to induce the prospective timeshare holder to enter into the timeshare contract.<sup>68</sup> Listed below are common inducements which are common in the timeshare market: <sup>69</sup>

#### **The certainty of enjoying the holiday at the peak season.**

One of the widely used claims that salespersons use on prospective purchasers is ‘of course you can take your family away in peak holiday season’.<sup>70</sup> In each timeshare

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<sup>66</sup> European Commission, ‘Consumers: EU steps up protection for holidaymakers for Timeshare Holidays and holiday discount clubs’, IP/07/775, Brussels 2007, 2. For more details concerning how free market is not just a playing field for legitimate developers but also is a playing field for rogue developers, please refer to George A. Akerlof & Robert J. Shiller, *Phishing for phools* (Princeton University Press 2015) 163-164.

<sup>67</sup> Article 3/2 of the repealed Directive.

<sup>68</sup> Timeshare Consumer Association, ‘Timeshare in Europe 2004: An Industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 13. For more details concerning how advertisers zoom in our weak spots, please refer to George A. Akerlof & Robert J. Shiller, *Phishing for Phools* (Princeton University Press 2015) 45.

<sup>69</sup> Timeshare Consumer Association, ‘Timeshare in Europe-2007’ (England, Timeshare Consumers Association, 2007) 13.

<sup>70</sup> Sandy Grey, ‘A Paper Presented to the Workshop on the Review of the Timeshare Directive of 1994’ 19 July 2006, 2.

resort the year is divided into three seasons according to the scale of demand for holidays, each season is given a specific colour, as follows:<sup>71</sup>

i) The peak season which is the time of the year during which demand for holidays is the highest. This season is typically represented by the red colour.

ii) The intermediary season which is the time of the year during which demand for holidays is moderate. This season is usually represented by the white and yellow colours.

iii) The off-peak season (also called the value season) which is the time of the year during which demand for holidays is the lowest. This season is usually represented by the blue and green colours.

Consequently, the aforesaid claims can only be true if the prospective timeshare holders buy their timeshares in the peak season and thus all the prospective timeshare holders who buy their timeshares in the intermediary or off-peak seasons will not be able to enjoy their vacations in the peak season.

**Timeshare holders have full control over the future costs.**

Salesmen also claim ‘All future costs are controlled by the owners,’<sup>72</sup> when in fact the costs are controlled by the developer.

**Timeshare is a good investment.**

Others claim timeshare is ‘an excellent investment, you will get all your money back when you sell’<sup>73</sup> whereas in reality the timeshare holder will be very lucky to sell at any price as many second hand timeshares (be they weeks or points) are totally

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<sup>71</sup> The classification of the year into three coloured seasons is also followed by the exchange companies so as to determine the trading power for both the deposited and requested weeks in respect of an exchange request. For example, the Resort condominium International, one of the main exchange companies worldwide, divides the year in each member resort into three sections of time, each section is given a specific colour, as follows:

\* Red colour for the high demand season.

\* White colour for the intermediate demand season.

\* Blue colour for the low demand season.

<sup>72</sup> Sandy Grey, ‘A Paper Presented to the Workshop on the Review of the Timeshare Directive of 1994’ 19 July 2006, 2.

<sup>73</sup> Sandy Grey, ‘A Paper Presented to the Workshop on the Review of the Timeshare Directive of 1994’ 19 July 2006, 2.

worthless<sup>74</sup> as will be seen later on in this chapter when discussing the resale problems or what is also known as the secondary market problems.

The use of these misleading marketing techniques is causing damage to the image of timesharing and tarnishing its reputation in the minds of the general public.<sup>75</sup>

#### Protection provided by the repealed Directive

To tackle this problem, the repealed Directive required the vendors to provide the prospective purchasers with written particulars.<sup>76</sup> This document had to include, in addition to a general description of the timeshare property,<sup>77</sup> accurate information on the exact period within which the right of occupancy could be exercised, its duration, and the date on which the purchaser could start to exercise the right of occupancy. This was to avoid any type of *verbal* misrepresentation concerning the enjoyment of the vacation during the peak season.<sup>78</sup> The document also had to include the basis for the calculation of the amount of charges relating to the occupation of the timeshare property, the mandatory statutory charges (e.g., taxes and fees) and the administrative overheads (e.g., management, maintenance and repairs) so as to avoid *verbal* misrepresentation concerning the service charges (future costs).<sup>79</sup>

Moreover, the repealed Directive stipulated that all the information provided to the prospective purchasers by means of the aforesaid information document had to form an integral part of the timeshare agreement.<sup>80</sup> There were two main reasons for this; first, to ensure compliance by vendors to provide correct and accurate information to the prospective purchasers; second, to eliminate the use of misleading marketing techniques (for example, verbal misrepresentation) which played a considerable role in tarnishing the image of the timeshare business.

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<sup>74</sup> Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 13.

<sup>75</sup> Ramon Mullerat & Bernat Mullerat, 'A Self Defending Industry: Timesharing in Europe' [2002] Business Law International 252,260.

<sup>76</sup> Article 3/1 of the repealed Directive.

<sup>77</sup> Article 3/1 of the repealed Directive.

<sup>78</sup> Point h of the Annex of the repealed Directive.

<sup>79</sup> Point i of the Annex of the repealed Directive.

<sup>80</sup> Article 3/2 of the repealed Directive.



### The current Directive: Refining the Protection Further

The current Directive upholds the measures set out in the repealed Directive,<sup>81</sup> with one addition, which concerns the prohibition of marketing timeshare products as an investment, as analysed below.<sup>82</sup>

Salespeople used to make broad claims that timeshare is an excellent investment<sup>83</sup> and they used to justify this statement by asserting ‘you will get all your money back when you sell’.<sup>84</sup> This is to stimulate the demand for timesharing and to encourage the prospective timeshare holders to conclude the timeshare agreement. However, this is never actually realised because the developers failed to ensure a healthy secondary market.<sup>85</sup>

To resolve this problem, the Directive prohibits the marketing of the timeshare as an investment. Article 3/4 provides for that by stating ‘A timeshare or a long-term holiday product shall not be marketed or sold as an investment’.

### Extracting the Optimal Aspects of Timeshare: Protection against verbal misrepresentation

The implementation of the aforementioned protection measures has resulted in two main positive consequences. Firstly, it has curbed the unethical behaviour of unprincipled developers and salespeople making false promises to the potential timeshare holders. Secondly, it has restricted unscrupulous developers and salespeople from promoting timeshare as an investment.<sup>86</sup> Therefore, nowadays, timeshares are marketed as an investment in lifestyle rather than investment for monetary gain. That is to say, timeshares are marketed as a purely consumer product

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<sup>81</sup> Articles 3, 4 and 5 of the current Directive.

<sup>82</sup> Article 3/4 of the current Directive.

<sup>83</sup> Ron Haylock, ‘The European timeshare market: The Growth, Development, Regulation and Economic Benefits of One of the Tourism’s Most Successful Sectors’ (1994) 5 *Tourism Management* 333.

<sup>84</sup> Sandy Grey, ‘A Paper Presented to the Workshop on the Review of the Timeshare Directive of 1994’ 19 July 2006, 2.

<sup>85</sup> European Commission/ Health and Consumer Protection Directorate- General ‘Consultation Paper: Review of the Timeshare Directive (94/47/EC)’, Brussels 2006, 6.

<sup>86</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015.

dedicated for the benefit and pleasure of the consumer who can easily afford to make such expenditure.<sup>87</sup>

Consequently, it is believed that one of the optimal features of effective timeshare legislation is to make all promises provided by the developers and salespeople to the prospective consumers in writing and an integral part of the contract, as well as to prohibit the marketing of the timeshare as an investment for return.

## **Phase II) Problems associated with ownership**

At present, ownership problems (i.e. those which arise during the phase of enjoying the timeshare) are on the increase. They are as detrimental to consumers as the difficulties associated with the purchasing problems, as discussed above. However, there is a partial lack of legal protection for this second phase of the timeshare cycle.<sup>88</sup> The Timeshare Consumer Association identified a significant decrease in the level of complaints with regard to purchasing. However, there has been a noticeable increase in complaints about ownership.<sup>89</sup> This mainly, concerns the uncertainty of delivery, the excessive increase in the annual costs for no objective reasons, the declining of resorts' standards and the closure of resorts.

### *Alleged Availability and Flexibility*

The failure of developers and exchange companies to deliver holidays for the timeshare holders stems from two sources. Firstly, the alleged flexibility of the floating-weeks' pattern and points' pattern. Secondly, the overselling of the benefits of the exchange system, as follows:

The alleged flexibility of the floating-weeks' pattern and points' pattern

As set out in Chapter Two,<sup>90</sup> the floating-weeks' pattern<sup>91</sup> and points' pattern<sup>92</sup> are systems whereby the timeshare holder is entitled to choose a holiday accommodation

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<sup>87</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 Journal for Financial Services Marketing 156.

<sup>88</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 16.

<sup>89</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 16.

<sup>90</sup> For more explanation in respect of the timeshare products, please refer to Section 2.6 of Chapter Two.

<sup>91</sup> **Floating weeks:** a pattern whereby the timeshare holder has the right to use a holiday accommodation for a certain period of time yearly without a fixed date or/and place being allocated to him in advance. In other words, the date or/and place of exercising the occupancy right will be

from a pool of resorts every year.<sup>93</sup> These patterns have been designed by the timeshare developers to comply with the demand of timeshare holders seeking more flexibility in the timeshare products.<sup>94</sup> However, the use of these patterns has led to dissatisfaction due to three main reasons:

i) These patterns depend on the reservation system. This places timeshare holders who are able to plan their vacation well in advance at an advantage. However, it places many at a disadvantage when they are not sure when and where they can enjoy their vacation because of their work, family or health circumstances.<sup>95</sup>

ii) These patterns do not secure the attainment of the desired accommodation and/ or week because the right of the timeshare holder in occupancy is not attached to a specific accommodation or week.<sup>96</sup>

iii) The timeshare holders do not receive clear information concerning the real value of their points. Therefore, the timeshare holders cannot judge how likely or unlikely they are to obtain the accommodation and/ or week they are interested in.<sup>97</sup> In addition, the timeshare holders are very often vulnerable to the devaluation of their points by the timeshare companies which in turn reflects negatively on their opportunities in enjoying their vacation during the peak season or in a five-star accommodation.<sup>98</sup>

Consequently, The European Commission, national bodies responsible for consumer protection (such as the Citizen Advice Bureau) and timeshare organisations (such as

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specified each year by means of reservation. For more details, Please refer to Section 2.6.1.2 of Chapter Two.

<sup>92</sup> **Points clubs:** a pattern whereby the timeshare holder purchases a membership in a club. The membership is converted to a number of points each year so as to be used to reserve a period of time at one of the resorts owned by the club. For more details, Please refer to Section 2.6.2 of Chapter Two.

<sup>93</sup> European Commission/ Health and Consumer Protection Directorate- General, 'Review of the Timeshare Directive (94/47/EC): Impact Assessment: Questionnaire for Business Stakeholders' SANCO/B2/GR/sm/D2006/220181, 5.

<sup>94</sup> D W Butler, 'Time-Shares Conferring Ownership' [1985] Acta Juridica 315.

<sup>95</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 5.

<sup>96</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 5.

<sup>97</sup> Nuria Rodriguez Murillo 'The Reversion of the Timeshare Directive' (2007) International Travel Law Journal 84.

<sup>98</sup> Susan Marks, *Paradise Lost* (Citizen Advice Bureau, UK 2003) 44; Nuria Rodriguez Murillo ' A Paper presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 2.

the Timeshare Consumer Association) have received a large number of complaints from disappointed timeshare holders about the non-delivery of the promised product.<sup>99</sup>

The overselling of the benefits of the exchange system

As detailed in Section 2.5.3 of Chapter Two, the exchange system plays an essential role in the timeshare industry due to the variety and flexibility that it offers to the timeshare holders. Pursuant to the exchange system, the timeshare holders are entitled to join an exchange company if their resort is affiliated to such a company. Members of an exchange company deposit their week into the pool of the exchange company and request an exchange on a like-for-like basis from the pool of weeks deposited by members worldwide. The exchange system may also be constructed in a way that points are assigned to the timeshare based on several factors including the quality of the resort and the size of the apartment. Members can identify the number of points they need for stays in other affiliated resorts and request a stay. The members have to pay an annual fee for the membership of the exchange company and a transaction fee for each exchange.<sup>100</sup>

The possibility of joining an exchange company is often used in the marketing of timeshare as a benefit associated with that resort. Purchasers of timeshare rate the exchange opportunity as one of the most important motivations for buying.<sup>101</sup> According to the European Commission, the flexibility offered by the exchange system constitutes the reason to buy the timeshare for approximately 80% of timeshare holders.<sup>102</sup>

However, timeshare holders report problems with the exchange companies. The most important is the overselling of the advantages and possibilities of timeshare

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<sup>99</sup> Ramon Mullerat & Bernat Mullerat, 'A Self Defending Industry: Timesharing in Europe' [2002] *Business Law International* 258; Sandy Grey, 'A Paper Presented to the Workshop on the Review of the Timeshare Directive of 1994' 19 July 2006, 3; European Commission/ Directorate General for Justice and Consumers 'Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report' March 2015, 31.

<sup>100</sup> World Tourism Organisation, *Timeshare – The New Force in Tourism* (Spain 1996) 33.

<sup>101</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 20.

<sup>102</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term Holiday Products' (2007) MEMO/07/231. 3.

exchange.<sup>103</sup> Salespeople and exchange companies play an important role in this problem by exaggerating the merits of the exchange service, specifically the ease in which timeshare holders can change the place and time of their vacation every year. This is not true because the ability of the timeshare holders to change the time and place of their vacations depends on the value of their timeshares which is usually assessed based on several factors, mainly: the size of the apartment, the quality of the resort and the season of the vacation. Therefore, those who buy their timeshares in the intermediary season will not be able to exchange with those who buy their timeshares in the peak season, and those who buy their timeshares in three star resorts will not be able to exchange with those who buy their timeshares in five star resorts.<sup>104</sup> This has resulted in timeshare holders being disappointed or dissatisfied with their exchange membership because they find out the options are more limited than what they expected.<sup>105</sup> Furthermore, some of the exchange companies let the accommodation which should be available to the timeshare holders for exchange to ordinary consumers.<sup>106</sup>

Consequently, a large proportion of the complaints concerning the lack of availability are reported by the dissatisfied timeshare holders to the European Consumer Centres and timeshare consumer organisations. According to the Timeshare Release:<sup>107</sup>

The lack of availability is one of the major frustrations among Timeshare owners and, like a number of the other problems with Timeshare, the greed of the Timeshare Groups/Resorts is sadly the root cause. The relentless sales drives of these organisations over time means that many Resorts & Point Schemes are hugely oversubscribed, which means that only a very small proportion of the members are ever lucky enough to be able to book their first choice accommodation & dates. This is exacerbated by the fact that some resorts, groups and exchange networks are known to hold back some of the most desirable accommodation and dates for sale on the open holiday-maker market, rather than sharing the full allocation fairly across their fee-

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<sup>103</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term holiday Products' (2007) MEMO/07/231, 3.

<sup>104</sup> Diane M Messer, 'An Overview Of Time-Sharing and the Tennessee Time-Share Act: Are Purchaser Now Protected?' (1986) 53 Tennessee Law Review 789.

<sup>105</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 20.

<sup>106</sup> Sandy Grey 'A Paper Presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 3.

<sup>107</sup> Timeshare Release: The UK and Europe's leading Timeshare Contract Release and Compensation Claims Specialists 'WHY CAN'T I BOOK MY HOLIDAYS WHERE I WANT and WHEN I WANT?' on <<http://www.timesharerelease.co.uk/faqs.php#ancle6>> accessed on 21 October 2016.

paying membership. On top of this, there is often a further allocation of the best units/dates held back for new potential customers, who are flown in for a few days so the sales teams can try and sell them into the prevailing special Timeshare scheme of the moment. It all means that the actual fee-paying members/owners, who have bought into their Timeshares and dutifully paid their Maintenance Fees, are often pushed to the back of the queue and generally find themselves having to choose from what's left over.

Accordingly, it is critical to ensure that the timeshare holders are adequately informed about the possibilities and limitations of the exchange service before they conclude the timeshare contract as this service has a strong influence on their decision of taking part in the timeshare project.<sup>108</sup>

#### Protection provided by the repealed Directive

The repealed Directive resolved the problem of lack of availability as far as it concerns the floating-weeks' pattern and points' pattern. The repealed Directive placed an obligation on the salespeople and developers to provide the prospective timeshare purchasers with accurate pre-contractual information on the precise period within which the right of occupancy may be exercised, its duration, and the date on which the purchaser may start to exercise the right of occupancy.<sup>109</sup> Moreover, the Directive placed an obligation on the developers to include this information in the timeshare agreement.<sup>110</sup> This is to provide the prospective timeshare purchasers with a clear view concerning the possibilities of exercising the right of occupancy and thus keep them away from any type of disappointment.

#### The current Directive: Refining the Protection Further

The European legislature retained the same protection measures stipulated in the repealed Directive.<sup>111</sup> However, the current Directive updates the information to be provided to consumers, and it expands the scope of the obligation to also cover the exchange contracts. This change was brought about because a large proportion of the

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<sup>108</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term holiday Products' MEMO/07/231, 3; Diane M Messer, 'An Overview of Time-Sharing and the Tennessee Time-Share Act: Are Purchaser Now Protected?' (1986) 53 Tennessee Law Review 788.

<sup>109</sup> Article 3/1 of the repealed Directive. For more details regarding the pre-contractual information please refer to the Section of the Lack of Disclosure within Phase I of this Chapter.

<sup>110</sup> Article 4/1 of the repealed Directive.

<sup>111</sup> Articles 3/1 and 4/1 of the current Directive.

complaints reported to the European Consumer Centres related to these contracts, as it has been highlighted above.<sup>112</sup> The changes are set out below:

In respect of the floating-weeks' pattern and points' pattern

The current Directive updates the provisions concerning the exercise of the right of occupancy where the right is / can be selected from a pool of accommodations, as is the case under the floating-weeks' pattern and points' pattern. The current Directive places an obligation on the developers and marketers to provide the prospective timeshare holders with clear and accurate information 'on restrictions on the consumer's ability to use any accommodation in the pool at any time'.<sup>113</sup> This is to provide the prospective timeshare purchasers with a clear vision with regard to the possibilities and limitations of the exercise of the right of occupancy and hence limit any possible dissatisfaction.<sup>114</sup>

In respect of the exchange contracts

The current Directive places an obligation on the sales personnel and exchange companies to provide the potential timeshare holders who are interested in joining an exchange company with real and precise information about the exchange possibilities and restrictions. This is stipulated in Part 3/1 of (Annex IV) which reads as follow:

-Explanation of how the exchange system works; the possibilities and modalities for exchange; an indication of the value allotted to the consumer's timeshare in the exchange system and a set of examples of concrete exchange possibilities,

-an indication of the number of resorts available and the number of members in the exchange system, including any limitations on the availability of particular accommodation selected by the consumer, for example, as the result of peak periods of demand, the potential need to book a long time in advance, and indications of any restrictions on the choice resulting from the timeshare rights deposited into the exchange system by the consumer.

This is to prevent the sellers of exchange membership from overselling the benefits and advantages of the exchange service and thus keep the timeshare holders satisfied with their exchange membership.

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<sup>112</sup> For more details, please refer to page 86 (previous page).

<sup>113</sup> Part 3 of Annex I of the current Directive.

<sup>114</sup> Clause 9 of the preamble of the current Directive.

### Extracting the Optimal Aspects of Timeshare: flexibility and protection against lack of availability.

Accordingly, one of the features of good timeshare legislation is to properly regulate the exchange service because it plays a key role in the development and growth of timeshare industry as whole.<sup>115</sup> This is for three reasons: firstly, the exchange service brings flexibility and variety to the timeshare system and therefore it is an important tool to the developer to overcome the inherent inflexibility of having to return to the same place each year for holidays.<sup>116</sup> Secondly, the exchange service secures that the quality levels of resorts are maintained as they are entitled to take action to exclude from the system the resorts that do not maintain pre-established quality standards.<sup>117</sup> Thirdly, the exchange provides a number of peripheral services to timeshare holders such as travel insurance.<sup>118</sup>

In addition, a further feature would be to provide the timeshare holders with timely information prior to the creation of a contract. This information should be understandable, clear and precise and contain details about the following: the season during which the right of occupancy can be exercised; its duration, the date on which the timeshare holder can start to exercise the right of occupancy, and the restrictions on the exercise of the occupancy right is a fundamental element of consumer protection in the timeshare industry. This is necessary for three reasons. First, the complexity of the floating-weeks' pattern, the points' pattern and the exchange system means that there needs to be a very robust reservation management system in place to take into account the many relevant factors such as: unit size; length of stay; location availability and seasonal issues.<sup>119</sup> Second, it helps to protect the timeshare holders from the practices of the rogue marketers and developers and thus squeezing them out of the timeshare marketplace which is very important to create a level playing field

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<sup>115</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 2-15.

<sup>116</sup> Stephany A Madsen, 'Exchange Networks' 125, in *Timesharing II* issued by The Urban Land Institute, Washington, D. C. 1982.

<sup>117</sup> For more details concerning the role of the exchange companies, please refer to Section 2.5.3 of Chapter Tow.

<sup>118</sup> Haylock R, 'Developments in Worldwide Timeshare' (1988) 2 *Travel and Tourism Analyst* 62.

<sup>119</sup> Randall Upchurch and Conrad Lashley, *Timeshare Resort Operations: A Guide to Management Practice* (Elsevier Butterworth-Heinemann 2006); Stephany A Madsen, 'Exchange Networks' 125, in *Timesharing II* issued by The Urban Land Institute, Washington, D. C. 1982; Timeshare Consumers Association, 'Points Clubs' accessed on 18<sup>th</sup> of April 2012 <<http://www.timeshare.org.uk/points.html>>. For more details, please refer to Chapter Tow, Sections 2.5.4 and 2.5.5.



for the legitimate developers.<sup>120</sup> Finally, it boosts the confidence of the timeshare holders, which in turn reflects positively on the reputation of the timeshare industry, thereby increasing the chances of a successful timeshare industry.<sup>121</sup>

Therefore, it is believed that one of the optimal features of effective timeshare legislation is to provide the timeshare holders with clear and accurate information concerning:

- (1) The season during which the right of occupancy can be exercised.
- (2) The duration of the right of occupancy.
- (3) The date on which the timeshare holder can start to exercise the right of occupancy.
- (4) The restrictions on the exercise of the occupancy right, specifically under the floating-weeks' pattern and points pattern.
- (5) The possibilities, limitations and modes for exchange.

This is important to avoid complaints and protect the interests of the timeshare holders.

### *The excessive increases in annual service charges*

Timeshare projects require communal management arrangements, as explained in detail in Section 2.5.4 of Chapter Two. Therefore, service charges have to be paid by the timeshare holders to the management entity so as to cover the fees of operating and maintaining the timeshare project such as the charges of upkeep and cleaning, utility bills, insurance, security and taxes.<sup>122</sup> A 'global cost' is calculated and then apportioned between the sold weeks in order to produce an annual maintenance fee for each timeshare holder, adjusted for accommodations of different sizes.<sup>123</sup>

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<sup>120</sup> European Commission, 'Consumers: EU Steps up Protection for Holidaymakers for Timeshare Holidays and Holiday Discount Clubs', IP/07/775, Brussels 2007, 2.

<sup>121</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 41.

<sup>122</sup> Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 10.

<sup>123</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 279.

The main concern is the excessive increase in annual fees and little transparency about how these fees are spent.<sup>124</sup> Therefore, many complaints have been presented to the European Consumer Centres regarding the increase in annual fees above a reasonable rate after a short period of the life of the timeshare project.<sup>125</sup> There is evidence to suggest that prior to the implementation of the current Directive annual costs of timeshare ownership were increasing faster than all other general living costs. For example, in 2006 Grey commented, ‘timeshare fees have doubled whilst living costs have only increased by one third’.<sup>126</sup> In addition, in 2007 the Commission of the European Communities reported that, 53% of the timeshare holders expressed their concerns about future annual fee increases.<sup>127</sup> There were two main concerns regarding the increase in fees. Firstly, these increases would make timeshare membership economically unviable.<sup>128</sup> Secondly, timeshare holders must pay the annual fees even if their financial or physical condition deteriorates in the future.<sup>129</sup>

There are three main reasons for the excessive increase in annual fees, as set out below:

i) The lack of transparency concerning the mechanism of calculation of the annual fees and how these fees are spent.<sup>130</sup> Therefore, respondents to the European Commission/ Directorate General for Justice and Consumers agreed that ‘consumer

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<sup>124</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 36; Susan Marks, *Paradise Lost* (Citizen Advice Bureau, UK 2003) 42.

<sup>125</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 22.

<sup>126</sup> Sandy Grey ‘A Paper Presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006’ 3; European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 36.

<sup>127</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 22.

<sup>128</sup> Martin Hovey, ‘Is Timeshare Ownership An Investment Product?’ (2002) 7 *Journal for Financial Services Marketing* 150.

<sup>129</sup> David A Bowen, ‘Timeshare Ownership: Regulation and Common Sense’ (2006) 18 *Loyola Consumer Law Review* 468.

<sup>130</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 280.

dissatisfaction is mainly linked to a perceived lack of transparency from companies, particularly as regards the fixing of maintenance fees'.<sup>131</sup>

ii) The decrease of the sales rate. There is evidence that annual fees represent between 40% and 60% of revenue for some developer/management company groups because of the decrease in primary sales revenue.<sup>132</sup> Some developers, at the beginning of the timeshare project life, only manage to sell part of the timeshares, often timeshares in the peak and intermediary seasons, resulting in a number of timeshares being left unsold; these are often timeshares in the off-peak season, due to lack of demand.<sup>133</sup> To offset their losses, developers increase the annual fees of the current timeshare holders.<sup>134</sup> Consequently, some timeshare developers appear to be reliant on management and maintenance fee income for at least 40% of their annual profits. This accounts for the excessive increase in annual fees.

iii) By contrast, some timeshare developers subsidise the annual fees during the selling phase (primary market) in order to facilitate the sale of the timeshares.<sup>135</sup> It is required, as a general rule, that the timeshare resorts annually distribute to their timeshare holders a detailed budget which describes how their annual fees are allocated and used. The first pro-forma budget, usually prepared by the developer, should be part of the disclosure statement which buyers receive as part of purchase documentation. As the developer remains in control of the resort, timeshare holders have little input into the budget process. The obvious desire of the developer at this time (the selling phase) is to keep the annual fees low so as to satisfy the existing timeshare holders and attract the prospective buyers to conclude the timeshare contract. To achieve this goal, the developer may even subsidise the budget during the

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<sup>131</sup> European Commission/ Directorate General for Justice and Consumers 'Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report' March 2015. Same problem reported by the Department of Trade and Industry, 'Summary of Responses to Consultation of Timeshare Sales' May 2002.

<sup>132</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 9. From 1996 until now the rate of increase in sales volumes in EU-15 dropped from approximately 15% to less than 5%. Please refer to: European Commission/ Health and Consumer Protection Directorate- General 'Consultation Paper: Review of the Timeshare Directive (94/47/EC)', Brussels 2006, 13.

<sup>133</sup> World Tourism Organization, *Timeshare – The New Force in Tourism* (Spain 1996) 89.

<sup>134</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 9 and 17.

<sup>135</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 *Journal for Financial Services Marketing* 150.

selling phase.<sup>136</sup> However, this behaviour leads to timeshare holders facing an increase in the annual fees after the sales team complete their mission because the subsidies will be removed.<sup>137</sup>

#### Protection provided by the repealed Directive

To resolve this problem, the repealed Directive placed an obligation on the salespeople and developers to provide the prospective purchasers with written particulars.<sup>138</sup> This document must include, in addition to a general description of the timeshare property,<sup>139</sup> accurate information regarding the basis for the calculation of the amount of charges relating to the occupation of the timeshare property; the mandatory statutory charges (e.g., taxes and fees) and the administrative overheads (e.g., management, maintenance and repairs). This requirement is to avoid any type of ambiguity and confusion in respect of the mechanism of the calculation of the annual fees and how these fees are spent.<sup>140</sup>

Moreover, the Directive stipulated that all the information provided to the prospective purchasers form an integral part of the timeshare agreement.<sup>141</sup> This is to ensure compliance by sales salespeople and developers to provide clear and accurate information to the prospective purchasers and thus improve the level of the protection of the timeshare holders.

#### The current Directive: Refining the Protection Further

The European legislature retained the same protection measures stipulated in the repealed Directive. However, the current Directive updates the information on the costs of timesharing which must be given to timeshare holders in order to provide them with clearer vision regarding the amounts they need to pay in return for the occupation of the timeshare accommodation. The current Directive places an obligation on the salespeople and developers to provide the potential timeshare holders with precise information about the method for the calculation of the annual fees and when such fees may be increase. This is stipulated in Part 3/4 of Annex I which reads as follow:

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<sup>136</sup> World Tourism Organization, *Timeshare – The New Force in Tourism* (Spain 1996) 135.

<sup>137</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 *Journal for Financial Services Marketing* 150.

<sup>138</sup> Article 3/1 of the repealed Directive.

<sup>139</sup> Article 3/1 of the repealed Directive.

<sup>140</sup> Point i of the Annex of the repealed Directive.

<sup>141</sup> Article 3/2 of the repealed Directive.

- an accurate and appropriate description of all costs associated with the timeshare contract; how these costs will be allocated to the consumers and how and when such costs may be increased; the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs),
- where applicable, information on whether there are any charges, mortgages, encumbrances or any other liens recorded against title to the accommodation.

This is to provide the timeshare holders with further protection against the excessive increase in the annual fees; this was in response to the complaints reported to the European Consumer Centres related to this problem, as detailed above.

#### *Extracting the Optimal Aspects of Timeshare: Protection against excessive increase in annual fees.*

The implementation of the aforementioned protection measures has had positive consequences for the timeshare holders, and the timeshare industry in general. This due to the fact that only 15.4% of the timeshare holders have faced this problem after the implementation of the current Directive in comparison to 71.7% before its implementation.<sup>142</sup>

Therefore, it is believed that one of optimal features of effective timeshare legislation is to include provisions preventing or at least curbing the increase in annual fees. Furthermore, it is essential that whichever legal arrangement is adopted provides a solution to this problem. For example, by enabling the timeshare holders to participate with the developers in making the key decisions concerning the management and maintenance of the timeshare development, specifically the determination of the annual fees which must be paid by each timeshare holder in the project. This is to prevent the over estimation of the annual fees whether by the developer or his management company. This is very important to make timeshare projects economically viable and therefore attractive for holidaymakers.<sup>143</sup>

#### *The Declining of Resort Standards*

Good management is important to the smooth running of any time-shared project, for two main reasons. Firstly, they would be targeting close to 100 percent occupancy and

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<sup>142</sup> European Commission, 'Report from the Commission to the European Parliament and the Council on the Evaluation of the Timeshare Directive 2008/122/EC' COM (2015) 644 Final, 7.

<sup>143</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 Journal for Financial Services Marketing 150.

so there would be numerous changeovers throughout the year.<sup>144</sup> Secondly, good professional management plays a key role in creating a satisfactory holiday experience by maintaining the resort's standards.<sup>145</sup> This requires advance planning, attention to detail, systematic execution and genuine hospitality.<sup>146</sup> Nevertheless, a significant proportion of developers have failed to maintain quality standards of their resorts, leading to dissatisfaction with timeshare holders,<sup>147</sup> who in turn reported this to the European Consumer Centres, national bodies responsible for consumer protection (such as the Citizen Advice Bureau) and timeshare organisations (such as the Timeshare Consumer Association).<sup>148</sup>

### European Action

However, the European legislature has not taken any step to redress this problem either in the repealed Directive or in the current Directive. According to the European Commission/ Directorate General for Health and Consumer Protection, this has had 'detrimental effects for the competitiveness of the timeshare industry at EU level, as well as for the image of the industry within EU borders'.<sup>149</sup> A report on the state of play of the European timeshare market demonstrated that some companies are now reporting losses as timeshare holders are continuing to abandon the market because of the ownership problems associated with *inter alia* the deterioration in resort standards.<sup>150</sup>

It has been suggested that this problem can be tackled through the creation of an effective mechanism by which the timeshare holders can ensure an acceptable level of control over the timeshare development,<sup>151</sup> as follows:<sup>152</sup>

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<sup>144</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 2-13.

<sup>145</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 *Journal for Financial Services Marketing* 151.

<sup>146</sup> Robert Masteller, 'Practical Management for Timesharing' 135, in *Timesharing II* issued by The Urban Land Institute, Washington, D. C. 1982.

<sup>147</sup> Sandy Grey 'A Paper Presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 3.

<sup>148</sup> Ramon Mullerat & Bernat Mullerat, 'A Self Defending Industry: Timesharing in Europe' [2002] *Business Law International* 258.

<sup>149</sup> European Commission/ Health and Consumer Protection Directorate- General 'Consultation Paper: Review of the Timeshare Directive (94/47/EC)', Brussels 2006, 6.

<sup>150</sup> Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 20.

<sup>151</sup> Haylock R, 'Developments in Worldwide Timeshare' (1988) 2 *Travel and Tourism Analyst* 61.

<sup>152</sup> For more details in respect of the management of the timeshare projects, please refer to Sections 2.5.4 and 2.5.5 of Chapter Two.

Fee ownership arrangements<sup>153</sup> and quasi-ownership arrangements<sup>154</sup>

The aforementioned mechanism is achieved by the establishment of a body which represents all the timeshare holders in the project. This body takes the form an owners' association under the fee ownership arrangements,<sup>155</sup> a club under the club-trustee arrangement,<sup>156</sup> and a company under the company share arrangement.<sup>157</sup> This is because under the foresaid arrangements the developer transfers the ownership of the timeshare development to the timeshare holders.<sup>158</sup> This body is responsible to exercising general control over the timeshare project and making decisions concerning the key issues of management and maintenance of the timeshare project, while the day-to-day management issues are usually entrusted to an independent property management firm which work under the supervision of this body.<sup>159</sup>

The right to use<sup>160</sup> and non-ownership arrangements<sup>161</sup>

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<sup>153</sup>With the fee ownership arrangements, a timeshare purchaser receives an infinite possessory ownership interest, which can be sold, devised, transferred, encumbered, and mortgaged. The fee ownership arrangements consist of time-span ownership and interval ownership arrangements. The fee ownership arrangements are introduced in Section 2.2.2.1 of Chapter Two and will be explored in more detail in Chapter Seven.

<sup>154</sup> With quasi-ownership arrangements, the developer forms a company or club consisting of the timeshare holders. Pursuant to the company arrangement, timeshare holders purchase shares in the company entitling them to the right to occupy a unit of the timeshare project owned by the company. Under the club arrangement, the trustee holds the units upon trust for the benefit of the timeshare holders as club members. Thus, members acquire a right to use a unit of the timeshare property managed by the club through the payment of membership and maintenance fees. The quasi-ownership arrangements are introduced in Section 2.2.2.2 of Chapter Two and will be examined in more detail in Chapter Six.

<sup>155</sup> World Tourism Organisation, *Timeshare – The New Force in Tourism* (Spain 1996) 134.

<sup>156</sup> James Edmonds, *International Timesharing* (3rd edn Longman Group, UK 1991) 44.

<sup>157</sup> Peter Sparkes, *European Land Law* (Hart publishing, 2007) 279.

<sup>158</sup> World Tourism Organisation, *Timeshare – The New Force in Tourism* (Spain 1996) 134.

<sup>159</sup> For more details in respect of the management of the timeshare projects, please refer to Section 2.5.4 of Chapter Two.

<sup>160</sup> With the right-to-use arrangements, a purchaser acquires a contractual right to use a certain unit or type of unit in a timeshare resort for a designated period each year for specific number of years. Consequently, no fee interest in real property is transferred to the purchaser under the right-to-use arrangements. Right-to-use arrangements consist of licence arrangement and lease arrangement. These arrangements are introduced in Chapter Two/ Section 2.2.2.2 and will be examined in more detail in Chapters Four (for licence arrangement) and Six (for lease arrangement).

<sup>161</sup> With the non-ownership arrangements, the developer retains the bare ownership of the timeshare complex. However, the developer transfers to the timeshare holders one of the original real rights which emanates from ownership right under the civil law system, namely, usufruct right or usage right for a limited period of time. At the end of this period, the developer regains the right of usage or the usufruct right which he transferred to each timeshare holder in the project. The non-ownership arrangements are introduced in Chapter Two/ Section 2.2.2.2 and will be examined in more detail Chapter Five.

Under these arrangements the developer retains the ownership of the timeshare property and thus he is responsible for setting the policies and making the important decisions concerning the timeshare project. He is also responsible for running and maintaining the timeshare project by hiring and training the necessary staff himself or hiring a specialised management company.<sup>162</sup> Therefore, the previously mentioned bodies that are used under the fee ownership arrangements and quasi-ownership arrangements such as the ‘owners’ association’ cannot be used. However, Messer has suggested the establishment of a ‘management advisory board’ as a substitute for the aforementioned bodies. This is to give the timeshare holders the opportunity to participate with the developers in making the key decisions concerning the management and maintenance of the timeshare development, including the hiring and termination of the management company.<sup>163</sup> This power is vital in protecting the interests of the timeshare holders as it would preclude the possibility of developers hiring management companies on long-term contracts and providing timeshare holders with unacceptable services.<sup>164</sup>

#### Extracting the Optimal Aspects of Timeshare: Protection against the declining of resort standards.

Accordingly, maintaining quality standards of the timeshare resorts is a fundamental element in the success of the timeshare industry because it has an enormous impact on creating a pleasant holiday experience which in turn reflects positively on the confidence of the timeshare holders in the timeshare products and thus increasing the chances of the boom of the timeshare industry.<sup>165</sup>

Therefore, it is believed that one of the optimal features of a robust timeshare system is to include a provision to arrest the decline of the resorts’ standards as this is very important to make timeshare a viable concept.<sup>166</sup> This can be achieved by adopting one of the following solutions:

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<sup>162</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 2-15.

<sup>163</sup> Diane M Messer, ‘An Overview Of Time-Sharing and the Tennessee Time-Share Act: Are Purchaser Now Protected?’ (1986) 53 *Tennessee Law Review* 787.

<sup>164</sup> Diane M Messer, ‘An Overview Of Time-Sharing and the Tennessee Time-Share Act: Are Purchaser Now Protected?’ (1986) 53 *Tennessee Law Review* 787.

<sup>165</sup> Martin Hovey, ‘Is Timeshare Ownership An Investment Product?’ (2002) 7 *Journal for Financial Services Marketing* 150.

<sup>166</sup> Robert Masteller, ‘Practical Management for Timesharing’ 135, in *Timesharing II* issued by The Urban Land Institute, Washington, D. C. 1982.



(1) The inclusion of provisions in the timeshare legislation whereby a governmental agency/ department is established /allocated for rating and inspecting the timeshare resorts in order to ensure that they enjoy the same quality standard. Resorts that fail to maintain the required quality should be subjected to administrative penalties such as the replacement of the management entity to guarantee they are adhering to the required standard and thus keeping the timeshare holders satisfied with their timeshares.

(2) Enabling the timeshare holders, under the right-to-use and non-ownership legal arrangements, of participating with the developers in making the key decisions concerning the management and maintenance of the timeshare development, specifically the hiring and termination of the management company. This is vital, as it would preclude the possibility of developers hiring unqualified management companies and thus providing timeshare holders with unacceptable services.

### *Resort Closure and the Security of Timeshare Holders*

A more recent problem facing timeshare holders is the closure of resorts.<sup>167</sup> An increasing number of resorts are actively driving timeshare holders out of the resort in order to use the development for other purposes and make more profit.<sup>168</sup> Every year an increasing number of resorts cease to exist as timeshare resorts, either converting into rental, package holiday resorts or being destroyed and reconstructed as hotels and the like.<sup>169</sup> This is because their real estate value is considerably greater than their timeshare value.<sup>170</sup>

There are two sets of techniques which are usually used by the developers for driving the timeshare holders out the resorts, as follows:

### **Legal techniques: The revocation of the timeshare agreement**

The revocation of the timeshare agreement is the legal technique used by some developers for driving the timeshare holders out their resorts. This is due to the fact

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<sup>167</sup> Sandy Grey 'A Paper Presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 3.

<sup>168</sup> Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 16.

<sup>169</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 17.

<sup>170</sup> Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 21.

that some of the timeshare legal arrangements, specifically the timeshare licence, entitle the developer to revoke the agreement at his will.<sup>171</sup>

### **Practical techniques: Mismanagement**

The common practical techniques for forcing the timeshare holders out are:<sup>172</sup>

i) Progressive increase of annual fees until they are too high for timeshare holders to accept.<sup>173</sup>

ii) Forgetting to send management fee invoices and then terminating membership by way of foreclosure for non-payment. The rules of the timeshare are usually set out in the timeshare project documentation which vary from a timeshare project to another depending on the legal arrangement (licence, lease, club-trustee, company, tenancy-in-common...etc.) used to regulate each timeshare project. These documents usually provide that if there is any default in the payment of fees, costs, and assessments owed by a holder of a timeshare interest, the entire unpaid assessed sum with accrued interest and other charges (for example, attorneys' fees) shall become a lien against the timeshare interest of the non-paying holder. In most cases, once a timeshare holder fails to pay, the lien automatically attaches to the timeshare. In some cases, the proprietor of the timeshare project will record a lien with the competent authority (and this practice varies from one country to another) to provide public notice that the lien exists. Once the proprietor has a lien on the timeshare interest of the defaulting holder, he may foreclose on that lien as permitted by the documents of the timeshare project and the law of the country in which the timeshare project is situated.<sup>174</sup>

iii) Failing to keep the resort in good condition so that it loses the exchange facility.<sup>175</sup>

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<sup>171</sup> David A Bowen, 'Timeshare Ownership: Regulation and Common Sense' (2006) 18 Loyola Consumer Law Review 466. This point will be considered in detail in Chapter Four.

<sup>172</sup> Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 21.

<sup>173</sup> For more details concerning the unjustified and excessive increase of annual fees, please refer to Phase II of this chapter.

<sup>174</sup> Peter Sparks, *European Land Law* (Hart Publishing 2007) 280; Timeshare Consumer Association, 'Timeshare in Europe-2005' (England, Timeshare Consumers Association, 2005) 28; Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 19.

<sup>175</sup> The exchange companies play key role in in guaranteeing and raising the level of quality in timeshare resorts by carrying out a rating and inspection system in all the affiliated resorts, which in turn ensures that they enjoy the same quality standard. The resorts that fail to maintain the required quality are precluded from taking part in the exchange system by the exchange company itself which is

iv) Refusing to transfer ownership to a new buyer, leaving an unwilling timeshare holder who may just walk away.<sup>176</sup>

v) Encouraging timeshare holders to join a proprietary club controlled by the developer by offering the timeshare holders extra benefits in return for their ownership certificates until the developer gets enough votes to close the resort.<sup>177</sup>

These techniques are usually used when the legal structure of the timeshare resort does not entitle the developer to terminate the timeshare agreement by his single will as is the case under the timeshare lease arrangement. Hence, the developers use the aforesaid techniques so as to reduce the number of the timeshare holder to a point where the resort is no longer financially viable as timeshare. This creates the perfect excuse for closing the resort and removing the timeshare holders who are the only barrier to realising the aforementioned benefits such as the high reselling value of the timeshare property.<sup>178</sup>

Consequently, timeshare holders who are dissatisfied because of the closure of their resorts have brought a number of complaints concerning the loss of their timeshares to the courts throughout Europe. The Lanzarote Beach Club case is a leading case in this regard.<sup>179</sup> The Lanzarote Beach Club (LBC) was opened in 1985 as one of the best timeshare resorts in Lanzarote. For many years, LBC was the most sought after resort in Europe for exchange. The change started in 1989 when the LBC increased the maintenance fees imposed on the timeshare holders 389%. Since then, timeshare holders saw many alarming activities at LBC, many of which proved incompatible with the club's constitution. At the same time, many timeshare holders were

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regarded as a strong motive for adhering to the required standard.<sup>175</sup> For more details, Please refer to Chapter Two/ Section 2.5.3.

<sup>176</sup> The obstacles set by some timeshare companies to block re-sales will be analysed when exploring the resale problems in phase III of this Chapter.

<sup>177</sup> For more details with regard to the proprietary clubs, please refer to Section 2.5.4 of Chapter Two.

<sup>178</sup> Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 16.

<sup>179</sup> This case reported by Timeshare Consumer Association, 'Lanzarote Beach Club' <<http://www.timeshareconsumerassociation.org.uk/2014/11/07/lanzarote-beach-club-lbc1-lbc2/>> accessed on 7/10/2016; International Timeshare Refund Action, 'Lanzarote Court Awards Compensation for Beach Club Fraud' <<http://www.itra.net/?p=249&lang=de>> accessed on 7/10/2016; BBC News Channel, 'Timeshare members being forced out' <[http://news.bbc.co.uk/1/hi/programmes/working\\_lunch/3096089.stm](http://news.bbc.co.uk/1/hi/programmes/working_lunch/3096089.stm)> accessed on 8/10/2016; Timeshare Consumer Association 'Timeshare News – 2005' <<http://www.timeshareconsumerassociation.org.uk/2005/12/27/timeshare-news-2005/>> accessed on 7/10/2016; Timeshare Exit and Support Service, 'Timeshare News from 2000-2009' <<http://tesslimited.co.uk/timeshare-news-from-2000-2009/>> accessed on 8/10/2016.

persuaded to purchase into International Vacation Club (also known as Lanzarote Beach Club 2), an adjacent plot of land due to be constructed to even higher standards than the already five-star LBC. Furthermore, many timeshare holders at LBC were persuaded to join the Interchange Vacation Club which has been the cause of many complaints about poor quality accommodation at high prices.<sup>180</sup> In 2000, the management entity of the LBC started a campaign to drive out all the timeshare holders by escalating annual fees. Then, in 2003, LBC demanded huge extra levies, with little or no explanation and they refused to provide copies of accounts. This gave rise to many timeshare holders refusing to make payment of their shares of the annual fees and walked away. However, in March 2003, 12 French timeshare holders commenced a lawsuit against the management of the LBC seeking compensation in respect of the loss of their Club's membership because of the aforesaid fraudulent behaviour of the management entity. As a result, in November 2015, the Lanzarote court ordered the payment of €215,010 to the plaintiffs by way of compensation for loss of their membership in the Lanzarote Beach Club.

It is suggested that the publicity surrounding such court cases can reflect negatively on the image of timesharing and thus causing more difficulties on its marketability.<sup>181</sup>

### European Union Action

This problem has not been tackled by the repealed and current European Timeshare Directives. These Directives have not imposed a unified legal nature of timeshare rights, or a common mechanism to the management and maintenance of the timeshare properties. This is dealt with by municipal laws of the Member States, as these internal aspects are already covered by the legislation and traditions firmly rooted in the Member States.<sup>182</sup>

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<sup>180</sup> Classic Holidays, part of the Classic Group of Companies, manage Interchange Vacation Club. 'The Group was founded in 1978 and has since evolved into the largest, privately owned Australian company specialising in all facets of the timeshare industry, hospitality, training, property sales and member servicing. In Australia, the Group is responsible for the employment of over 500 staff and services over 70,000 timeshare owners.' Interchange Vacation Club 'about us' <<https://www.interchangevacationclub.com/aboutus.aspx>> accessed on 12/10/2016.

<sup>181</sup> Sandy Grey 'A Paper Presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 3.

<sup>182</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 10; EU Commission/ Directorate General Health and Consumer Protection, 'Report on the Application of the Directive

## Extracting the Optimal Aspects of Timeshare: Providing Security for the Timeshare Holders

Accordingly, it is believed that one of the optimal features of robust timeshare system is to include provisions regulating the management and maintenance of the timeshare resorts in a way that prevents the developers from threatening the stability and continuation of the timeshare project by using one or more of the previously mentioned mismanagement techniques.<sup>183</sup> This is very vital to ensure a dynamic life to the timeshare projects, make timeshare a viable tourist activity and thus secure the occupancy rights of the timeshare holders in the projects.

Furthermore, an optimal legal arrangement for timeshare should include the following features (1) providing the timeshare holders with the right of exclusive possession over the accommodation during the period of occupancy, (2) providing the timeshare holders with a considerable degree of security against arbitrary forfeiture or re-entry practised by the developer, or any person claiming through or for the benefit of him such as the liquidator in the case of the developer's insolvency and (3) not entitling the developers to revoke the timeshare agreement by his single will. This is crucial to guarantee; first, the exercise of the occupancy right for the full period of the timeshare agreement; and second, the stability and continuity of the timeshare project and hence ensure a dynamic life to the timeshare projects and make timeshare attractive for holidaymakers as it secures their occupancy rights in the timeshare project from being lost.<sup>184</sup>

### **Phase III) Problems associated with the secondary market and termination by individual timeshare holders**

#### *Resale and termination problems faced by an individual*

The timeshare current Directive mainly regulates the buying phase of timeshare and, therefore, there is partial lack of legal regulation for the third phase of the timeshare ownership cycle – resale/termination – where there is a considerable amount of

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94/47/EC of the European Parliament and Council of 26 October 1994' SEC (1999) 1795 final, 9; Commission of the European Communities 'Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' COM(2007)303 final, 7.

<sup>183</sup> Timeshare Consumer Association, 'Timeshare in Europe – 2004: An Industry at the Cross of Roads' (England, Timeshare Consumers Association, 2004) 24.

<sup>184</sup> This point will be analysed in detail in the coming chapters.

consumer dissatisfaction.<sup>185</sup> Consequently, the complaints of the timeshare holders have been gravitating from the buying phase of the timeshare ownership cycle to the resale/termination phase.<sup>186</sup> The European Commission, national bodies responsible for consumer protection and timeshare organisations have received a large number of complaints in the last few years from dissatisfied timeshare holders regarding the difficulty of reselling or terminating their timeshares because of the obstacles created by the developers and the fraudulent behaviour of some of the resale agents.<sup>187</sup>

### Reasons for Resale or Termination

Timeshare holders may seek to resell or dispose of their timeshare for a variety of reasons:<sup>188</sup>

- i) A change in personal circumstances such as getting older, infirmity, divorce and children leaving home.
- ii) A change in financial circumstances, e.g. redundancy and bankruptcy.
- iii) Owner's dissatisfaction.
- iv) The excessive increase of annual fees.
- vi) The deterioration of resorts' standards.

### Difficulties with Resale or Termination

The timeshare holders face two major difficulties when they want to resell or terminate their timeshares. The first difficulty relates to the lack of an active and healthy secondary market, whereas the second difficulty relates to the conditions set by some developers when transferring/ terminating ownership. Such conditions include provisions relating to very high penalty transfer fees, and drafting the timeshare contracts in a way which denies timeshare holders the right to terminate them.<sup>189</sup> These difficulties are analysed respectively hereunder:

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<sup>185</sup> Timeshare consumer Association, 'Timeshare in Europe – 2004: An industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 16.

<sup>186</sup> Nuria Rodriguez Murillo 'The Reversion of the Timeshare Directive' (2007) *International Travel Law Journal* 86.

<sup>187</sup> European Commission, 'Report from the Commission to the European Parliament and the Council on the Evaluation of the Timeshare Directive 2008/122/EC' COM (2015) 644 Final, 7.

<sup>188</sup> World Tourism Organization, *Timeshare: the New Force in Tourism* (1st ed World Tourism Organization 1996) 33; Timeshare consumer Association, 'Timeshare in Europe – 2004: An industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 18.

<sup>189</sup> It is worth mentioning that there is no negotiation in the timeshare contracts as they are adhesion contracts as detailed in Chapter Two/ Section 2.4.1. However, these conditions can be challenged under the Directive 93/13/EEC on Unfair Contract Terms as will be seen later on in this section.

### **(A) The lack of an active and healthy second-hand market**

Timeshare salespersons and developers often create false expectations concerning the ability of buyers to re-sell their timeshares at a later stage of the life of the timeshare project.<sup>190</sup> Therefore, timeshare holders who wish to resell their timeshare often find that this is a more complicated process than they were led to believe<sup>191</sup> due to the excess of supply over demand which in turn can be attributed to three main reasons, as follows:

i) The timeshare market has been saturated over the past few years because new timeshares are still offered for sale by the developers of new timeshare projects in addition to the old timeshares offered for sale by the timeshare holders of the old projects.<sup>192</sup>

ii) The image of the timeshare industry has been tainted by a number of misleading and dishonest sales (e.g. lack of disclosure and aggressive marketing techniques) and management practices (e.g. the excessive increase of annual fees) by the rogue developers operating in this industry. This has harmed the reputation of timesharing in the minds of the general public and consequently has caused a considerable decrease in demand for timeshare products.<sup>193</sup>

iii) The demand for timeshare accommodation is governed by the attributes and position of the timeshare property as well as the allocated season for the exercise of the right of occupancy. Therefore, there may not be demand for a timeshare property located in an unpopular holiday destination, or which is poorly situated or maintained, or only available during an out-of-season week.<sup>194</sup>

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<sup>190</sup> More details are presented under Phase I/ Verbal Misrepresentation.

<sup>191</sup> Nuria Rodriguez Murillo 'The Reversion of the Timeshare Directive' (2007) *International Travel Law Journal* 86.

<sup>192</sup> Ron Haylock, 'Developments in Worldwide Timeshare' (1988) 2 *Travel and Tourism Analyst* 62.

<sup>193</sup> Ramon Mullerat & Bernat Mullerat, 'A Self Defending Industry: Timesharing in Europe' [2002] *Business Law International* 262; Beverley Hoyle 'RCI: Global Vacation Network' 'A Presentation submitted to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 4. As the EU Commission reported in the consultation Document, from 1996 until now the rate in increase in sales volumes have dropped from about 15% to less than 5%. European Commission/ Health and Consumer Protection Directorate-General 'Consultation Paper: Review of the Timeshare Directive (94/47/EC)', Brussels 2006, 13.

<sup>194</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 *Journal for Financial Services Marketing* 152.

The combination of dissatisfied timeshare holders and the lack of demand for resale properties has resulted in a rapid increase in the number of resale companies. However, rather than helping sellers and prospective buyers to get in touch with each other, they have chosen to exploit the timeshare holders who are seeking to sell their timeshare. Sellers are systematically asked for a fee (either a percentage of the fee or a flat fee) before the sale is concluded which is not recoverable in the case of problems including the failure of the resale company to make the sale. This is because the right to a cooling-off period in the repealed Directive did not cover resale contracts.<sup>195</sup>

Furthermore, the lack of demand has had a negative impact on the resale value, its marketability and the time it takes to sell the timeshare in the resale market.<sup>196</sup> The marketing and administrative expenses,<sup>197</sup> which are incurred by a developer, constitute 50% or more of the original selling price of a timeshare. These expenses are deducted automatically during the resale phase (for example, by the developer; resale agent; resale company and private resale etc.) at the point when the timeshare holder comes to resell the timeshare. This in turn has led to a depression in resale prices and therefore the timeshare holder cannot get back the original selling price or make any profit on the resale.<sup>198</sup> Another factor that tends to depress resale prices is competition from the original developer who may be trying to resell weeks he acquired through foreclosure for non-payment of management and maintenance fees.<sup>199</sup> In these circumstances, timeshare holders are unlikely recover the original value of their timeshare in the case of resale except in two instances:(1) in top quality resorts where the price of timeshare has increased,<sup>200</sup> (2) when the government has imposed a moratorium on additional timeshare development, thereby giving rise to fewer

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<sup>195</sup> Commission of the European Communities 'Questions and Answers on Timeshare and Long-term holiday Products' MEMO/07/231, 2.

<sup>196</sup> Martin Hovey, 'Is Timeshare Ownership An Investment Product?' (2002) 7 Journal for Financial Services Marketing 152.

<sup>197</sup> Administrative expenses: the costs incurred by developers in meeting legal obligations to provide information on their production either to public authorities or to private parties. Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 58.

<sup>198</sup> Betsy B Stringam, 'Timeshare and Vacation Ownership Executives' Analysis of the Industry and the Future' (2010) 9 Journal of Retail and Leisure Property 43.

<sup>199</sup> George Leposky, 'Timeshare Basics' (Timeshare Today) <[www.tstoday.com](http://www.tstoday.com)> accessed 12 September 2015 12.

<sup>200</sup> Ron Haylock, 'Developments in Worldwide Timeshare' (1988) 2 Travel and Tourism Analyst 62.



properties available on the market, as is the case in high-demand destinations such as Sanibel Island, Florida.<sup>201</sup>

Accordingly, the vast majority of resold timeshare change hands for 50% or less of their original selling price, not including a commission of 10% to 25% of the selling price for transaction arranged through a resale agent.<sup>202</sup>

## **(B) The Investment Issue**

The majority of consumers who were sold timeshare products as an investment many years ago (i.e., during 1980s and 1990s) were told that they would have the possibility reselling it one day and making a profit.<sup>203</sup> However, they are now finding it is very difficult to terminate their contract or resell their timeshare, for two main reasons:<sup>204</sup>

### **i) Restrictions on resale/ termination**

Some timeshare companies set obstacles to block re-sales, such as applying very high transfer fees.<sup>205</sup> Other companies may allow timeshare holders to exit either in very limited circumstances such as illness that makes travelling to the resort impossible,<sup>206</sup> or ‘if specific conditions are met’ such as selling the timeshare through a certain resale agent of the company’s choice.<sup>207</sup> This is to boost demand for unsold timeshares.<sup>208</sup>

### **ii) Clauses set by some developers when transferring/ terminating ownership**

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<sup>201</sup> George Leposky, ‘Timeshare Basics’ (Timeshare Today) <[www.tstoday.com](http://www.tstoday.com)> accessed 12 September 2015 12.

<sup>202</sup> Timeshare in Europe – 2004: An industry at the Cross Roads’ (England, Timeshare Consumers Association, 2004) 19.

<sup>203</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 16.

<sup>204</sup> European Commission, ‘Report from the Commission to the European Parliament and the Council on the Evaluation of the Timeshare Directive 2008/122/EC’ COM (2015) 644 Final, 7.

<sup>205</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 275.

<sup>206</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 29.

<sup>207</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 31.

<sup>208</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 275.

Timeshare contracts, under non-fee ownership arrangements, are mostly tailored by the developers to serve their interests and consequently these contracts often deprive the timeshare holders, whether directly or indirectly, of the right to terminate them. According to Murillo:

The EU Commission's consultation document fails to address the difficulties faced by consumers on the grounds of excessively long contract commitments. Yet contracts tailored unilaterally to the benefit of the entrepreneur often deny consumers directly or indirectly the right to terminate them.<sup>209</sup>

#### In-perpetuity and long-term clauses

Some timeshare contracts have included an in-perpetuity clause whereby the contract 'does not have a specified end-date and is therefore capable of continuing indefinitely, or alternatively contains a term that expressly provides for this effect'.<sup>210</sup> Other contracts have included a long-term clause under which the timeshare contract will last far into the future - for example, 80 years.<sup>211</sup> Therefore, many of the timeshare holders are locked into such contracts. As time passes, many timeshare holders have found that they can no longer use their timeshare or keep it due to the change in their circumstances.<sup>212</sup> They have tried to re-sell their timeshare but the second-hand market is largely dormant as discussed above. They have also found that their contracts make no provision for termination in such circumstances,<sup>213</sup> or permit the timeshare holders to leave the timeshare project at the developer's discretion or 'only in very limited, narrow circumstances'.<sup>214</sup> Thus, they remain responsible for the payment of the management and maintenance fees for the duration of the contract, which may seem to be forever as is the case with in

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<sup>209</sup> Nuria Rodriguez Murillo 'A Paper presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006' 3.

<sup>210</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 27.

<sup>211</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 27.

<sup>212</sup> Lorraine Conway, *Timeshares* (House of Commons Library, 22 June 2016) 14.

<sup>213</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 6.

<sup>214</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 29.

perpetuity contracts, while, in fact, they get no usage from their timeshare because of their new circumstances.<sup>215</sup>

The problem of terminating such timeshare contracts has been tackled in some of the EU Member States, specifically UK and Spain. In UK, ‘it does not appear to be the modern approach of the courts to treat contracts of indefinite duration as being perpetual in nature’.<sup>216</sup> The British courts are using the dual techniques of ‘construction and implication’ to cut down the perpetual contracts. The court could imply a term allowing termination on notice where the timeshare contract is silent on duration, unless there is clearly no basis for such implication because of circumstances and other express contractual clauses.<sup>217</sup> Alternatively, where the parties have expressly and intentionally agreed on such clauses in the timeshare contract the court could rule that the in-perpetuity clause or long-term clause is unfair either in accordance with Unfair Terms in Consumer Contracts Regulations 1999 if the contract is concluded before 01 October 2015 or pursuant to the Consumer Rights Act 2015 if the contract is concluded after 01 October 2015 as will be seen in detail in Chapter Four/ Section 4.4.

As for Spain, in 15 January 2015, the Spanish Supreme Court in the case brought by Tove Grimsbo, a Norwegian Citizen, against Gran Canaria based Anfi Group ruled that the timeshare contract concluded between the plaintiff and defendant was invalid because it was for an undefined period (i.e., in-perpetuity). The decision was based on the Spanish law 42/1998 of 15 December. This law requires that the maximum duration of a contract is 50 years (Articles 1.6 and 3.1) and thus contracts of longer duration are null and void (Article 1.7).<sup>218</sup>

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<sup>215</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 6.

<sup>216</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 28.

<sup>217</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 28.

<sup>218</sup> Quim Forner Delaygua, ‘Case Comment, Spain: Contract – Timeshare Property’ *International Company and Commercial Law review* 2016, 27(3), N2-N23.

The Spanish way of tackling the in-perpetuity and long-term contracts encouraged Fiona O'Donnell, former MP in the UK House of Commons, to ask the government to enact a law to protect the rights of the timeshare holders along the lines of the Spanish law. O'Donnell expressed it by saying:

I have been informed by an official at the UK ECC that in Spain contracts for longer than 50 years, including contracts in perpetuity, are unenforceable as they are deemed unfair. Although this ruling is beneficial to UK consumers who have agreements with Spanish companies, could the UK Government not look at adopting such a rule in the UK? I look forward to hearing the Minister's response on that.<sup>219</sup>

It is worth pointing out that the 'Politicians in Brussels are now reviewing relevant timeshare legislation, seeking to apply tighter rules retrospectively, with enforcement expected later this year [2015]'.<sup>220</sup>

#### Estate-Binding Clauses

Furthermore, some timeshare contracts have included an estate-binding clause<sup>221</sup> whereby the estate of the timeshare holders continue to be liable for payment of the management and maintenance fees after their death which have had serious consequences for settling the estate and dividing its assets amongst heirs.<sup>222</sup> This evidenced by the Competition and Marketing Authority.<sup>223</sup>

Some timeshare contracts may contain estate-binding clauses. If no beneficiary wants the timeshare, the PRs may, subject to obtaining a court directions order, need to ensure that provision is made from the estate to meet current and future liabilities – liabilities that, with timeshares, may last far into the future or even, supposedly, forever. A PR faced with this

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<sup>219</sup> Fiona O'Donnell, 'Timeshare Contracts - House of Commons Debates' Monday, 3 June 2013 < <https://www.theyworkforyou.com/debates/?id=2013-06-03b.1351.0>> accessed on 30/10/2016.

<sup>220</sup> Kate Palmer, 'Timeshare Horrors: Fresh Hope for 100,000 People Locked in Costly Contracts' Telegraph, 30 May 2015 < <http://www.telegraph.co.uk/finance/personalfinance/money-saving-tips/11616223/Timeshare-horrors-fresh-hope-for-100000-people-locked-in-costly-contracts.html>> accessed on 30/10/2016.

<sup>221</sup> Estate-binding Clause: a term included in some timeshare contracts under which the estate of the timeshare holders continue to be liable for payment of the management and maintenance fees after their death. Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 9.

<sup>222</sup> Lorraine Conway, *Timeshares* (House of Commons Library, 22 June 2016) 14; European Commission, 'Report from the Commission to the European Parliament and the Council on the Evaluation of the Timeshare Directive 2008/122/EC' COM (2015) 644 Final, 7.

<sup>223</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 37.

situation would presumably attempt to sell or give away the timeshare. However, if the attempt is unsuccessful, there may be difficulties settling the estate and distributing the assets.

## Actions taken by the Developers and the Problems caused for Timeshare Holders

Some of the timeshare holders who failed to re-sell their timeshares have refused to pay the management and maintenance fees in order to put pressure on the developers to absolve them from liability. Developers have dealt with this behaviour in two ways:-

i) Repossessing ownership: this is exactly what the timeshare holder wants. However, repossession is on the decline because developers found it is hard to re-sell the repossessed timeshares as the vast majority of them in the middle and off-peak seasons.<sup>224</sup>

ii) Taking legal action against the defaulting timeshare holders for non-payment. According to the Timeshare Consumer Association:

There are at least 20 resort groups threatening to take owners to court for non-payment of annual fees. Most of these owners have attempted to sell their ownership without success and those who have been taken to court find themselves with millstone round their necks for the rest of their lives - and perhaps the lives of their children also.<sup>225</sup>

This is a disturbing trend because if the timeshare holder owns unsaleable timeshare and the developer successfully takes legal action to recover the unpaid management and maintenance fees, he will be locked into the arrangement for extremely long term or even for an entire life.<sup>226</sup>

The harmful effects of such contracts (in-perpetuity contracts, long-term contracts, estate-binding contracts) for the timeshare holders are:<sup>227</sup>

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<sup>224</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 19.

<sup>225</sup> Timeshare Consumer Association, 'Timeshare in Europe-2007' (England, Timeshare Consumers Association, 2007) 26.

<sup>226</sup> Timeshare Consumer Association, 'Timeshare in Europe 2004: An Industry at the Cross Roads' (England, Timeshare Consumers Association, 2004) 19.

<sup>227</sup> Lorraine Conway, *Timeshares* (House of Commons Library, 22 June 2016) 15.

i) Financial harm – paying annual fees on the timeshare property but not getting any benefit in return because they no longer use their timeshares due to their physical or financial circumstances.

ii) Frustration and anxiety because of the failure in re-selling their timeshare on the second-hand market or return it to the developer, or worrying that the problem will be passed on to their heirs.

The difficulty of termination has other consequences for the timeshare industry. It is one reason why some people distrust timeshares and are unwilling to buy on the second-hand market because they will be locked into the timeshare project and not able to exist in the event of the change of their financial or physical circumstances.<sup>228</sup>

### European Union Action

The repealed Directive did not deal with termination and resale problems because such matters were outside its scope. However, the current Directive does offer solutions to some of the problems detailed above. The current Directive seeks to establish healthy secondary market in three ways:

i) By improving the image of the timeshare industry in the minds of the public by increasing the level of protection and flexibility provided for timeshare holders, and squeezing the rogue developers out of the timeshare marketplace, as detailed above. In turn, this has reflected positively on all the aspects of the timeshare industry, as evidenced by the final report of the Centre of Strategy and Evaluation Services:

Since the Directive was implemented, there has been a decrease in the number of all complaints recorded annually by ECCs across the EU, from an average of 2,150 per year prior to the implementation of the Directive (i.e. between 2008 and 2011) to an average of 1,820 after the Directive was implemented in all Member States (i.e. 2012-2013).<sup>229</sup>

ii) The current Directive regulates the resale contracts. It places an obligation on the salespersons and resale companies to provide timeshare holders who are interested in entering into a resale contract with accurate, understandable and comprehensive pre-

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<sup>228</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 6.

<sup>229</sup> Centre of Strategy and Evaluation Services ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 30.

contractual information, such as how the resale system works, limitations of resale and the fee which should be paid in return for the resale service. This is provided for in Article 4/1/c:

1) In good time before the consumer is bound by any contract or offer, the trader shall provide the consumer, in a clear and comprehensible manner, with accurate and sufficient information, as follows:

....

c) In the case of a resale contract: by means of the standard information form as set out in Annex III and information as listed in Part 3 of that form;

This is to provide timeshare holders with a clear view concerning the costs, possibilities and limitations of the resale system and thus aims to protect them against any form of misrepresentation.<sup>230</sup>

Furthermore, the current Directive provides timeshare holders with a fourteen-day cooling-off period, during which they are entitled to withdraw from the resale contract without justification in order to tackle the aggressive marketing problem and the fraudulent behaviour of some of the resale agents. Article 6/1 provides for that by stating:

In addition to the remedies available to the consumer under national law in the event of breach of the provisions of this Directive, Member States shall ensure that the consumer is given a period of 14 calendar days to withdraw from the timeshare, long-term holiday product, *resale* or exchange contract, without giving any reason.

In addition, the current Directive prohibits the collection of advanced payments during the cooling-off period. This is stipulated in Article 9/2:

Member States shall ensure that in relation to resale contracts any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the trader or to any third party by the consumer before the actual sale takes place or the resale contract is otherwise terminated, is prohibited.

This is to guarantee the timeshare holder's right to withdraw without pressure and to avoid practical problems associated with reimbursement of advance payments.<sup>231</sup>

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<sup>230</sup> For more details, please refer to Phase I/ Verbal Misrepresentation.

<sup>231</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council

The aforesaid protection measures have reflected positively on the resale market because these measures have had the effect of limiting the number of rogue resale companies in the timeshare market, thereby creating a level playing field for legitimate developers.<sup>232</sup>

iii) The current Directive prohibits marketing the timeshare as a financial investment. Article 3/4 states: ‘A timeshare or a long-term holiday product shall not be marketed or sold as an investment’. This makes holidaymakers aware that a timeshare ‘is not a financial investment but an investment in high quality future holidays,’ thereby raising the awareness of timeshare holders about the possible eventual depreciation of the timeshare value.<sup>233</sup>

Nevertheless, the current Directive is devoid of any legislative treatment of the problems related to perpetuity, very long-term or estate-binding clauses attached to timeshare contracts, which have a particular bearing when the timeshare holder wants to resell or relinquish his timeshare or when the timeshare holder dies and his heirs want to terminate the contract. It is noteworthy that 45% of timeshare-related complaints reported to the European Consumer Centres were linked to contract clauses.<sup>234</sup> Such clauses could be challenged under the Directive 93/13/EEC on Unfair Contract Terms.<sup>235</sup> The Unfair Contract Terms Directive protects consumers in the European Union from unfair terms and conditions which might be included in a standard contract for goods and services they purchase.<sup>236</sup> This Directive came into force on 31 December 1994.<sup>237</sup> It applies to business-to-consumer contracts in general and therefore it covers timeshare and other holiday contracts.<sup>238</sup> It introduces the notion of ‘good faith’ to prevent any significant imbalance in the rights and

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on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 19.

<sup>232</sup> Commission Of the European Communities ‘Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange’ (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 19.

<sup>233</sup> Peter Sparkes, *European Land Law* (Hart Publishing 2007) 275; Nuria Rodriguez Murillo ‘ A Paper presented to the Workshop of Reviewing the Timeshare Directive (94/47/EC) Organised by the European Commission – DG Sanco - 19 July 2006’ 3.

<sup>234</sup> European Commission/ Directorate General for Justice and Consumers ‘Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report’ March 2015, 33.

<sup>235</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p.29.

<sup>236</sup> The preamble of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>237</sup> Article 10 of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>238</sup> Article 1 of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.



obligations of the parties to the detriment of the consumer<sup>239</sup> by requiring, for example, contract terms, which have not been individually negotiated to be drafted in plain and intelligible language;<sup>240</sup> ambiguities to be interpreted in favour of consumers;<sup>241</sup> and unfair standard contracts terms to be declared not binding on the consumer.<sup>242</sup> Therefore, the Unfair Contract Terms Directive complements the Timeshare Directive in protecting consumers once the contract has been concluded.<sup>243</sup>

However, most timeshare holders are seemingly unaware of this legal possibility. This can be changed by a more proactive attitude from national enforcement authorities as well as increasing awareness activities at the national level. Furthermore, timeshare consumer associations could play a more active role, including throughout court proceedings, in helping timeshare holders to defend their rights as individual timeshare holders have difficulties in launching court actions to challenge their contracts pursuant to the Unfair Contracts Terms Directive.<sup>244</sup>

Nevertheless, the Unfair Contract Terms Directive is principles based. That is to say, it is not always clear how a court would decide a particular case. Every timeshare contract is likely to be construed in the light of all the circumstances attending the conclusion of the particular contract.<sup>245</sup> This discretion may be a positive attribute to this Directive as it enables the court to apply the rules of the Directive to a wide range of circumstances. However, this does not seem a very satisfactory way to exit timeshare and adds further uncertainty.<sup>246</sup>

The industry has also taken self-regulatory steps to tackle this problem. For example, the Resort Development Organisation<sup>247</sup> and Timeshare Association for Timeshare

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<sup>239</sup> Article 3/1 the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>240</sup> Article 5 the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>241</sup> Article 5 the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>242</sup> Article 6 of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. .

<sup>243</sup> Noemi Downes, 'More about Timeshare: A Revised Directive or a Regulation? Incidence of Other Instruments of Consumer Protection' (2008) 4 *European Review of Private Law* 622.

<sup>244</sup> European Commission, 'Report from the Commission to the European Parliament and the Council on the Evaluation of the Timeshare Directive 2008/122/EC' COM (2015) 644 Final, 7.

<sup>245</sup> Article 4/1 of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

<sup>246</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 10.

<sup>247</sup> Resort Development Organisation (RDO) is 'the trade association for vacation ownership across Europe, encompassing a number of usage types including timeshare, fractional interests, private residence clubs, condo hotels, destination clubs etc., all aimed at providing holidaymakers with quality holiday accommodation'. RDO members are committed to high service standards and integrity. 'They are bound by a code of conduct and an independent arbitration scheme, providing levels of protection

Owners and Committees<sup>248</sup> require the affiliated timeshare companies to put in place exit strategies for timeshare holders who want to terminate their contracts.<sup>249</sup>

Finding remedies to address each exit issue is likely to be difficult. Industry initiatives may help. However, the legal complications and the need to take court action means that there is little scope for timeshare holders to help themselves, in addition to creating a significant degree of uncertainty as to the protection held by consumers when trying to exit a timeshare arrangement. However, there is a potential remedy to this complexity and uncertainty: the introduction of some form of legal, obligatory, right to exit.<sup>250</sup> To be effective, a legal right to exit would need to have retrospective effect, applying to all existing timeshare contracts, not just new ones. Moreover, the right to exit should apply EU-wide because of the cross-border and multi-jurisdictional nature of the timeshare products.<sup>251</sup> Furthermore, the right to exit should deal with the most serious exit issues such as perpetuity and estate-binding clauses and provide objective criteria for the exercise of right to exit and thus reducing the likelihood of disputes going to court.<sup>252</sup>

### Extracting the Optimal Aspects of Timeshare: Resale and Termination

It is suggested that optimal legislation for timeshare should make provision for the following: (1) to obligate the developer to provide the timeshare holders who wish to enter into a resale contract with sufficient pre-contractual information in understandable language, (2) to provide the timeshare holders with a cooling-off period during which they are entitled to withdraw from the resale contract without

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beyond those required by law'. RDO, 'What is RDO' < <http://rdo.org/about-rdo/overview/>> accessed on 15/08/2016.

<sup>248</sup> Timeshare Association for Timeshare Owners and Committees (TATOC) is a timeshare association established in 1989. It is the largest consumer-representative body for timeshare owners in Europe as it has more than 90 resort members throughout Europe representing around 400,000 timeshare families. TATOC's mission is 'To safeguard and enhance the timeshare holiday experience for existing and prospective users and to be the voice of owners'.

<sup>249</sup> European Commission/ Directorate General for Justice and Consumers 'Evaluation Study on the Application of the Timeshare Directive 2008/122/EC – Final Report' March 2015, 69. TATOC, 'TATOC – Timeshare Association' <<http://www.tatoc.co.uk/>> accessed on 15/08/2016.

<sup>250</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 9.

<sup>251</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 10. This because this Chapter is restricted to European Union Member States as stipulated in the introduction.

<sup>252</sup> Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 11.

justification and without suffering financial penalties, and (3) to prevent the resale companies or third parties collecting any payments from the timeshare holders before sale. These features will increase the credibility and reliability of the timeshare industry, and hence improve its image in the minds of the general public which in turn will lead to the establishment of a healthy and active second-hand market.

Furthermore, a robust timeshare legal arrangement should include terms to empower the timeshare holders to resell their timeshare without limitations such as applying high transfer fees. In addition, it should prohibit the inclusion of clauses in timeshare contracts under which timeshare holders are locked into the timeshare project such as the perpetuity and estate-binding clauses. Furthermore, it should include terms to empower the timeshare holders to exit long-term timeshare contracts when they can no longer use their timeshare or keep it because of the change in their circumstances. This is very important to ensure ease of resale and termination of the timeshare products in order to establish an active second-hand market.<sup>253</sup>

#### **Phase IV) Collective Action Problem**

This phase considers the problems associated with the mechanism of managing and terminating the timeshare developments in two cases. First, when the timeshare holders have the exclusive power of managing and maintaining the timeshare development. This would be the case within legal arrangements whereby the developer transfers the full ownership of the project to the timeshare holders, such as the fee ownership arrangements. Second, when the timeshare holders are empowered to participate with the developer in making the key decisions concerning the management and maintenance of the timeshare development. This can be seen within legal arrangements whereby the developer retains the full ownership of the project, such as the right-to-use arrangements. Therefore, there is a correlation between this phase and some of the ownership problems such as the deterioration of the resort standards as it linked tightly with the management of the timeshare development. Consequently, the collective action problem exists in two main forms:

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<sup>253</sup> World Tourism Organization, *Timeshare: the New Force in Tourism* (1st ed World Tourism Organization 1996) 100.

### *(A) The management of the timeshare project*

The management problem vary depending on the nature of the timeshare holders interest in the development, as follows:

#### **Fee ownership arrangements<sup>254</sup> and quasi-ownership arrangements<sup>255</sup>**

When the developer transfers the ownership of the timeshare project to the timeshare holders, whether directly, as is the case under the fee ownership arrangements, or indirectly, as is the case with club-trustee arrangement and company share arrangement, he will also pass the control and management of the project to the timeshare holders. Thus, they will be collectively responsible for the management of the timeshare project. This is an issue because ‘a mechanism must be created for the exercise of general control over the development’.<sup>256</sup> In most projects, a form of management body that includes all the timeshare holders in the project is used.<sup>257</sup> This body may take the form owners’ association under the fee ownership arrangements,<sup>258</sup> a club under the club-trustee arrangement<sup>259</sup> and a company under the company share arrangement.<sup>260</sup> The developer will no longer possess the controlling interest in the management body after selling more than half of the interests in the project.<sup>261</sup>

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<sup>254</sup> With the fee ownership arrangements, a timeshare purchaser receives an infinite possessory ownership interest, which can be sold, devised, transferred, encumbered, and mortgaged. The fee ownership arrangements consist of time-span ownership and interval ownership arrangements. The fee ownership arrangements are introduced in Section 2.2.2.1 of Chapter Two and will be explored in more detail in Chapter Seven.

<sup>255</sup> With quasi-ownership arrangements, the developer forms a company or club consisting of the timeshare holders. Pursuant to the company arrangement, timeshare holders purchase shares in the company entitling them to the right to occupy a unit of the timeshare project owned by the company. Under the club arrangement, the trustee holds the units upon trust for the benefit of the timeshare holders as club members. Thus, members acquire a right to use a unit of the timeshare property managed by the club through the payment of membership and maintenance fees. The quasi-ownership arrangements are introduced in Section 2.2.2.2 of Chapter Two and will be examined in more detail in Chapter Six.

<sup>256</sup> Paul Barron, ‘The Louisiana Timesharing Act: An Analysis and Assessment’ (1984) 58 Tulane Law Review 873.

<sup>257</sup> Paul Barron, ‘The Louisiana Timesharing Act: An Analysis and Assessment’ (1984) 58 Tulane Law Review 873.

<sup>258</sup> World Tourism Organisation, *Timeshare – The New Force in Tourism* (Spain 1996) 134.

<sup>259</sup> James Edmonds, *International Timesharing* (3rd edn Longman Group, UK 1991) 44.

<sup>260</sup> Peter Sparkes, *European Land Law* (Hart publishing, 2007) 279.

<sup>261</sup> Paul Barron, ‘The Louisiana Timesharing Act: An Analysis and Assessment’ (1984) 58 Tulane Law Review 872.

<sup>261</sup> Mark E. Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6.2[4] 6-4.

This is beneficial for the timeshare holders as they will get ‘democratic control over their own investment in proportion to their own interest’,<sup>262</sup> and they will be able to ‘make their decisions regarding management, maintenance and usage fees as well as regarding the rules and regulations of the complex’.<sup>263</sup> Nevertheless, the management body will have some problems. Each unit in the project will be occupied successively by more than one timeshare holder and therefore they will never be in occupation at the resort at the same time. Therefore, the employment of a professional managing agent (Management Company) is essential.<sup>264</sup> The management body will be responsible for setting rules, policies, fees and making the important decisions affecting the project, while the daily operation will be the responsibility of the managing agent.<sup>265</sup> The managing agent will perform the daily operations under the supervision of the management body and therefore, some viable form of participation, either as a director or through individual voting is necessary.<sup>266</sup> Since the majority of the timeshare holders will not be in possession at any given meeting date, there will be a problem with the quorum. However, despite not being at the meeting they may still want to have an input into the management process.<sup>267</sup> Consequently, a lawyer who drafts the documentation for any such management body should be sure that a feasible mechanism of management and decision-making (quorum, voting, etc.) is set.<sup>268</sup>

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<sup>262</sup> Mark E. Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6.2[4] 6-4.

<sup>263</sup> Mark E. Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6.2[4] 6-4.

<sup>264</sup> Mark E. Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6.2[4] 6-5.

<sup>265</sup> Daniel T. Engle, ‘Legal Challenges to Time sharing Ownership’ (1980) 45 Missouri Law Review 425.

<sup>266</sup> Paul Barron, ‘The Louisiana Timesharing Act: An Analysis and Assessment’ (1984) 58 Tulane Law Review 872.

<sup>267</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6.2[4] 6-5.

<sup>268</sup> Mark E. Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 6.2[4] 6-5.

## Right-to-use arrangements<sup>269</sup> and non-ownership arrangements<sup>270</sup>

With *right-to-use arrangements and non-ownership arrangements* there is no collective action problem concerning the mechanism of the management of the timeshare project. This is because the management of the project is the responsibility of the developer and thus the timeshare holders do not need to act collectively to manage and maintain the timeshare project. Nevertheless, a collective action problem will be faced if the developer gives limited power to the timeshare holders to participate in some of the management issues such as the determination of the annual management and maintenance fees. This is because all the issues that have been highlighted above concerning the management of the timeshare projects under the fee ownership arrangements and quasi-ownership arrangements can also be seen here.

### *(B) Ending the life of the timeshare project*

#### Fee ownership arrangements and quasi-ownership arrangements

Under the fee ownership arrangements and quasi-ownership arrangements, the timeshare project ends on a given date typically determined in the project's documents. On that date, the timeshare holders are free to decide to sell the property and divide the proceeds among themselves, or to renew the timeshare agreement for another defined period, followed by another decision.<sup>271</sup> Thus, a collective decision is required to be made by the timeshare holders as the developer has transferred the full ownership of the timeshare project to them. This is an issue because there will be a problem with the quorum. Consequently, in the same way as above, a lawyer who drafts the documentation for any such timeshare projects should be sure that a feasible mechanism for decision-making is set in such circumstances.

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<sup>269</sup> With the right-to-use arrangements, a purchaser acquires a contractual right to use a certain unit or type of unit in a timeshare resort for a designated period each year for specific number of years. Consequently, no fee interest in real property is transferred to the purchaser under the right-to-use arrangements. Right-to-use arrangements consist of licence arrangement and lease arrangement.

<sup>270</sup> With the non-ownership arrangements, the developer retains the bare ownership of the timeshare complex. However, the developer transfers to the timeshare holders one of the original real rights which emanates from ownership right under the civil law system, namely, usufruct right or usage right for a limited period of time. At the end of this period, the developer regains the right of usage or the usufruct right which he transferred to each timeshare holder in the project. The non-ownership arrangements are introduced in Chapter Two/ Section 2.2.2.2 and will be examined in more detail Chapter Five.

<sup>271</sup> George Leposky, 'Timeshare Basics' (Timeshare Today) <[www.tstoday.com](http://www.tstoday.com)> accessed 24 on March 2012 4.

### Right-to-use arrangements and non-ownership arrangements

With *right-to-use arrangements and non-ownership arrangements*, there is no collective action problem concerning the termination of the life of the timeshare project. This is because the date of termination is stipulated in the documents of the project in advance. The interests of timeshare holders are temporal (last for a certain period) as the developer retains the ownership of the timeshare project and therefore the timeshare interests must be handed back to the developer after the defined period constituting the life of the project. However, the termination of the timeshare contracts can be an issue under the right-to-use arrangements and non-ownership arrangements. This is because some of the timeshare contracts are tailored by the developers in a way lead to lock the timeshare holders within the project, as is the case with the in-perpetuity contracts<sup>272</sup> and estate-binding contracts.<sup>273</sup> This has been considered in detail above when analysing the problems associated with the resale and termination of timesharing.

### European Union Action

This problem has been neither tackled by the repealed nor the current Directives. These Directives have not imposed a unified legal nature of timeshare rights, and a common mechanism to the management and maintenance of the timeshare properties leaving that to be regulated by the national laws of the Member States.<sup>274</sup>

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<sup>272</sup> In-perpetuity contract is 'one that does not have a specified end-date and is therefore capable of continuing indefinitely, or alternatively contains a term that expressly provides for this effect'. Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 27.

<sup>273</sup> Estate-binding Clause: a term included in some timeshare contracts under which the estate of the timeshare holders continue to be liable for payment of the management and maintenance fees after their death. Competition and Marketing Authority, *Disposal of timeshares and other long-term holiday products – a report for Business, Innovation & Skills and the European Commission* (Competition and Marketing Authority July 2014) 9.

<sup>274</sup> Commission Of the European Communities 'Commission Staff Working Document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' (IMPACT ASSESSMENT/ DETAILED) SEC(2007) 744, 10; EU Commission/ Directorate General Health and Consumer Protection, 'Report on the Application of the Directive 94/47/EC of the European Parliament and Council of 26 October 1994' SEC (1999) 1795 final, 9; Commission of the European Communities 'Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange' COM(2007)303 final, 7.

Extracting the optimal aspect of timeshare: feasible mechanism for the management of timeshare projects.

Accordingly, it is believed that one of the features of robust timeshare legal arrangement is to include provisions regulating the mechanism of the management of the timeshare properties under the fee ownership arrangements and quasi-ownership arrangements. This can be achieved by the creation of the following arrangements:

- i) The creation of an owners' association under the fee ownership arrangements, a club under the club-trustee arrangement, and a company under the company share arrangement. These entities provide general control over the timeshare project and facilitate decision making in respect of the key issues regarding the management and maintenance of the timeshare project.
- ii) Vesting the day-to-day management issues in a professional management company that work under the supervision of one of the entities discussed above.
- iii) Drafting the project's documents<sup>275</sup> by the legal practitioners who work for the developer in detail as much as possible to avoid any type of ambiguity concerning the rights, obligations and responsibilities of each of the parties involved.
- iv) Determining the required quorum for annual and termination meeting on a practical basis. A possible solution is that the documents of the timeshare project places an obligation on the timeshare holders of each unit, at the beginning of the project, to agree among themselves on a schedule whereby one of them, every year, represent the unit at the annual general meetings of the management body. Thus, each representative has a number of votes equal to the total number of votes of the timeshare holders of the unit which he represents. In this way, it can be guaranteed that the cost and effort of the participating in the annual meetings will be divided evenly among the timeshare holders.

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<sup>275</sup> With the *company share* arrangement, the project documentation consist of memorandum and articles of association. Under the *club-trustee* arrangement, the project documentation comprise purchase agreement, club constitution, trust deed, management agreement and holiday certificate. Pursuant to the fee-simple arrangements, the project documentation consist of a real estate sales contract, deed, articles of incorporation for owners' association, bylaws for owners' association, the management agreement, Declaration of Covenants, Conditions and Restrictions.



These optimal features are necessary to ensure the smooth running and effectiveness of the operation of the timeshare project and reducing the likelihood of disputes going to court.

## **EVALUATIVE FRAMEWORK QUESTIONS**

The following questions will be used to carry out a functional analysis for the timeshare models in the countries under discussion. It should be noted that some answers will only be found in the timeshare legislation of the concerned country, such as the answers of the questions related to Phase I. This is because timeshare legislation gives all the timeshare holders in the country the same level of protection with regard to the aggressive marketing, lack of disclosure, verbal misrepresentation and the lack of availability regardless the legal arrangement used to regulate the timeshare project. Some answers will only be found in the legal arrangement used to construct the timeshare project such as the answers of the questions related to Phases III and IV. This is owing to the fact that the timeshare legislations in the countries under discussion left the issues addressed under these phases to be regulated in accordance with the legal arrangement used to construct each timeshare project. The answer of the remaining questions may be found in either the timeshare legislation or the legal arrangement that has been adopted, specifically the questions related to the excessive increase in annual fees and the deterioration of resort standards. This is due to the fact some timeshare legislations include unified solutions for these problems regardless of the legal nature of the timeshare, whereas other legislations leave such issues to be regulated by whichever legal arrangement is adopted to construct each timeshare project.

### **PHASE I QUESTIONS: Problems associated with the initial sale and purchase of timeshare**

#### **Aggressive marketing**

Does the legislation provide the consumers with a cooling-off period for reconsideration?

Does the legislation provide the consumers with the right to withdraw from the timeshare contracts, exchange contracts and resale contracts during the cooling-off period, without any charges or justification?

Does the legislation prohibit payments being collected prior to the end of the cooling-off period with regard to the timeshare and exchange contracts?

Does the legislation prohibit payments being collected prior to the actual sale taking place with regard to the resale contract?

Does the legislation provide for the automatic termination of all the ancillary contracts in the case of the exercise of the right of withdrawal?

### **Lack of disclosure**

Does the legislation require the provision of written; accurate and comprehensive information, on paper or other durable medium, which is easily accessible to the consumer, in understandable language, both at pre-contractual and contractual stage?

Does the legislation stipulate that the pre-contractual information should form an integral part of the contract?

### **Verbal Misrepresentation**

Does the legislation require for promises to be made in writing / part of the contract?

Does the legislation prohibit the marketing of timeshare as an investment?

## **PHASE II QUESTIONS: Problems associated with ownership**

### **Alleged Availability and Flexibility**

Does the legislation require the provision of clear and accurate information concerning the season during which the right of occupancy can be exercised, the duration of the right of occupancy, date on which the timeshare holder can start to exercise the right of occupancy and the restrictions on the consumer's ability to exercise the right of occupancy, specifically under the floating-weeks' pattern and points pattern?

Does the legislation require the provision of clear and accurate information relating to the possibilities, limitations and modes for exchange?

### **Excessive increases in annual service charge**

Does the legislation have provisions to curb or prohibit the increase in annual fees?

Does the legal arrangement provide a solution to the potential for excessive increase in annual fees?

### **Declining Resort Standards**

Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?

Does the legislation impose penalties based on declining resort standards?

Does the legal arrangement have a solution to the deterioration of resort standards?

### **Resort Closure and the Security of Timeshare Holders**

Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

Does the legal arrangement prohibit the developer from revoking the agreement at will?

Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer's insolvency?

## **PHASE III QUESTIONS: Problems associated with the secondary market and termination by individual timeshare holders**

### **Resale and Termination Problems faced by the individual**

Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?

## **PHASE IV QUESTIONS: Collective action problems**

### **Collective Action Problems**

Does the legal arrangement have an owners' association, club or a company?

Does the legal arrangement require for a professional management company to be appointed?

Does the legal arrangement have provisions to arrange a meeting and decision-making process on a 'practical basis'?

## **PART II**

### **The Functional Analysis: What features of legal regimes for timeshare are likely to provide the optimal system of a timeshare operation in any jurisdiction?**

The aim of this Part is to carry out a functional analysis in respect of timeshare models in jurisdictions under consideration so as to extract the features of legal regimes for timeshare that are likely to provide the optimal system of a timeshare operation in any jurisdiction. This is essential because the legislative proposal which will be introduced to the Iraqi legislature for regulating the timeshare agreements will be informed by the extracted optimal features as will be seen in Part III.

## CHAPTER FOUR

### ENGLAND AND WALES MODEL

#### 4.1 INTRODUCTION

The aim of this Chapter is to carry out a functional analysis for the timeshare model in England and Wales.<sup>1</sup> This analysis shall be carried out by applying the evaluative framework established in Chapter Three to the timeshare legislation and legal arrangements that operate in England and Wales. This analysis is crucial as it will lead to the identification of the optimal features present in the legal regime for timeshare in England and Wales that could be used to provide the optimal system of a timeshare operation in any jurisdiction.

It must be noted that all the timeshare projects in England and Wales, regardless of the legal arrangement used to regulate the relationship between the developer and the timeshare holders, are governed by the same legislation. This legislation is called the Timeshare, Holiday Products, Re-sale and Exchange Contracts Regulations 2010.<sup>2</sup> The Timeshare Regulations were enacted pursuant to Article 16 of the current European Timeshare Directive<sup>3</sup> and they came into force on 23rd February 2011.<sup>4</sup> The Timeshare Regulations were designed to cover four main contracts: (1) timeshare contracts, (2) long-term holiday product contracts, (3) resale contracts and (4) exchange contracts.<sup>5</sup> Therefore, the protection measures provided for within these Regulations, such as the right of reflection, cover the consumers in all the aforementioned types of contracts. Furthermore, the Timeshare Regulations do not impose a unified legal nature of timeshare rights, or a common mechanism to the management, maintenance and termination of the timeshare projects. These aspects are regulated by the legal arrangement used by the developer to construct the timeshare project available within this jurisdiction. Therefore, there is variety in the legal

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<sup>1</sup> In this thesis, the timeshare model means both the legislation and the legal arrangements which are in use to regulate the timeshare projects in a certain country.

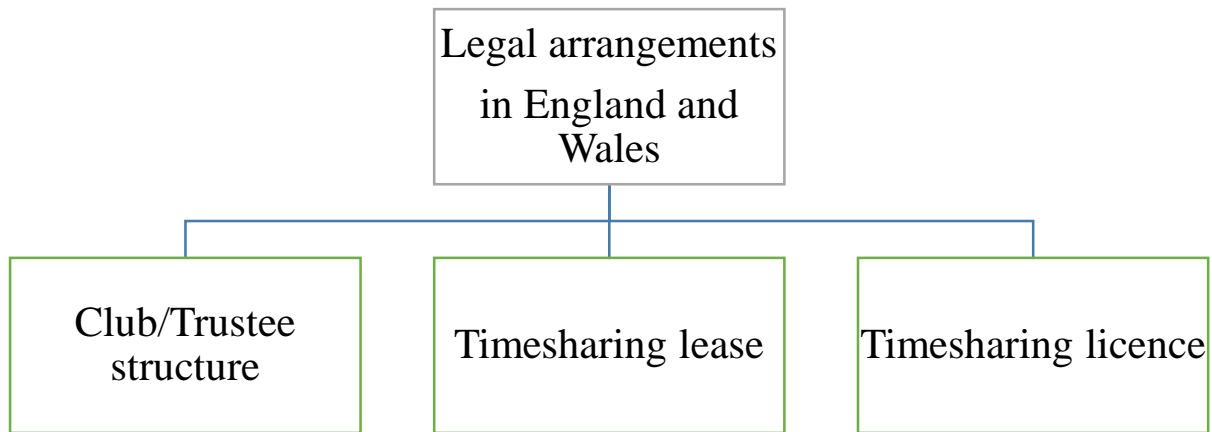
<sup>2</sup> Article 1(1) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. This regulations made on 11th December 2010, laid before Parliament on 15 December 2010 and come into force on 23rd February 2011. This regulation printed and published in the UK by the Stationary Office Limited under the authority and superintendence of Carol Tullo, controller of Her Majesty's Stationary Office and Queen's printer of Acts of Parliament. Hereinafter [the Timeshare Regulations].

<sup>3</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L33/10.

<sup>4</sup> Article 1 (2) of the Timeshare Regulations.

<sup>5</sup> Article 3 of the Timeshare Regulations.

arrangements which are in use to construct the timeshare projects in England and Wales. However, there are three legal arrangements which are common on the ground: (1) club/ trustee, (2) timesharing lease and (3) timesharing licence. These can be conveniently be set out diagrammatically as follows:<sup>6</sup>



These arrangements are consecutively analysed hereunder:

## 4.2 CLUB/ TRUSTEE LEGAL ARRANGEMENT

### 4.2.1. Overview of the legal arrangement

This is the most common legal arrangement which is used by developers to regulate timeshare projects in England and Wales.<sup>7</sup>

Under the club/ trustee legal arrangement, the clubs typically take the form of unincorporated members' clubs. Therefore, a committee is usually elected by the clubs' members to represent their interests.<sup>8</sup> The developer and his representatives establish the club and therefore they are its founder members. The founder members will form the first committee<sup>9</sup> and approve the first constitution of the club.<sup>10</sup> The first committee will, on behalf of the

<sup>6</sup> Source of diagram: the author.

<sup>7</sup> James Edmonds, *International Timesharing* (3rd edn, Longman Group 1991) 50.

<sup>8</sup> The club is 'an unincorporated association whose members agree to be bound by a common set of rules and who together elect a committee to represent their interests'. See, James Edmonds, 'The Club/ Trustee System' (1987) 19 Law Society Gazette 1.

<sup>9</sup> The members of the club are usually represented by an elected committee according to the conditions and terms of the club's constitution. Nevertheless, the first committee is often exempted from the rule of election because it represents the interests of the developer, and because the timeshare holders have not been appointed in the club as original members yet. See, James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 46.

<sup>10</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 46.

club, enter into arrangements for the appointment of a trustee to hold the timeshare property for the benefit of club members<sup>11</sup> as well as entering into contracts with a management company.<sup>12</sup>

The management company is responsible for the management of the timeshare project, pending the election of a second committee to represent the timeshare holders. The election will take place once a sufficient number of timeshare holders are appointed in the club as original members by the developer as a founder member. After the election, the management powers will be passed to the elected committee, and the management company will be responsible for the daily administration of the timeshare project.<sup>13</sup> The committee will invariably be the agent which represents the club members for the purposes set out in the club's constitution. The constitution usually entitles the committee to enter into agreements in order to achieve the defined goals of the club. Nevertheless, if the committee acts *ultra vires*, the committee members might find themselves personally responsible for any agreements entered into on behalf of the club. The committee members might also be liable to third parties in tort unless the constitution provides otherwise.<sup>14</sup>

Under the club's constitution, each accommodation in the timeshare project is divided into a certain number of occupancy periods, usually ranging from between 50 and 51 weeks represented by holiday certificates.<sup>15</sup> The holiday certificates are then transferred to the developer; this is done in return for his arranging for the transfer of the accommodations of the timeshare project to the trustee.<sup>16</sup> After this has been achieved, the developer will transfer the holiday certificates to the timeshare holders as and when each holiday period is sold.<sup>17</sup> The sole right of original appointment of new members is vested in the developer, as a

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<sup>11</sup> In the case of timesharing projects, the trustee usually takes the form of an independent trust corporation 'such as those operated by the clearing banks or one of the trust corporations which specialise in providing such a service in the field of timesharing schemes, such as Holiday Property Trustee Ltd or Timeshare Trustee (International) Ltd'. See, James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 45.

<sup>12</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 47.

<sup>13</sup> James Edmonds, 'The Club/ Trustee System' (1987) 19 Law Society Gazette 2.

<sup>14</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 47.

<sup>15</sup> The membership in the club is linked to the available occupancy periods (i.e., holiday certificates). Thus, the possibility to acquire a membership in the club is limited to the number of accommodation in the timeshare project and the number of occupancy periods.

<sup>16</sup> This means that the developer abandons his interest in the accommodations in exchange for the right to sell club memberships.

<sup>17</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 48.



founder member, but any member who derives title from the developer can appoint a new member in his place through selling or transfer his holiday certificate (i.e., time-share).<sup>18</sup>

Accordingly, in the club/trustee legal arrangement the developer as a settlor transfers the ownership of the timeshare property<sup>19</sup> to independent trustees who in turn hold the property upon trust for the benefit of the timeshare holders as club members.<sup>20</sup> The timeshare holders, in return for a financial consideration,<sup>21</sup> acquire a certificate of membership in a club which entitles them to occupy fixed accommodation or any accommodation in a timeshare resort and use its common facilities<sup>22</sup> for a designated period of time each year,<sup>23</sup> and for a specified number of years.<sup>24</sup>

The timeshare holders usually make their payments to the trustees, who holds the money until the resort is ready for occupation and then release the money to the developer. It is the duty of the trustees to ensure that the documentation relating to the timeshare resort is in order before accepting the trusteeship of that timeshare resort.<sup>25</sup> It is worth pointing out that the required documents to establish a club/trustee timesharing project consists of a trust deed, club constitution, management agreement, purchase agreement and club certificate.<sup>26</sup>

At the expiration of the life of the timeshare project, it is possible to renew the timeshare trust agreement without breaching the rule against remoteness of vesting. The alternative possibility is for the trustees to sell the development and distribute the proceeds among the

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<sup>18</sup> James Edmonds, 'The Club/ Trustee System' (1987) 19 Law Society Gazette 1.

<sup>19</sup> In some cases, the developer transfers a long leasehold estate to the trustee rather than a freehold estate. See: Keith Baker, 'Timeshare '88 The English Viewpoint' [1989] International Legal Practitioner 14, Patrick J. Rohan and Daniel A. Furlong, 'Timesharing and Consumer Protection: A Precise for Attorneys' (1984) 10 William Mitchell Law Review 17.

<sup>20</sup> Tim Bourne, 'Is Timeshare Coming Of Age?' [1998] International Travel Law Journal 67. In the common law system, trust regards an ideal and flexible method to use an asset for the benefit of a group of individuals called beneficiaries. See, Peter Sparkes, *European Land Law* (Hart Publishing 2007) 273.

<sup>21</sup> Michelle D. Brodie, 'Regulating of Time Sharing in South Carolina' (1986) 37 South Carolina Review 37; Terry L. Arnold, 'Real Estate Timesharing: Construction of Non-Fee Ownership' 26 Washington University Journal of Urban and Contemporary Law 222. The financial consideration includes the membership fee which is a fixed sum of money paid usually in advance, and the maintenance fees which is usually paid on a yearly basis.

<sup>22</sup> Such as, swimming pool, tennis playground, golf court ...etc.

<sup>23</sup> Debbie L. Jared, 'Timesharing: An Innovative Concept' (1978-1980) 1 Mississippi Law Review 443. The period of occupancy will be either fixed or floated. It is worth mentioning that several timeshare projects, presently, work based on a floating time period rather than a period recurring at the same time each year. See, Lisa A. Weixelman, 'Time- Sharing: the Need for Legislation' (1981-1982) 50 UMKCL Law Review 307.

<sup>24</sup> The initial period of operation of the timeshare scheme and hence the trusteeship must be within the perpetuity period not exceeding 125 years. See, section (5/1) of the Perpetuities and Accumulation Act 2009.

<sup>25</sup> Tim Bourne, 'Is Timeshare Coming Of Age?' [1998] International Travel Law Journal 67.

<sup>26</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 48-50; Keith Baker, 'Timeshare '88 The English Viewpoint' [1989] International Legal Practitioner 14.

timeshare holders on a pro rata basis, commensurate with the time periods that they occupied the timeshare units.<sup>27</sup>

#### 4.2.2 Functional analysis

##### *Phase I Questions: Problems associated with the initial sale and purchase of timeshare*

##### **Aggressive marketing**

##### Does the legislation provide the consumers with a cooling-off period for reconsideration?

The Timeshare Regulations provide the consumer with a fourteen-day cooling-off period for reconsideration.<sup>28</sup> The cooling-off period shall be calculated:

1. from the day of the conclusion of the holiday accommodation contract;<sup>29</sup> or
2. from the day when the consumer receives the holiday accommodation contract if it is later than the date of the conclusion of the contract.<sup>30</sup>

Moreover, the cooling-off period shall expire:

1. After one year and fourteen calendar days from the day of the conclusion of the holiday accommodation contract or its receipt if that occurred later than the date of its conclusion, if a separate standard withdrawal form<sup>31</sup> has not been included in the contract by the trader as required by Article 15 (7) of this Regulations.<sup>32</sup> Nevertheless, if the developer sends the withdrawal form within the aforementioned one year, the normal fourteen days will be applied from the date of the receipt of the withdrawal form.<sup>33</sup>
2. After three months and fourteen calendar days from the day of the conclusion of the holiday accommodation contract or its receipt if that took place later than the date of its conclusion, if the key information in relation to the contract has not delivered to the consumer in accordance with the requirements stipulated in Article 12(4) to (7).<sup>34</sup> However, if the developer sends the key information within the aforesaid three

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<sup>27</sup> G. L. Jones, 'Timesharing Practice and Operation', A paper presented at a workshop session of the Twelfth Pan Pacific Congress of Real Estate Appraisers, Valuers and Counsellors 21st-26th August, 1983, 514.

<sup>28</sup> Article 21(1)(b) of the Timeshare Regulations.

<sup>29</sup> Article 21 (2) (a) of the Timeshare Regulations. For this Chapter, a holiday accommodation contract means a timeshare contract, a resale contract and an exchange contract.

<sup>30</sup> Article 21 (2) (b) of the Timeshare Regulations.

<sup>31</sup> The withdrawal form is a standard form (set out in Schedule 5 of the Timeshare Regulations) that must be provided by traders to consumers in order to be used by them to notify the developers about their decision of withdrawing from the holiday accommodation contract.

<sup>32</sup> Article 21(3) and 21 (4) (a) of the Timeshare Regulations.

<sup>33</sup> Article 21 (3) and 21 (4) (b) of the Timeshare Regulations.

<sup>34</sup> Article (21/5 and 21/6/a) of the Timeshare Regulations.

months, the normal 14 days will be applied from the date of the receipt of the key information.<sup>35</sup>

If an exchange contract<sup>36</sup> is offered to the consumer at the same time as the timeshare contract, only a single cooling-off period shall apply to both contracts. The cooling-off period for both contracts shall be calculated in the same manner detailed above.<sup>37</sup>

[Does the legislation provide the consumers with the right to withdraw from the timeshare contracts, exchange contracts and resale contracts during the cooling-off period, without any charges or justification?](#)

The Timeshare Regulations entitle the consumer to withdraw from the contract during the cooling-off period<sup>38</sup> without incurring any charges<sup>39</sup> or justification<sup>40</sup> by way of giving the trader written notice of withdrawal. The consumer may use the standard withdrawal form that must be included in the contract by the trader according to Article 15(7) of this Regulation as the notice of withdrawal.<sup>41</sup> The deadline is met if the notification is sent before the cooling-off period has expired.<sup>42</sup>

[Does the legislation prohibit payments being collected prior to the end of the cooling-off period with regard to the timeshare and exchange contracts?](#)

Article 25(3) of the Timeshare Regulations prohibits any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the trader or to any third party by the consumer before the end of the cooling-off period in relation to timeshare and exchange contracts.

[Does the legislation prohibit payments being collected prior to the actual sale taking place with regard to the resale contract?](#)

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<sup>35</sup> Article (21/6/a) of the Timeshare Regulations.

<sup>36</sup> Pursuant to Article 10(1) of the Timeshare Regulations, an exchange contract is ‘a contract between a consumer who is also party to a timeshare contract, and a trader, under which the consumer, for consideration, joins a timeshare exchange system’. According to Article 10(2) of the same regulation, a timeshare exchange system is ‘a system which allows a consumer access to overnight accommodation or other services in exchange for giving other persons temporary access to the benefits deriving from the consumer’s timeshare contract’.

<sup>37</sup> Article 21(8) and (9) of the Timeshare Regulations.

<sup>38</sup> Article 20 (1) of Timeshare Regulations.

<sup>39</sup> Article 22 (4) of the Timeshare Regulations.

<sup>40</sup> Article 20 (3) of the Timeshare Regulations

<sup>41</sup> Article 20 (4) of the Timeshare Regulations.

<sup>42</sup> Article 20 (2) of the Timeshare Regulations.

Article 25(5) of the Timeshare Regulations prevents the trader or any third party from accepting any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration from the consumer before the actual sale takes place, or the resale contract is otherwise terminated.

[Does the legislation provide for the automatic termination of all the ancillary contracts in the case of the exercise of the right of withdrawal?](#)

Where the consumer exercises the right to withdraw from the timeshare contract, the obligations of the parties under the timeshare contract are automatically terminated at no cost to the consumer with effect from the date the consumer sends the notice of withdrawal.<sup>43</sup> The same applies to any exchange contract ancillary to it, or any other ancillary contract. Furthermore, where the price is fully or partly covered by credit granted to the consumer by the trader, or by a third party on the basis of an arrangement between the third party and the trader, the credit agreement is automatically terminated, at no cost to the consumer, where the consumer exercises the right to withdraw from the holiday accommodation contract.<sup>44</sup>

### **Lack of disclosure**

[Does the legislation require the provision of written; accurate and comprehensive information, on paper or other durable medium, which is easily accessible to the consumer, in understandable language, both at pre-contractual and contractual stage?](#)

The Timeshare Regulations require the trader to give the consumer accurate and sufficient information (in a clear and comprehensible manner) in good time before the consumer is bound by any holiday accommodation contract or offer,<sup>45</sup> as follows:

1. In the case of a timeshare contract: by means of the standard information form as set out in Schedule 1 of the Timeshare Regulations and information as listed in Parts 1 - 3 of that form;<sup>46</sup>

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<sup>43</sup> Article 22 of the Timeshare Regulations. Pursuant to Article 22 (6) of the Timeshare Regulations, An ancillary contract, in relation to a timeshare contract (the main contract), is 'a contract under which the consumer acquires services which are related to the main contract and which are provided by the trader, or a third party on the basis of an arrangement between the third party and the trader'.

<sup>44</sup> Article 23 of the Timeshare Regulations.

<sup>45</sup> Article 12 (1), (2) and (4) of the Timeshare Regulations.

<sup>46</sup> Articles 12 (5) (a) and 13 (2) (a) of the Timeshare Regulations.

2. In the case of a resale contract: by means of the standard information form as set out in Schedule 3 of the Timeshare Regulations and information as listed in Parts 1 - 3 of that form;<sup>47</sup>
3. In the case of an exchange contract: by means of the standard information form as set out in Schedule 4 of the Timeshare Regulations and information as listed in Parts 1 - 3 of that form;<sup>48</sup>

Moreover, the Timeshare Regulations place an obligation on the trader to provide the consumer with the aforementioned pre-contractual information free of charge; written on paper or on another durable medium; which is easily accessible to the consumer.<sup>49</sup> Furthermore, the trader has to draw up the aforesaid pre-contractual information in the language or one of the languages of the Member State in which the consumer is resident or a national, of the consumer's choosing, provided it is an official language of the European Community.<sup>50</sup>

[Does the legislation stipulate that the pre-contractual information should form an integral part of the contract?](#)

The Timeshare Regulations require the pre-contractual information to be set out again in the holiday accommodation contract.<sup>51</sup> Consequently, the contract needs to include the following additional information:<sup>52</sup>

1. The identity, place of residence and signature of each of the parties.
2. The date and place of conclusion of the contract.

Additionally, the Timeshare Regulations require that the holiday accommodation contract contains the standard withdrawal form set out in Schedule 5 of this Regulation.<sup>53</sup>

Furthermore, the Timeshare Regulations necessitate that the holiday accommodation contracts have to be in writing.<sup>54</sup> The contract has to be written in a language understandable by the consumers. Consequently, the consumer has the right to obtain the contract in the language of his country of residence or the country of nationality, of his choosing, provided it

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<sup>47</sup> Articles 12 (5) (a) and 13 (2) (c) of the Timeshare Regulations.

<sup>48</sup> Articles 12 (5) (a) and 13 (2) (d) of the Timeshare Regulations.

<sup>49</sup> Article 12 (5) (b), (c) and (d) of the Timeshare Regulations.

<sup>50</sup> Articles 12 (6) and (7) of the Timeshare Regulations.

<sup>51</sup> Article 15 (3) of the Timeshare Regulations.

<sup>52</sup> Article 15 (2) of the Timeshare Regulations.

<sup>53</sup> Article 15 (7) of the Timeshare Regulations.

<sup>54</sup> Article 15 (2) of the Timeshare Regulations.

is an official language of the European Community.<sup>55</sup> In any case, the contract must be written in English, in addition to the other languages, when the consumer resides in the United Kingdom, or the trader carries on sales activities in the United Kingdom.<sup>56</sup>

It is worth pointing out that the Timeshare Regulations prohibit the alteration of the pre-contractual information provided to the consumer by means of the standard information form<sup>57</sup> unless the parties expressly agree otherwise or the changes result from unusual and unforeseeable circumstances beyond the trader's control.<sup>58</sup> In such a case, the trader is committed to inform the consumer about these alterations before the contract is concluded<sup>59</sup> and to mention them expressly in the contract.<sup>60</sup>

Moreover, the Timeshare Regulations place an obligation on the trader to draw the attention of the consumer, in an explicit way, to the existence of the right of withdrawal, the length of the cooling-off period, and the ban on advance payments during the cooling-off period. This must be done before the conclusion of the contract.<sup>61</sup> In addition, the trader must obtain the signature of the consumer in relation to each section of the contract dealing with those matters.<sup>62</sup>

Ultimately, the Timeshare Regulations require that the consumer is provided with a copy, or copies, of the holiday accommodation contract at the time of its conclusion in order to enable the consumer to reconsider the terms and conditions of the contract and to seek advice during the cooling-off period.<sup>63</sup>

### Verbal Misrepresentation

[Does the legislation require for promises to be made in writing / part of the contract?](#)

There is no Article in the Timeshare Regulations deals with the matters provided for in this question.

[Does the legislation prohibit the marketing of timeshare as an investment?](#)

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<sup>55</sup> Article 17 (1), (2) and (3) of the Timeshare Regulations.

<sup>56</sup> Article 17 (4) of the Timeshare Regulations.

<sup>57</sup> Article 15 (4) (b) of the Timeshare Regulations.

<sup>58</sup> Article 15(5) of the Timeshare Regulations.

<sup>59</sup> Article 15 (5) of the Timeshare Regulations

<sup>60</sup> Article 15 (6) of the Timeshare Regulations.

<sup>61</sup> Article 16 (1) of the Timeshare Regulations.

<sup>62</sup> Article 16 (2) of the Timeshare Regulations.

<sup>63</sup> Article 16 (3) of the Timeshare Regulations.

The Timeshare Regulations prohibit the marketing of the timeshare as an investment. Article 14 (3) provides for that by stating ‘A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment...’

### *Phase II Questions: Problems associated with ownership*

#### **Alleged Availability and Flexibility**

Does the legislation require the provision of clear and accurate information concerning the restrictions on the consumer’s ability to exercise the right of occupancy, specifically under the floating-weeks’ pattern and points pattern?

The Timeshare Regulations place an obligation on the salespeople and traders to provide the prospective consumers with accurate pre-contractual information on the precise period within which the right of occupancy may be exercised; its duration; the date on which the consumer may start to exercise the right of occupancy<sup>64</sup> and the restrictions on the consumer’s ability to exercise the right of occupancy where the right is / can be selected from a pool of accommodations, as is the case under the floating-weeks’ pattern and points’ pattern.<sup>65</sup> The Timeshare Regulations place an obligation on the trader to include this information in the timeshare contract.<sup>66</sup> This is to provide the prospective consumers with a clear view concerning the possibilities of exercising the right of occupancy and thereby minimising the chance of any disappointment.

Does the legislation require the provision of clear and accurate information relating to the possibilities, limitations and modes for exchange?

The Timeshare Regulations oblige the salespeople and exchange companies to provide the potential consumers who are interested in joining an exchange company with real and precise information about the exchange possibilities and restrictions. This is stipulated in Part 3/1 of Schedule 4 which reads as follows:

-explanation of how the exchange system works; the possibilities and modalities for exchange; an indication of the value allotted to the consumer’s timeshare in the exchange system and a set of examples of concrete exchange possibilities,

Is this space in the original? Yes.

-an indication of the number of resorts available and the number of members in the exchange system, including any limitations on the availability of particular

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<sup>64</sup> Article 12 of the Timeshare Regulations; Part 1 of Schedule 1 (Standard Information Form for Timeshare Contracts) of the Timeshare Regulations.

<sup>65</sup> Part 3 of Schedule 1 (Standard Information Form for Timeshare Contracts) of the Timeshare Regulations.

<sup>66</sup> Article 15 (3) of the Timeshare Regulations.

accommodation selected by the consumer, for example, as a result of peak periods of demand, the potential need to book a long time in advance, and indications of any restrictions on the choice resulting from the timeshare rights deposited into the exchange system by the consumer.

This is to prevent the sellers of exchange membership from overselling the benefits and advantages of the exchange service and thus keep the consumers satisfied with their exchange membership.

### **Excessive increases in annual service charge**

[Does the legislation have provisions to curb or prohibit the increase in annual fees?](#)

The Timeshare Regulations place an obligation on the salespeople and traders to provide the prospective consumers with written information document.<sup>67</sup> This document must include, in addition to a general description of the timeshare property, the following particulars:<sup>68</sup>

1. An accurate and appropriate description of all costs associated with the timeshare contract,
2. How these costs will be allocated to the consumer,
3. How and when such costs may be increased,
4. and the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (e.g., taxes and fees) and the administrative overheads (e.g., management, maintenance and repairs).

Moreover, the Timeshare Regulations stipulate that all the above-mentioned information form an integral part of the timeshare contract.<sup>69</sup> This is to ensure compliance by salespeople and traders to provide clear and accurate information to the consumers regarding the amounts they need to pay in return for the occupation of the timeshare accommodation, and consequently, provide the consumers with appropriate level of protection against the excessive increase in the annual fees.

[Does the legal arrangement provide a solution to the potential for excessive increase in annual fees?](#)

One of the required documents to establish club/trustee timesharing projects is the management agreement. This agreement should determine the extent of the liability of the

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<sup>67</sup> Article 12 of the Timeshare Regulations.

<sup>68</sup> Part 3 of Schedule 1 (Standard Information Form for Timeshare Contracts) of the Timeshare Regulations.

<sup>69</sup> Article 15 (3) of the Timeshare Regulations.



timeshare holders concerning the maintenance and administration fees in respect of the timeshare complex and its common facilities. Put differently, the management agreement should define in detail the mechanism of the allocation of the running expenses between the club members as well as the responsibilities of the management company in order to ensure the non-abuse by the management company with respect to the timeshare holders and protect them against the excessive escalation in annual fees.<sup>70</sup>

### **Declining Resort Standards**

Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?

Does the legislation impose penalties based on declining resort standards?

There is no provision within the Timeshare Regulations to deal with the above matters.

Does the legal arrangement have a solution to the deterioration of resort standards?

A club, which includes all the timeshare holders in the resort, is typically constituted for exercising a general control over the timeshare resort and making decisions concerning the key issues of management and maintenance of the timeshare project.<sup>71</sup> The club invariably employs a professional management company to deal with the daily operation of the timeshare resort. This is vital, as it would preclude the possibility of hiring unqualified management company and thus maintaining the standard of services of the timeshare resort.<sup>72</sup>

### **Resort Closure and the Security of Timeshare Holders**

Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?

The club/ trustee arrangement gives property rights in the timeshare property, via trust, to the timeshare holders as the beneficiaries of the trust.

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

The developer, as a settlor, transfers the ownership of the timeshare property to independent trustees who hold the property upon trust for the benefit of the timeshare holders as club members as explained in section 4.2.1.

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<sup>70</sup> James Edmonds, 'The Club/ Trustee System' (1987) 19 Law Society Gazette 2; James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 49.

<sup>71</sup> For more details, please refer to Section 4.2.1.

<sup>72</sup> For more details, please refer to Chapter Three/ Phase II/ The Declining of Resort Standards.

Does the legal arrangement prohibit the developer from revoking the agreement at will?

Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer's insolvency?

The following answer covers the two above questions.

As explained in section 4.2.1, the developer transfers the ownership of the timeshare property to independent trustees who hold the property upon trust for the benefit of the timeshare holders. This has two main results. First, protecting the timeshare holder against revocation, forfeiture and repossession by the developer because the trust once constituted, the developer as the settlor cannot change his mind and try to recover his property.<sup>73</sup> Second, securing the assets of the timeshare project<sup>74</sup> as well as protecting the rights of the timeshare holders in the cases of the death and bankruptcy of the developer.<sup>75</sup> This because the club/ trustee arrangement ensures that the units of the timeshare property are properly transferred free of encumbrances to the trustees,<sup>76</sup> and because the developer abandons his interest in the timeshare property in exchange for the right to sell club memberships. Consequently, if the developer passes away or becomes bankrupt, the liquidator or receiver acquires only this right (right to sell club memberships), not the ownership of the timeshare property itself.<sup>77</sup> This results in securing the interests of the timeshare holders because the timeshare property that they have a right to occupy will not be taken away from them in the cases of the death and bankruptcy of the developer.<sup>78</sup>

***Phase III Questions: Problems associated with the secondary market and termination by individual timeshare holders***

**Resale and Termination Problems**

Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

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<sup>73</sup> Judith Bray, *Unlocking Land Law* (4<sup>th</sup> edn, Routledge 2014) 35.

<sup>74</sup> Bourne (n 20) 67.

<sup>75</sup> James Edmonds, 'The Club/ Trustee System' (1987) 19 *Law Society Gazette* 3.

<sup>76</sup> The trust deed, one of the required document to establish a club/trustee timesharing project, typically places an obligation on the trustees to ensure that the trust assets are properly transferred free of encumbrances to the trust. See, James Edmonds, 'The Club/ Trustee System' (1987) 19 *Law Society Gazette* 3.

<sup>77</sup> Christopher D. Jones, 'The timeshare Trust' 76, in *Timesharing II* issued by The Urban Land Institute, Washington, D. C. 1982 76.

<sup>78</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 48. James Edmonds, 'The Club/ Trustee System' (1987) 19 *Law Society Gazette* 3.

The following answer covers the two above questions.

As mentioned in Section 4.2.1, one of the required documents to establish club/trustee timesharing projects is the trust agreement. This document should include provisions for the sale, lease, and the other legal ways of the disposition of the interests of beneficiaries. It, also, should include provisions determining the date of the expiration of the timeshare project. At this date, there is two possibilities. First, to renew the timeshare trust agreement without breaching the rule against remoteness of vesting. Second, to sell the timeshare development by the trustees and then distribute the proceeds among the timeshare holders on a pro rata basis, commensurate with the time periods that they occupied the timeshare units.<sup>79</sup>

[Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?](#)

A timeshare holder cannot exit the timeshare agreement if his circumstances changed during the term of the project because he acquired a proprietary interest in the timeshare development. However, he can get rid of his timeshare by way of resale or donation in accordance with the provisions laid down in the project documentation.

#### ***Phase IV Questions: Collective action problems***

[Does the legal arrangement have an owners' association, club or a company?](#)

As explained in detail in Section 4.2.1, unincorporated members' club is typically formed for the exercise of general control over the timeshare resort. The club typically comprises of the timeshare holders, the developer and the management company. Therefore, a committee is usually elected by the clubs' members to represent their interests. This committee assumes ultimate responsibility for running the resort, settling management and maintenance fees, determining future investments and making further sales and resales.

[Does the legal arrangement require for a professional management company to be appointed?](#)

As explained in detail in Section 4.2.1, the committee typically employs a professional management company to assist it. The management company will be responsible for the daily

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<sup>79</sup> James Edmonds, *International Timesharing* (3rd edn, Longman Group 1991) 49.

administration issues of the timeshare resort. The management company will perform the daily operations under the supervision of the committee.

Does the legal arrangement have provisions to arrange a meeting and decision-making process on a ‘practical basis’?

As highlighted in section 4.2.1, one of the required documents to establish club/trustee timesharing projects is the club constitution. This constitution must state, in detail, the rules regarding the procedures that should be followed at club’s meetings and the mechanism of election and authorities of the committee which represents the timeshare holders in the club.<sup>80</sup> Furthermore, the club constitution must state that the modification of club rules should be decided by majority vote. However, any changes to the rules which affect the trustee either directly or indirectly will not be valid unless these changes are approved by the trustee himself.<sup>81</sup> Ultimately, most constitutions define the process of decision-making in the project.<sup>82</sup> Consequently, there is no guarantee for the availability of a practical mechanism of meeting and decision-making. This is because such a mechanism will vary from a timeshare project to another depending on the rules laid down in the constitution of the club of each timeshare project.

## 4.3 TIMESHARE LEASE LEGAL ARRANGEMENT

### 4.3.1. Overview of the legal arrangement

In England and Wales, this legal arrangement is in use but it is less common than the club/trustee arrangement. This is possibly due to the fact that it may have lost some of its appeal when it was held in the case of *Cottage Holiday Association v Commissioners for Customs and Excise*<sup>83</sup> that a timeshare lease for eighty years was not ‘major interest in land’ and therefore will be subject to Value Added Tax.<sup>84</sup> This technique of developing a timeshare

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<sup>80</sup> Brian L. Wates, *Timesharing: The Practical Guide* (David & Charles Publishers Plc, 1987) 35.

<sup>81</sup> James Edmonds, *International Timesharing* (3rd edn, Longman Group 1991) 49.

<sup>82</sup> James Edmonds, ‘The Club/ Trustee System’ (1987) 19 Law Society Gazette 2.

<sup>83</sup> [1983] Q.B. 735.

<sup>84</sup> *Cottage Holiday Association v Commissioners for Customs and Excise* [1983] Q.B. 735. The case also reported by Keith Baker, ‘Timeshare ‘88 The English Viewpoint’ [1989] International Legal Practitioner 14. The case is summarised conveniently by Peter Sparkes, *European Land Law* (Hart Publishing 2007) 272, as follows:

[E]ach cottage was divided as a timeshare and individual weeks were sold over an 80-year period, the rent being a peppercorn but with a lump sum premium. This was a valid common law lease for a single term, only the periods of enjoyment being discontinuous. It is treated as lasting for a period equal to the summation of the discontinuous weekly periods of occupation; it followed that the interest granted was for less than 21 years and was not a major interest in the land and VAT was payable.

project brings about a Landlord and tenant relationship between the developer and the timeshare holders.<sup>85</sup> Thus, a timeshare lease is a pre-paid lease agreement<sup>86</sup> similar to the traditional rental agreements signed by most tenants under which the timeshare holder has the exclusive right to possess and occupy a particular accommodation of the timeshare project for a fixed period of time each year and for a specified number of years, usually calculated based on the estimated useful lifetime of the timeshare structure.<sup>87</sup>

In England and Wales, a timeshare lease takes the form of a discontinuous lease<sup>88</sup> under which each timeshare holder is granted a *divided* (i.e. not held in common) leasehold estate over a defined unit of the timeshare project. This leasehold estate entitles the timeshare holder to possess and occupy that unit exclusively for a determined period each year for a given term of years usually corresponding to the useful life of the timeshare structure. Leasehold timesharing, as a general rule, obliges each timeshare holder in the project to pay a fee in advance for the right of a long-term occupancy and to pay his pro rata share of the common expenses, such as the maintenance and reconditioning charges, insurance, taxes, and utility costs. Moreover, each timeshare holder has to pay a percentage fee to the management company which is designated to manage the timeshare project.<sup>89</sup>

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<sup>85</sup> James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 20. Mary Ann Flynn, 'North Carolina's Time-Share Act: Guidelines for Those Who Buy and Sell' 20 Wake Forest Law Review 937.

<sup>86</sup> Terry L. Arnold, 'Real Estate Timesharing: Construction of Non-Fee Ownership' 26 Washington University Journal of Urban and Contemporary Law 221.

<sup>87</sup> Joseph M. Meier, 'Timesharing-Oregon's Legislation' (1984) 20 Willamette Law Review 286; Paul Barron, 'the Louisiana Timesharing Act: An Analysis and Assessment' (1984) 58 Tulane Law Review 873.

<sup>88</sup> A discontinuous lease, in general, is a special category of lease in England and Wales whereby the lessee is entitled to possess and occupy the demised property exclusively for a series of discontinuous periods. Thus, under the discontinuous lease, the lessee is not entitled to possess and use the demised property for a single continuous period but rather he is entitled to possess and use the demised property on certain dates every month or year and for a given number of years such as two weeks per year for ten years. See, Roger J. Smith, *Property Law* (6th edn, Pearson Education 2009) 226; Roger J. Smith, *Introduction to Land Law* (Pearson Education, 2007) 179, 290. A discontinuous lease grants the lessee a proprietary interest in the demised property for a specified and limited period of time. A discontinuous lease is basically 'a long-term lease agreement ranging from twenty to ninety nine years, or in some cases for the lifetime of the owner.' See, Discontinuous lease and Legal definition on <<http://definitions.uslegal.com/d/discontinuous-lease/>> accessed on 23/12/2013. In the field of timesharing industry, a discontinuous lease refers to a lease agreement under which the owner of a resort or condominium style development leases out an apartment-like unit for a designated period of time each year, such as for one week or two weeks, and for a specific numbers of years usually calculated based on the estimated economic life of the timeshare buildings. See, Jonathan Law and Elizabeth A. Martin, *Oxford Dictionary of Law* (7<sup>th</sup> edn, Oxford University Press 2009). This dictionary is published online on <<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095721274>> accessed on 23/12/2013. For tracing back the genesis of the discontinuous lease and its conceptual dilemma under the laws of England and Wales, please refer to Chris Willmore 'Leases, Licences and Joint Venture Agreements: Durable Shared Possession' a paper presented at the MSPL conference in Liverpool in April 2014 13.

<sup>89</sup> Frank L. Amoroso, 'New Ideas in the Vacation Home Market' (1974) 48 St. John's Law Review 12; Spyros Pantazis, 'The Role of Information Communication Technologies in the Greek Timesharing Industry' (MSc thesis, University of Surry 2003) 13.

In the timeshare lease, the developer retains the reversion in the timeshare property and does not end up transferring it to the timeshare holders. Therefore, when the lease expires the right to possession reverts to the developer. Nevertheless, the timeshare holders are allowed to transfer, sublet, and exchange their rights in general and the right of occupancy in particular, without the consent of the developer unless the lease provides otherwise.<sup>90</sup> Hence, the timeshare holder is given all the privileges and burdens with all the responsibilities of a tenant, subject to the conditions that he does not default on the lease or violate the terms of the timeshare agreement.<sup>91</sup>

### 4.3.2 Functional analysis

#### *Phase I Questions: Problems associated with the initial sale and purchase of timeshare*

##### **Aggressive marketing, Lack of disclosure and Verbal Misrepresentation**

Inasmuch as the Timeshare Regulations applied to all timeshare projects in England and Wales. Therefore, by parity of reasoning reach the same conclusions when analysing all the problems under this Phase with regard to the timeshare lease arrangement.

#### *Phase II Questions: Problems associated with ownership*

##### **Alleged Availability and Flexibility**

Please refer to the discussion carried above in respect of the club/trustee arrangement as the same piece of legislation governs all timeshare projects in England and Wales regardless of the legal arrangement used to construct each timeshare project.

##### **Excessive increases in annual service charge**

**Does the legislation have provisions to curb or prohibit the increase in annual fees?**

Please refer to the discussion carried above in respect of the club/trustee arrangement as the same piece of legislation governs all timeshare projects in England and Wales regardless of the legal arrangement used to construct each timeshare project.

**Does the legal arrangement provide a solution to the potential for an excessive increase in annual fees?**

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<sup>90</sup> Patrick J. Rohan and Daniel A. Furlong, 'Timesharing and Consumer Protection: A Precise for Attorneys' (1984) 10 William Mitchell Law Review 17.

<sup>91</sup> William B. Ingersoll, 'The Legal Forms of Timesharing' p.19, in Timesharing II issued by The Urban Land Institute, Washington, D. C. 1982; Curtis J. Berger, 'Timesharing in the United States' 38 American Journal of Comparative Law 136.

The general principle is that the landlord's power (or, the developer's power in case of timeshare lease) to levy a service charge and a leaseholder's obligation (timeshare holder in case of timeshare lease) to pay it are governed by the provisions of the lease (timeshare contract). Therefore, there is no obligation on the leaseholder to pay anything other than what is provided for in the lease.<sup>92</sup> Consequently, service charges can go up or down without any limit, but the landlord can only recover those costs which are *reasonable*. This enshrined in Section 19 (1) of the Landlord and Tenant Act 1985 which reads as follows:

Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and  
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;  
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Leaseholders have a statutory right to seek a summary of the service charge account from the landlord. The request must be in writing and can be sent directly to the landlord or to the managing agent. It can require a summary of the relevant costs in relation to the service charges payable in respect of the last accounting year, or where accounts are not kept by accounting years, the past 12 months preceding the request. Section 21 (1) of the Landlord and Tenant Act 1985 provides for that by stating the following:

A tenant may require the landlord in writing to supply him with a written summary of the costs incurred—

(a) if the relevant accounts are made up for periods of twelve months, in the last such period ending not later than the date of the request, or  
(b) if the accounts are not so made up, in the period of twelve months ending with the date of the request,

and which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period.

Where the landlord has received such a demand he must provide the summary within one month or within six months of the end of the 12-month accounting period, whichever is the later. This is enshrined in Section 21 (4) of the Landlord and Tenant Act 1985 which states that, 'The landlord shall comply with the request within one month of the request or within six months of the end of the period referred to in subsection (1) (a) or (b) whichever is the later'. Where the service charge is payable by the leaseholders of more than four dwellings (as is the case under

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<sup>92</sup> Welsh Assembly Government/ Department for Communities and local Government, *Service Charges and Other Issues* (The Leasehold Advisory Service, without date of publication) 5.

timesharing), the summary must be certified by a qualified accountant as a fair summary and sufficiently supported by accounts, receipts and other documents produced to the accountant. This is provided for in Section 21 (6) of the Landlord and Tenant Act 1985 which reads as follows:

If the service charges in relation to which the costs are relevant costs as mentioned in subsection (1) are payable by the tenants of more than four dwellings, the summary shall be certified by a qualified accountant as—

- (a) in his opinion a fair summary complying with the requirements of subsection (5), and
- (b) being sufficiently supported by accounts, receipts and other documents which have been produced to him.

Furthermore, the leaseholder has the right to inspect documents relating to his service charge as a follow-up to obtain more detail on the summary. Within a period of six months from receipt of the summary, the leaseholder may write to the landlord requiring him to allow access to and inspection of the accounts, receipts and any other documents relevant to the service charge information in the summary and to provide facilities for them to be copied. This is stipulated in Section 22 (2) of the Landlord and Tenant Act 1985 which reads as follows:

The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities—

- (a) for inspecting the accounts, receipts and other documents supporting the summary, and
- (b) for taking copies or extracts from them.

Facilities for inspection must be provided within one month of the request, and must be available for a period of two months. Section 22 (4) of the Landlord and Tenant Act 1985 provides for that by stating, ‘The landlord shall make such facilities available to the tenant or secretary for a period of two months beginning not later than one month after the request is made’.

Accordingly, leaseholders have rights to challenge service charges that they feel are unreasonable at the appropriate court or tribunal. This is stipulated in Section 20 (c) (1) of the Landlord and Tenant Act 1985 which states:

A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation tribunal [or the First-tier Tribunal ], or the [ Upper Tribunal ], or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.



The court may reduce the service charge to be reasonable in accordance with the conditions of each case. Section 20 (c) (3) of the Landlord and Tenant Act 1985 provides for that by stating, ‘The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances’.

### Declining Resort Standards

Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?

Does the legislation impose penalties based on declining resort standards?

There is no provision within the Timeshare Regulations to deal with the above matters.

Does the legal arrangement have a solution to the deterioration of resort standards?

As a rule, the developer, as the landlord, is the person who has the right to exercise a general control over the timeshare project (leased property) and make decisions concerning the key issues of the management of the timeshare resort due to the fact that the freehold estate in the timeshare project is retained by him.<sup>93</sup> However, in England and Wales, the Commonhold and Leasehold Reform Act 2002 provides a right for leaseholders to force the transfer of the landlord’s management functions to a special company set up by them – the Right to Manage Company (RTM Company).<sup>94</sup> This right is vital because it would empower the timeshare holders, as leaseholders, to take general control of the management and upkeep of their units, and thus become wholly responsible for all decision-making in terms of budgets and reserve funds, standards of management and provision of services, repairs and major works, and with the overall function of the resort.<sup>95</sup> This would largely protect the timeshare holders against any potential decline in the resort’s standards because they can activate this right in case of the deterioration of resort standards under the management of the developer or his management company. This is because the activation of this right does not require the consent of the landlord (developer in the case of timesharing) or any order of the court.<sup>96</sup>

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<sup>93</sup> Mark E Henze, *The Law and Business of Time-Share Resort* (Clark Boardman Company Ltd 1984) 2-15. For more details, please refer to Chapter Two/ Section 2.5.4.1.

<sup>94</sup> Section 71 of Commonhold and Leasehold Reform Act 2002. For more details concerning the Right to Manage Company, please refer to Chapter Two/ Section 2.5.4.

<sup>95</sup> Section 96 (5) of Commonhold and Leasehold Reform Act 2002.

<sup>96</sup> Department for Communities and Local Government, *Residential Long Leaseholders: A Guide to your Rights and Responsibilities*

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/9432/leaflet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9432/leaflet.pdf)> accessed on 29/12/ 2016.

## Resort Closure and the Security of Timeshare Holders

Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?

Pursuant to the English property law,<sup>97</sup> there are three characteristics of a lease:<sup>98</sup> exclusive possession,<sup>99</sup> a determinate period<sup>100</sup> and for a rent.<sup>101</sup> Lord Templeman in *Street v Mountford*<sup>102</sup> affirmed this fact by saying ‘the grant of exclusive possession for a term at a rent creates a tenancy’.<sup>103</sup> The exclusive possession is the decisive characteristic of a lease. Lord Templeman in *Street v Mountford* established this principle by saying ‘There can be no tenancy unless the occupier enjoys exclusive possession’.<sup>104</sup> Accordingly, a lease cannot exist if the occupier does not have exclusive possession over the premises. Therefore, the timeshare lease gives to the timeshare holders the right of exclusive possession over the accommodation during the period of occupancy.

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

The successor of the developer, as a landlord, will get the timeshare development subject to the subsisting leases of the timeshare holders.<sup>105</sup> That is to say, the new developer will acquire only the reversion in the timeshare property. However, when the lease expires the right to possession reverts to the developer.

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<sup>97</sup> *Street v Mountford*. This case reported in [1985] AC 809.

<sup>98</sup> For more details about lease characteristics, please refer to Robert Megarry & William Wade, *The Law of Real Property*, (Sweet & Maxwell, 2012) 750.

<sup>99</sup> Exclusive possession means the lessee is able to control over anyone who enters the premises and exclude everyone, including the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement such as the right to enter the premises for the purpose of viewing and repairing.

<sup>100</sup> A determinate period: The lease will be void if its period is deemed uncertain. This means that both the beginning and the duration of the lease should be identified clearly in the tenancy agreement.

<sup>101</sup> For rent: This means that a consideration, whether money or benefits in kind, must be paid to the landowner by the tenant in exchange for the utilisation of the premises. The rent historically has been seen as an important characteristic of the landlord and tenant relationship. However, in *Ashburn Anstalt v Arnold* (1989) Ch1, it has been held that a lease can be created without the payment of rent. Fox LJ at page (39) stated:

In the circumstances I conclude that the reservation of a rent is not necessary for the creation of a tenancy. That conclusion involves no departure from Lord Templeman's proposition in *Street v. Mountford* ‘If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable’. We are saying only that we do not think that Lord Templeman was stating the quite different proposition that you cannot have a tenancy without a rent.

<sup>102</sup> *Street v Mountford* [1985] AC 809.

<sup>103</sup> *Street v Mountford* [1985] AC 809, at 816.

<sup>104</sup> *Street v Mountford* [1985] AC 809, at 818.

<sup>105</sup> For more details about lease characteristics, please refer to Robert Megarry & William Wade, *The Law of Real Property*, (Sweet & Maxwell, 2012) 809.

Does the legal arrangement prohibit the developer from revoking the agreement at will?

Subject to a break clause, the developer cannot revoke the timeshare lease agreement unless the timeshare holder breaches one of the covenants or obligations of the lease.

Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer's insolvency?

In English property law, the landlord can forfeit the lease only when there is an express clause within the lease providing for forfeiture. Conditions are commonly inserted into leases to provide for re-entry if the leaseholder fails to perform his obligations under the lease such as the payment of the rent or service charges, or there is a denial of the landlord's title by the leaseholder.<sup>106</sup> Consequently, the developer cannot forfeit timeshare lease arbitrarily.

***Phase III Questions: Problems associated with the secondary market and termination by individual timeshare holders***

**Resale and Termination Problems**

Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?

This varies from one timeshare project to another depending on the rules laid down in the timeshare contract concerning the transferability of the occupancy right.

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

***In-perpetuity Lease***

Pursuant to the English common law, the maximum duration of a lease must be ascertainable from its inception.<sup>107</sup> This position is set out in the Law of Property Act 1925 which, in its

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<sup>106</sup> For more detail, please refer to Robert Megarry & William Wade, *The Law of Real Property*, (Sweet & Maxwell, 2012) 812.

<sup>107</sup> *Say v Smith* (1563) 1 Plowden 269, 272. In this case, it was held that the lease was valid only as to the certain term. Anthony Brown J said:

every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it, and in the end of it: so that all these ought to be known at the commencement of the lease, and words in a lease, which don't make this appear, are but babble. And these three are in effect but one matter, shewing the certainty of the time for which the lessee shall have the land, and if any of these fail, it is not a good lease, for then there wants certainty.

definition of 'term of years absolute', provides that the term must be 'either certain or determination'.<sup>108</sup> Consequently, a timeshare lease in perpetuity can be invalidated for uncertainty in the period.<sup>109</sup> Nevertheless, as the timeshare holder has paid rent, the court is likely to infer the existence of a periodic tenancy which may then be determined by either party on giving notice in the usual way.<sup>110</sup>

### *Long-term Lease*

The modern law in England and Wales permits the creation of lease of any length, as long as the commencement and the duration of the lease is clearly identified in the lease agreement.<sup>111</sup>

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Please also refer to *Lace v Chantler* [1944] KB 368 at 370. In this case, a lease granted for the duration of the war was held to be void because there was no certainty as to the maximum duration. Lord Greene MR stated:

Normally there could be no question that this was an ordinary weekly tenancy, duly determinable by a week's notice, but the parties in the rent-book agreed to a term which appears there expressed by the words 'furnished for duration,' which must mean the duration of the war. The question immediately arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would last. Mr Sturge in his argument has maintained that such a lease would be valid, and that, even if the term is uncertain at its beginning when the lease takes effect, the fact that at some future time it will be rendered certain is sufficient to make it a good lease. In my opinion that argument is not to be sustained. I do not propose to go into the authorities on the matter, but in Foa's 'Landlord and Tenant' 6th ed., p. 115, the law is stated in this way, and, in my view, correctly: 'The habendum in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void.'

<sup>108</sup> Section (205/1/xxvii) Law of Property Act 1925.

<sup>109</sup> *Sevenoaks, Maidstone and Tunbridge Railway Co v London, Chatham and Dover Railway Co* (1879) 11 Ch D 625 at 635. In this case, it was held that the lease could not be granted to endure in perpetuity. Jessel, M.R. expressed that by stating 'we have not by law any such thing as a lease in perpetuity. We have a fee simple subject to a rent-charge, and we have a lease for years, but we have no such thing as a lease in perpetuity'. Please also refer to *The Raphael Fishing Company Limited v The State of Mauritius* [2008] UKPC 43 at 86. In this case, it was held that the grant of a 'permanent lease' in respect of certain groups of islands by a deed was invalid because leases had to be limited in period. Lord Neuberger stated that 'The concept of a permanent lease is almost a contradiction in terms'. Therefore, he concluded that 'if one were forced to treat the 1901 Deed as a lease, it must be a nullity'.

<sup>110</sup> *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 A. C. at 394 by Lord Templeman. This case can be conveniently summarised as follows:

A highway authority purchased a piece of land alongside a highway, and leased it back to the seller, the terms of the lease stating that it was leased to him until it was required for the purposes of widening the road. Many years later the authority abandoned its plan to widen the road, and sold the land to another owner, who sought to terminate the lease by giving notice to quit. The lessee argued that the lease could only be terminated if the land was required for road-building. It was held that leases must be for a certain or determinable length of time, and thus the agreement leasing the land until it would be required for road-building was void. As the tenant paid rent yearly, then the lease would be held to be a yearly one, which the new owner could lawfully terminate.

<sup>111</sup> Robert Megarry & William Wade, *The Law of Real Property*, (Sweet & Maxwell, 2012) 744.

### *Estate binding clauses*

As a rule, the remainder of the lease is a property right. Therefore, the ownership of which will pass to the inheritor(s) of deceased lessee (timeshare holder) as part of the lessee's estate. However, the inheritor(s) is entitled to disclaim the unexpired remainder of the lease on the basis that it is an onerous property. This has the effect of determining the leases.<sup>112</sup>

[Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?](#)

This varies from a timeshare project to another depending on the terms laid down in the timeshare agreement. Nevertheless, if the timeshare agreement is included a long-term clause under which the timeshare project will last far into the future, the timeshare holder who need to exit the project because of the change in his circumstances may resort to the competent court and ask for the invalidation of the long-term clause pursuant to the Unfair Terms in Consumer Contracts Regulations 1999 as detailed in Chapter Three.

### ***Phase IV Questions: Collective action problems***

[Does the legal arrangement have an owners' association, club or a company?](#)

As a rule, there is no owners' entity under this legal arrangement because the developer retains the freehold estate in the timeshare development during the life of the project.<sup>113</sup> However, a special company can be formed by the timeshare holders – the Right to Manage Company (RTM company) - to take over the developer's management functions and thus being responsible for the management and maintenance of the timeshare development as explained in detail in Section 2.5.4 of Chapter Two.

[Does the legal arrangement require for a professional management company to be appointed?](#)

Typically, a professional resort management company is employed either by the developer or the Right to Manage Company (RTM) to deal with the day-to-day management issues of the timeshare project as explained in Chapter Two, Section 2.5.4.

[Does the legal arrangement have provisions to arrange a meeting and decision-making process on a 'practical basis'?](#)

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<sup>112</sup> Section 178 of the Insolvency Act 1986.

<sup>113</sup> For more details, please refer to Section 4.3.1 of this Chapter and Section 2.5.4.1 Chapter Two.

This question is not applicable if the developer exercises the management and maintenance functions due to the non-existence of owners' entity. However, if the management and upkeep functions have been taken over by the Right to Manage Company (RTM), the meetings and decision-making process will be governed by the related rules included in the articles of association of the RTM company which may vary from one to another.

## 4.4 TIMESHARE LICENCE LEGAL ARRANGEMENT

### 4.4.1. Overview of the legal arrangement

A licence to use land is 'an oral or written permission given by the occupant of real property allowing the licensee to do some act that otherwise would be trespasses.'<sup>114</sup> Consequently, a licence is 'a privilege to do one or more acts on the land, without having an interest therein. As a general proposition, it is personal to the licensee, is not assignable by him and is revocable by the licensor'.<sup>115</sup> Thus, a timeshare licence is a prepaid written agreement similar to the licence agreements under which the timeshare holder is given a right (permission) to occupy an accommodation<sup>116</sup> in a timeshare resort and enjoy its common facilities (the swimming pool, tennis court or golf course, for example) for a designated period of time<sup>117</sup> and for a specified number of years<sup>118</sup> but *without* a proprietary right in the timeshare structure.<sup>119</sup> Timeshare licences places an obligation on the developer and/ or the management company to maintain the project and its facilities and keep them operating and in a good condition. Furthermore, they have to insure the project against dangers such as, fire and theft, as well as establish an escrow fund of sales revenue to guarantee the operation of the timeshare resort. On the other hand, each timeshare holder in the project is under an obligation to pay an advance lump sum to the developer in return for a long-term right of

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<sup>114</sup> Jesse Dukeminier and James E. Krier, *Property* (Aspen Publishers 2002) 457.

<sup>115</sup> Yvette C. Mendez, 'Timesharing and Realty Interests under Martin Act: Consumer or Investor Protection?' (1988-1989) 17 *Fordham Urban Law Journal* 511. Same meaning can be found in: Thomas J. Daves, 'The Second-Home Market: Time-Sharing Ownership- Legal and Practical Problems' (1973-1974) 48 *St. John's Law Review* 1184.

<sup>116</sup> Typically, a timeshare licence agreement refers to a category of accommodation such as, one bedroom suite, instead of a designated accommodation. Therefore, any timeshare holder has to reserve the use of the desired accommodation some weeks in advance of the intended date of occupancy. This, in turn, enables the developer or the management company to schedule reservations in order to avoid overlap and to ask for reservations from the general public in order to reduce vacancies in the timeshare project. Berger Curtis J. Berger, 'Timesharing in the United States' 38 *American Journal of Comparative Law* 136; Debbie L. Jared, 'Timesharing: An Innovative Concept' (1978-1980) 1 *Mississippi Law Review* 442; Peter M. Gunner, 'Regulation of time-sharing' (1977-1978) 57 *Oregon Law Review* 33.

<sup>117</sup> This period of time is usually measured in weeks.

<sup>118</sup> The number of years is usually calculated based on the estimated useful lifetime of the timeshare building.

<sup>119</sup> Robert E. Dady and Robert S. Freedman, 'To Deed or Not to Deed: That Is the Timeshare Question' [2001] *Probate and Property* 49; Michelle D. Brodie, 'Regulating of Time Sharing in South Carolina' (1986) 37 *South Carolina Review* 532.

occupancy and to pay an annual fee to the management company to cover his share of the common expenses, such as the costs of maintenance and management.<sup>120</sup>

#### 4.4.2 Functional analysis

*Phase I Questions: Problems associated with the initial sale and purchase of timeshare*

##### **Aggressive marketing, Lack of disclosure and Verbal Misrepresentation**

The Timeshare Regulations applied to all timeshare projects in England and Wales regardless of the legal arrangement used to structure each timeshare project. Therefore, by parity of reasoning reach the same conclusions when analysing all the problems under this Phase with regard to the timeshare licence arrangement.

*Phase II Questions: Problems associated with ownership*

##### **Alleged Availability and Flexibility**

Conclusion already reached under the club/trustee arrangement can be seen under the timeshare licence arrangement because the same piece of legislation govern all timeshare projects in England and Wales regardless of the legal arrangement used to construct each timeshare project.

##### **Excessive increases in annual service charge**

Does the legislation have provisions to curb or prohibit the increase in annual fees?

Conclusion already reached under the club/trustee arrangement can be seen under the timeshare licence arrangement because the application of the same piece of legislation.

Does the legal arrangement provide a solution to the potential for excessive increase in annual fees?

The timeshare holders have no control over the timeshare project, specifically concerning the management and maintenance functions as this power is retained by the developer as the proprietor of the timeshare project.<sup>121</sup>

##### **Declining Resort Standards**

Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?

Does the legislation impose penalties based on declining resort standards?

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<sup>120</sup> Frank L. Amorso, 'New Ideas in the Vacation Home Market' (1974) 48 St. John's Law Review 11.

<sup>121</sup> For more details, please refer to Section 4.4.1 of this Chapter and Section 2.5.4 of Chapter Two.



There is no provision within the Timeshare Regulations to deal with the above matters.

Does the legal arrangement have a solution to the deterioration of resort standards?

No. This owing to the fact that timeshare holders have no control over the timeshare project, as explained above.

### **Resort Closure and the Security of Timeshare Holders**

Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?

As detailed in Section 4.3.2, the conclusive characteristic which distinguishes lease from licence in England and Wales is the exclusive possession. That is to say, if there is no exclusive possession then the arrangement cannot be a lease and must be a licence. Thus, if someone occupying property does not have exclusive possession, he can only claim a licence which is a mere personal right. Consequently, the timeshare licence arrangement does not provide the timeshare holder with the right to exclusive possession during the period of occupancy.

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

In England and Wales, as a general rule, a contractual licence does not bind a third party.<sup>122</sup> Therefore, the occupancy rights of the timeshare holders are not binding upon the developer's successor in title as they do not pass with the transfer of the property. However, the modern approach is that the contractual licence can only be binding on third parties if there is an evidence of a constructive trust.<sup>123</sup> Consequently, the law today will not recognise a contractual licence as binding interest in land unless it is accompanied by a constructive trust. This will be found by the court where it believes that the conscience of the successor in title

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<sup>122</sup> *King v David Allen and Sons Billposting Ltd* [1916] 2 AC 54. This case can be conveniently summarised as follows:

The defendant (licensor) had contracted to give the claimant (licensee) the right to put posters on some of the walls in a cinema owned by the defendant. The contract (licence) was to last for four years. Before the contract had expired, the cinema was sold. It was held that the purchaser took free of the rights of the claimant, who could only sue for breach of contract.

<sup>123</sup> *Binions v Evans* [1972] Ch 359. This case can be conveniently summarised as follows:

The trustees of Tredegar Estate had given Mrs Evans, the widow of his employee, a right to remain in a cottage which had been granted to her husband rent-free as a part of his job for the rest of her life. This is on condition that she keeps the cottage in good repair and manages the garden. The trustees then sold the cottage subject to the agreement with the widow. The purchasers, Mr and Mrs Binions, then tried to evict the widow. Lord Denning MR held that the purchasers who had notice of the agreement and have paid a reduced price because of it, held the property on constructive trust for the widow. Therefore, they could not evict her.



is affected so that it would be inequitable to allow him to deny the licensee's interest in the property.

It is worth pointing here that, in accordance with the aforesaid modern approach, the right of the licensee will be valid against the new proprietor not as a legal right arising from contractual licence, but as an equitable right resulting from a constructive trust.

**Does the legal arrangement prohibit the developer from revoking the agreement at will?**

In England and Wales, historically, the contractual licence is capable of being revoked at will although the licensee could try and obtain a remedy in damages applying ordinary contractual principles.<sup>124</sup> However, the modern approach is to make the 'contractual licence irrevocable except as contemplated by the terms of the contract'.<sup>125</sup> Thus, there is the ability to revoke the contractual licence subject to the terms of the contract. Consequently, the timeshare contract, under the timeshare licence arrangement, would be revocable at the developer's will if it includes such a term.

**Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer's insolvency?**

The licence is personal to the licensee, not binding on third parties and is revocable by the licensor as explained above.

***Phase III Questions: Problems associated with the secondary market and termination by individual timeshare holders***

### **Resale and Termination Problems**

**Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?**

Since the developer retains the title to the timeshare property and does not convey any real estate interest to the timeshare holders, the timeshare holders are not allowed to transfer their occupancy rights without the consent of the developer unless the license contract provides

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<sup>124</sup> *Wood v Leadbitter* (1845) 9 JP 312. In this case, it was held that the race goer (licensee) who has ejected from the racecourse of the licensor could only claim for damages because the licensor is entitled to exclude him at will.

<sup>125</sup> *Tan Hin Leong v Lee Teck Im* [2000] SGHC 70.

otherwise.<sup>126</sup> Thus, the transferability of the occupancy rights varies from a timeshare project to another depending on the construction of the timeshare contract in each project.

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?

This answer covers the two above questions.

The situation varies from one timeshare project to another depending on the terms stipulated in the timeshare agreement. However, if the timeshare agreement is included in-perpetuity clause or long-term clause under which the timeshare project will last far into the future, the timeshare holder who need to exit the agreement because of the change in his circumstances may resort to the competent court and challenge the validation of such clauses pursuant to the Regulations of the Unfair Terms in Consumer Contracts 1999 if the timeshare holder entered into the contract before 01 October 2015 or according to the Consumer Rights Act 2015 if he entered into the contract after 01 October 2015.<sup>127</sup> Nevertheless, it is not always clear how the

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<sup>126</sup> Yvette C. Mendez, 'Timesharing and Realty Interests under Martin Act: Consumer or Investor Protection?' (1988-1989) 17 Fordham Urban Law Journal 511; Debbie L. Jared, 'Timesharing: An Innovative Concept' (1978-1980) 1 Mississippi Law Review 442; Lisa A. Weixelman, 'Time Sharing: the Need for Legislation' (1981-1982) 50 UMKCL Law Review 307.

<sup>127</sup> The Consumer Rights Act 2015 is an Act of Parliament of the United Kingdom that consolidates existing consumer protection law legislation and also gives consumers a number of new rights and remedies. The Act replaces three major pieces of consumer legislation - the Sale of Goods Act 1930, Unfair Terms in Consumer Contracts Regulations 1999, and the Supply of Goods and Services Act 1982. The Act was introduced to simplify, strengthen and modernise the law, giving the consumer clearer shopping rights.

The Act is split into three parts:

- Part 1 concerns consumer contracts for goods, digital content and services.
- Part 2 concerns unfair terms.
- Part 3 concerns other miscellaneous provisions.

The Consumer Rights Act came into force on 1 October 2015 which meant from that date new consumer rights became law covering:

- What should happen when goods are faulty;
- What should happen when digital content is faulty;
- How services should match up to what has been agreed, and what should happen when they do not, or when they are not provided with reasonable care and skill;
- Unfair terms in a contract;
- What happens when a business is acting in a way which is not competitive;
- Written notice for routine inspections by public enforcers, such as Trading Standards; and greater flexibility for public enforcers, such as Trading Standards, to respond to breaches of consumer law, such as seeking redress for consumers who have suffered harm.

court would decide a particular case because every timeshare contract is likely to be construed in the light of all the circumstances attending the conclusion of the particular contract. This discretion does not seem a very satisfactory way to exit timeshare as it adds further uncertainty as detailed in Chapter Three.

### *Phase IV Questions: Collective Action Problems*

Does the legal arrangement have an owners' association, club or a company?

Under timeshare licence legal arrangement there is no owners' entity because the developer retains the title to the timeshare development during the life of the project.<sup>128</sup>

Does the legal arrangement require for a professional management company to be appointed?

Typically, a professional resort management company is employed by the developer to deal with the daily management issues of the timeshare project as explained in Section 4.4.1 of this Chapter and Section 2.5.4 of Chapter Two.

Does the legal arrangement have provisions to arrange a meeting and decision-making process on a 'practical basis'?

This question is not applicable here due to the non-existence of owners' entity.

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Most of these changes were important updates to existing laws. But two new areas of law were also introduced.

- For the first time rights on digital content have been set out in legislation. The Act gives consumers a clear right to the repair or replacement of faulty digital content, such as online film and games, music downloads and e-books.
- There are now also new, clear rules for what should happen if a service is not provided with reasonable care and skill or as agreed. For example, the business that provided the service must bring it into line with what was agreed with the customer or, if this is not practical, must give some money back.

Accordingly, The Consumer Rights Act 2015 stands alongside Regulations to create a greatly simplified body of consumer law. Taken together, they set out the basic rules which govern how consumers buy and businesses sell to them in the UK.

For more details please refer to Fieldfisher, 'Consumer Rights Act 2015: What has changed?' <<http://www.fieldfisher.com/publications/2015/09/consumer-rights-act-2015-what-has-changed#sthash.8aW2C9we.dpbs>> accessed 3 September 2017; Department for Business, Energy and Industrial Strategy, 'Policy paper: Consumer Rights Act 2015' <<https://www.gov.uk/government/publications/consumer-rights-act-2015/consumer-rights-act-2015>> accessed 3 September 2017; Consumer Rights Act 2015 <<http://www.which.co.uk/consumer-rights/regulation/consumer-rights-act>> accessed 3 September 2017.

<sup>128</sup> For more details, please refer to Section 4.4.1 of this Chapter and Section 2.5.4.1 Chapter Two.

## 4.5 CONCLUSION

Optimal features for timeshare should strive to provide the consumers with a sufficient level of protection in each phase of the timeshare cycle. This Chapter concludes that the model of England and Wales provides the consumers with a varying level of protection in many aspects of the timeshare cycle.

In the first phase, the model in England and Wales provides consumers with an advanced level of protection. It requires developers to provide the timeshare holders with written accurate and comprehensive information at each stage of the pre-contractual and contractual, with the aim of protecting consumers from being misled whether by developers or salespeople. The model also provides the timeshare holders with the right of withdrawal which is necessary to curb the aggressive marketing techniques. Moreover, the model prohibits the collection of advance payments from the timeshare holders before the expiry of the withdrawal period. Furthermore, the model provides for the automatic termination of all ancillary contracts in the case of the exercise of the right of withdrawal. In addition, the model prevents the marketing of timeshares as an investment. These features are worthy of taking forward as optimal features. Nonetheless, the model does not require verbal promises to be made in writing and to be part of the timeshare contract. This is important to curb the verbal misrepresentations systematically used by the unscrupulous salespeople. Therefore, this defect must be avoided when considering the optimal timeshare legal regime.

In the second phase, the model provides the consumers with a high level of protection with regard to the availability of timeshare products and the increase of service charges. The model places an obligation on the developers to supply the timeshare holders with accurate and complete information on when, where and how the right of occupancy can be exercised. Moreover, the model places an obligation on the developers to provide the timeshare holders with accurate and comprehensive information regarding the method of the calculation, distribution and collection of the service charges to prevent the developers from increasing the annual charges excessively. Such features are worthy of taking forward as optimal features. Nonetheless, the model provides the consumers with varying levels of protection against the problems associated with declining of resorts standards and resort closure as the level of protection relies on the legal arrangements which are used to regulate each timeshare project. Each of the club/trustee and timeshare lease arrangements provide the timeshare holders with exclusive possession during their periods of occupancy which is a feature

worthy of taking forward as an optimal feature. However, the timeshare licence arrangement does not provide the timeshare holders with such exclusive possession during their periods of occupancy which is a defect that must be avoided when considering the optimal timeshare legal regime. Moreover, both of the club/trustee and timeshare lease arrangements entitle the timeshare holders to establish an association, which includes all the timeshare holders in the project, to appoint, supervise and oust the management company. Thus, the association can respond quickly in the case of the deterioration of the standard of services of the timeshare resort. This feature is worthy of taking forward as an optimal feature. Nevertheless, the timeshare licence arrangement does not provide this mechanism, this is a defect which must be avoided when proposing the optimal timeshare legal regime. Furthermore, each of the club/trustee and timeshare lease arrangements protect the timeshare holders against revocation, forfeiture and repossession. This feature is worthy of taking forward as an optimal feature. Nonetheless, the timeshare licence arrangement does not provide the timeshare holders with such protection which is a gap that must be addressed when contemplating the optimal timeshare legal regime.

In the third phase, the model provides the consumers with a varying level of flexibility depending on which legal arrangement is used. Not one of the current legal arrangements in England and Wales prevents a developer from putting restrictions on the resale of the timeshares. This defect must be addressed when drafting the optimal timeshare regime. Moreover, the timeshare lease arrangement, unlike the club/trustee arrangement and timeshare licence arrangement, prohibits perpetuity and estate-binding contracts. This feature is worthy of taking foreword as an optimal feature. Nevertheless, all the aforementioned arrangements do not prohibit long-term contracts which has reflected negatively on the timeshare holders who cannot carry on because of the change in their circumstances as they cannot get out of the contract. Therefore, this lacuna must be addressed when enacting the optimal timeshare legal regime.

In the fourth phase, the mechanism for the management varies from project to project depending on the legal arrangement in place. Unlike the timeshare licence arrangement, the club/trustee and timeshare lease arrangements empower the timeshare holders to create a management association as highlighted above. Nevertheless, the previously-mentioned arrangements have no provisions to arrange meetings and effective decision-making. This defect must be avoided when proposing the optimal timeshare legal regime. Ultimately, the

club/trustee, timeshare lease and timeshare licence arrangements vest the daily management issues in a professional management company in order to maintain the quality of the services provided to the timeshare holders. This feature is also worthy of taking forward as an optimal feature.

## **CHAPTER FIVE**

### **THE FRENCH MODEL**

#### **5.1 INTRODUCTION**

There are two main pieces of legislation which regulate timeshare projects in France. The first is the law No. 86 - 18 of 6 January 1986, which relates to companies whose purpose is to allocate their shareholders the use of buildings to be enjoyed on a timeshare basis (Henceforth to be called the 1986 Timeshare Law). Pursuant to Article 1, all timeshare projects in France must take the form a company in which the timeshare purchasers are the shareholders and exercise their rights according to the company's memorandum and articles of association. Therefore, timesharing companies set up before the 1986 Timeshare Law came into effect were obliged to modify their legal documentation within two years in order to comply with the provisions of this law.<sup>1</sup> The 1986 Timeshare Law does not require that timeshare projects must adopt a certain company structure. Therefore, the founder members are free to choose any form of company provided for by French law.<sup>2</sup> The founder members are developers who subscribe to the shares for the purpose of selling them to public i.e. timeshare holders. Thus, the main aims of the 1986 Timeshare Law are to strengthen timeshare holders' rights of use of the timeshare property and to adapt French company law for timesharing purposes.<sup>3</sup>

The second main piece of legislation, which regulates timeshare projects in France, is section 9 of Chapter I of Title II of Book I of the Consumer Code as amended by Law 2009-888 of 22 July 2009, which is concerned with the development and modernisation of the tourist services. This Law has been enacted pursuant to Article 16 of the current European Timeshare Directive<sup>4</sup> and came into force on 1 January 2010.<sup>5</sup> Section 9 of Chapter I of Title II of Book I of the Consumer Code is designed to cover four main contracts: (1) timeshare

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<sup>1</sup> Article 34 of the 1986 Timeshare Law.

<sup>2</sup> Paragraph 1 of Article 1 of the 1986 Timeshare Law.

<sup>3</sup> Paragraph 1 of Article 1 of the 1986 Timeshare Law.

<sup>4</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L33/10.

<sup>5</sup> Section IV of Law 2009-888 of 22 July 2009 on the development and modernization of the tourist services.

contracts, (2) long-term holiday product contracts, (3) resale contracts and (4) exchange contracts.<sup>6</sup>

It must be noted that, in relation to timeshare contracts, the main focus of the 1986 Timeshare Law is the regulation of the legal arrangement of constructing timeshare projects, and the mechanism of the management, maintenance and termination of the timeshare projects. As for Section 9 of Chapter I of Title II of Book I of the Consumer Code, its main focus is upgrading the level of protection provided for timeshare holders under the 1986 Timeshare Law in a manner match with the level of protection stipulated in the current European Directive as well as regulating the contracts of long-term holiday products, exchange contracts and resale contracts as required by the current European Directive. This is because these contracts were not regulated whether by the French law or the repealed European Directive<sup>7</sup> which, in turn, caused a lot of problems for the consumers whether in France or throughout EU Member States, as detailed in Chapter Three. Consequently, the protection measures provided for in Section 9 of Chapter I of Title II of Book I of the Consumer Code, such as the right of reflection, cover the consumers in all the aforementioned types of contracts.<sup>8</sup>

Accordingly, the company share legal arrangement is the sole arrangement in use to construct timeshare projects in France. This legal arrangement is analysed below by applying the evaluative framework established in Chapter Three to the above-mentioned pieces of legislation.

## **5.2 COMPANY SHARE LEGAL ARRANGEMENT**

### **5.2.1 Overview of the legal arrangement**

Timesharing projects adopting the company share arrangement are structured by the establishment of a company owning the land and buildings of the timeshare project, with the result that the timeshare holders become shareholders in the company.<sup>9</sup> The timeshare company subsequently gives each shareholder the right of occupancy in one of its units of accommodation for a specified period of time each year for the shareholder's life, or for a

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<sup>6</sup> Paragraph (1) of Article L. 121-60 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>7</sup> Directive 94/47/EC of the European Parliament and the Council 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 [1994] OJ L 280/83.

<sup>8</sup> Article L. 121-60 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>9</sup> World Tourism Organization, *Timeshare: The New Force in Tourism* (1st ed World Tourism Organization 1996) 48.



given number of years as stipulated in the memorandum and articles of association.<sup>10</sup> Consequently, this legal arrangement vests the ownership of the timeshare project in the company rather than the shareholders (i.e., timeshare holders) individually.<sup>11</sup>

Simultaneously, the company provides each shareholder with the right to occupy one of the timeshare project accommodations and the right to use its other recreational facilities for a specific period of time each year proportionate to his share in the company's capital. Hence, the main objective of timesharing companies is to enable each shareholder to enjoy the right of use and occupation of a defined part of the company's property. In other words, timesharing companies are primarily incorporated for the purposes of building or purchasing housing units and distributing the right of occupancy in these units among the shareholders, each one according to his share in the company's capital.<sup>12</sup>

This is achieved by dividing the timesharing project into two parts. The first part includes the housing units that are allocated for private use, i.e., for the purpose of exercising the right of occupancy. The second part includes the common areas intended for shared use among all the shareholders (timeshare holders).<sup>13</sup> The housing units are then allocated to the shareholders. A timetable is then prepared setting out the start and end dates representing the specified period for each shareholder to exercise their right of occupancy in the housing unit which has been allocated to him.<sup>14</sup> As the aim of the establishment of timesharing companies is to give the shareholders the right to occupy an accommodation in a tourist development, dedicated to spending holidays and vacations, the 1986 Timeshare Law allows for these companies to perform three main functions. Firstly, to own the land and buildings comprising the timeshare development, and secondly, to own the necessary movables to furnish the accommodation and recreational facilities of the development, and thirdly to operate the timeshare project.<sup>15</sup>

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<sup>10</sup> Article 1 of the 1986 Timeshare Law. In the United Kingdom, it is possible to set up a timeshare project in a form of a public limited company and the timeshare purchasers become shareholders in that company. However, this type of timeshare projects is rarely to be found in the United Kingdom because of several facts: 'the detailed requirements of the Companies Acts relating to prospectuses and the offering of shares for sale to the public; the taxation implications of such a sale and, more recently, the requirements of the Financial Services Act 1986'. See, James Edmonds, *International timesharing* (3rd edn, Longman Group 1991) 20, 54.

<sup>11</sup> Paragraph 1 of Article 1 of the 1986 Timeshare Law.

<sup>12</sup> Paragraphs 2 and 3 of Article 1 of the 1986 Timeshare Law.

<sup>13</sup> Paragraph 1 of Article 8 of the 1986 Timeshare Law.

<sup>14</sup> Paragraphs 2 and 4 of Article 8 of the French 1986 Timeshare Law. As if each shareholder is allocated a week or fifteen days to be taken in a particular month of the year. Or, allocating a month in the year for each shareholder to be taken in a particular season, or throughout the year as stipulated in the company articles.

<sup>15</sup> Paragraphs 1 and 2 of Article 3 of the 1986 Timeshare Law.

The timeshare company, as a part of its duty of managing the timeshare project, has to perform several tasks. Most notably, enabling the shareholders to exercise their rights of occupancy, setting the rules that must be followed by the shareholders when they want to rent out or exchange their timeshares, maintaining and repairing the timesharing complex periodically, preparing the statements of accounts regarding the timeshare project, and determining the proportion of the annual fees payable by each shareholder, and setting the rules that must be followed by the shareholders when they want to sell their shares in the company's capital.<sup>16</sup>

## 5.2.2 Functional analysis

*Phase I Questions: Problems associated with the initial sale and purchase of timeshare*

### Aggressive marketing

Does the legislation provide the consumers with a cooling-off period for reconsideration?

The Consumer Code provides the timeshare holder with a fourteen-day cooling-off period for reflection.<sup>17</sup> The cooling-off period starts from the day of the conclusion of the holiday accommodation contract;<sup>18</sup> or the day when the consumer receives the holiday accommodation contract if this receiving is subsequent to the day of conclusion of the contract.<sup>19</sup> The cooling-off period shall come to an end as follows:

1. After one year and 14 days from the day of the conclusion of the holiday accommodation contract or the date of its receipt, if the trader has not provided the consumer with the standard withdrawal form stipulated in paragraph 5 of Article L. 121-68 of the Consumer Code.<sup>20</sup> Nonetheless, if the trader sends the withdrawal form within the aforementioned one year, the normal fourteen days will be applied from the date of the receipt of the withdrawal form.<sup>21</sup>
2. After three months and fourteen days from the date of the conclusion of the holiday accommodation contract or the date of its receipt if the trader has not provided the consumer the information set out in Articles L. 121-63 and L. 121-64 of the

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<sup>16</sup> Abdul Baset H, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle Press 2005) 17.

<sup>17</sup> Paragraph 1 of Article L. 121-69 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>18</sup> For this Chapter, a holiday accommodation contract means a timeshare contract, a resale contract and an exchange contract.

<sup>19</sup> Paragraph 2 of Article L. 121-69 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>20</sup> Paragraph 1 of Article L. 121-70 of Section 9 of Chapter I of Title II of Book I of the Consumer Code. The withdrawal form is a standard form that, in accordance with the Consumer Code, must be provided by traders to consumers in order to be used by them to notify the developers about their decision of withdrawing from the holiday accommodation contract.

<sup>21</sup> Paragraph 2 of Article L. 121-70 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

Consumer Code, and the corresponding standard information form annexed to the Decree of 15 June 2010 which enacted for laying down the content of standard forms of information for timeshare contracts, long-term holiday products contracts, resale contracts, exchange contracts and the content of the standard withdrawal form (Henceforth to be called the 2010 Decree).<sup>22</sup> Nevertheless, if the trader sends the information within the previously mentioned three months, the normal 14 days will be applied from the date of the receipt of the information.<sup>23</sup>

It is worth pointing out that in the event that the exchange contract is offered to the consumer together with and at the same time as the timeshare contract, only a single cooling-off period shall apply to both contracts. The cooling-off period for both contracts shall be calculated in the same manner detailed above.<sup>24</sup>

[Does the legislation provide the consumers with the right to withdraw from the timeshare contracts, exchange contracts and resale contracts during the cooling-off period, without any charges or justification?](#)

The Consumer Code entitles the timeshare holder to withdraw from the contract during the cooling-off period<sup>25</sup> without incurring any costs<sup>26</sup> or giving any reason<sup>27</sup> by way of giving the written notice of withdrawal. Thus, the consumer who intends to exercise the right of withdrawal should notify his decision to the trader before the expiry of the cooling-off period.<sup>28</sup> Pursuant to the Consumer Code, the consumer is free to use one of the following ways to notify the developer about his decision of withdrawal:

1. By registered letter,<sup>29</sup>
2. By the standard withdrawal form which must be included in the contract by the trader pursuant to Article L. 121-68 of the Consumer Code,<sup>30</sup>

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<sup>22</sup> Paragraph 3 of Article L.121-70 of Section 9 of Chapter I of Title II of Book I of the Consumer Code. The Decree of 15 June 2010 is enacted pursuant to Article 32/ III of the Law No. 2009-888 of 22 July 2009 on the development and modernization of tourism services, and Articles L. 121-60 to L. 121-79-5 of the Consumer Code.

<sup>23</sup> Paragraph 4 of Article L.121-70 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>24</sup> Article L.121 - 71 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>25</sup> Paragraph 1 of Article L. 121 - 69 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>26</sup> Articles L.121 – 69/ paragraph 2 and L.121-74 – Le of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>27</sup> Paragraph 1 of Article L.121- 69 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>28</sup> Please note that the word trader is used in the French Consumer Code to denote to the developer.

<sup>29</sup> Paragraph 1 of Article L.121-73 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>30</sup> Paragraph 2 of Article L.121-73 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

3. or by any other means providing the timeshare holder with a sufficient proof that he has sent the withdrawal notice within the cooling-off period.<sup>31</sup>

Does the legislation prohibit payments being collected prior to the end of the cooling-off period with regard to the timeshare and exchange contracts?

Pursuant to paragraph 1 of Article L. 121-75 of the Consumer Code, in relation to timeshare and exchange contracts, the trader is not allowed to request and receive an advance payment from the timeshare holder, in whatever form, whether for himself or for a third party, before the expiry of the cooling-off period and the actual conclusion of the contract.

Does the legislation prohibit payments being collected prior to the actual sale taking place with regard to the resale contract?

The above-mentioned prohibition regarding the collection of advance payments applies to resale contracts in accordance with Paragraph 2 of Article L. 121-75 of the Consumer Code.

Does the legislation provide for the automatic termination of all the ancillary contracts in the case of the exercise of the right of withdrawal?

Where the consumer exercises the right to withdraw from the timeshare contract, the obligations of the parties under the timeshare contract are automatically terminated at no cost to the consumer with effect from the date the consumer sends the notice of withdrawal.<sup>32</sup> The same applies to any exchange contract ancillary to it, or any other ancillary contract.<sup>33</sup> Moreover, where the price is fully or partly covered by credit granted to the consumer by the trader, or by a third party on the basis of an arrangement between the third party and the trader, the credit agreement is automatically terminated, at no cost to the consumer, where the consumer exercises the right to withdraw from the holiday accommodation contract.<sup>34</sup>

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<sup>31</sup> Paragraph 1 of Article L.121-73 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>32</sup> Paragraph 3 of Article L.121-73 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>33</sup> Paragraph 1 of Article L.121-77 of Section 9 of Chapter I of Title II of Book I of the Consumer Code. Pursuant to Paragraph 2 of Article L.121-77 Section 9 of Chapter I of Title II of Book I of the Consumer Code, an ancillary contract means 'a contract under which the consumer acquires services which are related to a timeshare contract or long-term holiday product contract and which are provided by the trader or a third party on the basis of an arrangement between that third party and the trader'.

<sup>34</sup> Article L. 121-78 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

## Lack of disclosure

Does the legislation require the provision of written; accurate and comprehensive information, on paper or other durable medium, which is easily accessible to the consumer, in understandable language, both at pre-contractual and contractual stage?

Paragraph 1 of Article L. 121-63 of the Consumer Code, places an obligation on the trader to give the consumer, in a clear and comprehensible manner, accurate and sufficient information concerning the property or services for which he intends to contract, in good time before the consumer is committed by any holiday accommodation contract or offer. An offer to all types of holiday accommodation contracts, in addition to the information stipulated in the corresponding standard information form, must include:<sup>35</sup>

1. The identity and the domicile of the trader or, if the trader is a legal entity, its name, legal form and registered office.
2. The name and description of the property or services and their location.
3. The object of the contract as well as the legal nature of the rights conferred on the consumer.
4. The precise period during which the rights will be exercised.
5. The duration of the contract and its date of taking effect.
6. The main price to be paid for the exercise of the rights conferred by the contract and the indication of the possible obligatory ancillary expenses.
7. The services and facilities available for the consumer and their cost.
8. The duration of the cooling-off right, its methods of exercise and its effects.
9. The information relating to the rescission of the contract, if applicable rescission of ancillary contracts, and their effects.
10. The prohibition of any advance payments.
11. The fact that the contract may be governed by a law other than the law of the Member State of the European Union in which the consumer is resident or is habitually domiciled.
12. The indication of the language used between the consumer and the trader on any matter relating to the contract.
13. Where appropriate, the modalities of out-of-court dispute resolution.
14. The existence, if any, of a code of conduct.

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<sup>35</sup> Paragraph 2 of Article L.121-63 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

For timeshare contracts, the above-mentioned offer to contract should also include:<sup>36</sup>

1. The existence or not of the possibility of participating in an exchange system and, if so, the name of this exchange system and its cost.
2. If the timeshare development is under construction, the essential information relating to the licence of the construction of the development, the state and the deadlines for completion of the development and its services, the guarantees of completion or refund in the event of non-completion.

In addition, for resale contracts, an offer to contract, besides the previously mentioned information, should include the price to be paid by the consumer for acquiring the resale service and the additional mandatory costs.<sup>37</sup>

Moreover, the Consumer Code place an obligation on the trader to provide the consumer with the aforementioned pre-contractual information free of charge<sup>38</sup> written on paper or on another durable medium which is easily accessible to the consumer.<sup>39</sup> Furthermore, the trader has to draw up the aforesaid pre-contractual information in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the European Community.<sup>40</sup>

[Does the legislation stipulate that the pre-contractual information should form an integral part of the contract?](#)

According to Paragraph 1 of Article L. 121-67 of the Consumer Code, the pre-contractual information is an integral part of the holiday accommodation contract. Consequently, the contract must include, in addition to the pre-contractual information detailed above, the following information:<sup>41</sup>

1. Information regarding the identity and place of residence of the parties.
2. The date and place of the contract's conclusion and the signature of the parties.
3. The standard withdrawal form.

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<sup>36</sup> Article L.121-64-I of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>37</sup> Article L.121-64-III of Section 9 of Chapter I of Title II of Book (I) of the Consumer Code.

<sup>38</sup> Paragraph 1 of Article L.121-65 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>39</sup> Paragraph 1 of Article L.121-63 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>40</sup> Paragraph 2 of Article L.121-65 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>41</sup> Article L.121-68 of Section 9 of Chapter I of Title II of Book (I) of the Consumer Code.

Furthermore, the Consumer Code necessitates that the holiday accommodation contracts has to be in writing.<sup>42</sup> The contract has to be written on paper or on any other durable medium in a language understandable by the consumers. Consequently, the consumer has the right to obtain the contract in the language of his country of residence or the country of nationality, at his choice provided it is an official language of the European Community.<sup>43</sup> In any case, the contract must be written in French, in addition to the previous languages, when the consumer resides in the France, or the trader carries on sales activities in France.<sup>44</sup>

It is worth pointing out that the Consumer Code prohibits the alteration of the pre-contractual information provided to the consumer unless the parties expressly agree otherwise or the changes result from force majeure.<sup>45</sup> In such a case, the trader is committed to inform the consumer about these alterations before the contract is concluded and to mention them expressly in the contract.<sup>46</sup>

Moreover, the Consumer Code places an obligation on the trader to draw to the attention of the consumer, in an explicit way, the existence of the right of withdrawal, the length of the cooling-off period, and the ban on advance payments during the cooling-off period. This must be done before the conclusion of the contract.<sup>47</sup> In addition, the trader must obtain the signature of the consumer in relation to each section of the contract dealing with those matters.<sup>48</sup>

Ultimately, the Consumer Code necessitate providing the consumer with a copy or copies of the holiday accommodation contract at the time of its conclusion in order to enable the consumer to reconsider the terms and conditions of the contract and to seek advice during the cooling-off period.<sup>49</sup>

### **Verbal Misrepresentation**

[Does the legislation require for promises to be made in writing / part of the contract?](#)

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<sup>42</sup> Paragraph 1 of Article L.121-66 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>43</sup> Paragraph 1 of Article L.121-66 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>44</sup> Paragraph 2 of Article L.121-66 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>45</sup> Paragraph 1 of Article L.121-67 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>46</sup> Paragraph 2 of Article L.121-67 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>47</sup> Paragraph 3 of Article L.121-67 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>48</sup> Paragraph 2 of Article L.121-68 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>49</sup> Paragraph 3 of Article L.121-68 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

There is no Article in Section 9 of Chapter I of Title II of Book I of the Consumer Code provide for this.

Does the legislation prohibit the marketing of timeshare as an investment?

Article L.121-68 of the Consumer Code prohibits the marketing of the timeshare as an investment by stating ‘A timeshare or a long-term holiday product should not be marketed or sold as an investment’.

### *Phase II Questions: Problems associated with ownership*

#### **Alleged Availability and Flexibility**

Does the legislation require the provision of clear and accurate information concerning the season during which the right of occupancy can be exercised, the duration of the right of occupancy, date on which the timeshare holder can start to exercise the right of occupancy and the restrictions on the consumer’s ability to exercise the right of occupancy, specifically under the floating-weeks’ pattern and points pattern?

The salespeople and traders are under an obligation to provide the prospective consumers with accurate pre-contractual information on:

1. Exact period during which the occupancy rights will be exercised.<sup>50</sup>
2. The duration of the occupancy right, if necessary.<sup>51</sup>
3. Date on which the consumer can exercise the occupancy right.<sup>52</sup>
4. The restrictions on the consumer’s ability to exercise the right of occupancy where the right is / can be selected from a pool of accommodations, as is the case under the floating-weeks’ pattern and points’ pattern.<sup>53</sup>

Furthermore, the trader is under an obligation to include this information in the timeshare contract.<sup>54</sup> This is to provide the prospective consumers with a clear view concerning the possibilities of exercising the right of occupancy and thus minimise the chance of dissatisfaction.

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<sup>50</sup> Paragraph (2) of Article (L.121-63) of Section (9) of Chapter (I) of Title (II) of Book (I) of the Consumer Code.

<sup>51</sup> Part 1 of Annex 1 (Standard Information Form for Timeshare Contracts) of the 2010 Decree.

<sup>52</sup> Part 1 of Annex 1 (Standard Information Form for Timeshare Contracts) of the 2010 Decree.

<sup>53</sup> Part 3 of Annex 1 (Standard Information Form for Timeshare Contracts) of the 2010 Decree.

<sup>54</sup> Paragraph (1) of Article (L. 121-67) of Section (9) of Chapter (I) of Title (II) of Book (I) of the Consumer Code.



Does the legislation require the provision of clear and accurate information relating to the possibilities, limitations and modes for exchange?

The salespeople and exchange companies are under an obligation to provide the potential consumers who are interested in joining an exchange company with precise information about the exchange possibilities and restrictions. This is stipulated in Part 3 (1) of Annex IV (Standard Information Form for Exchange Contracts) which reads as follow:<sup>55</sup>

-Explanation of how the exchange system works; the possibilities and modalities for exchange, an indication of the value allotted to the consumer's timeshare in the exchange system and set of concrete examples of exchange possibilities.

-An indication of the number of resorts available and the number of members in the exchange system, including any limitations on the availability of particular accommodation selected by the consumer, for example, as a result of peak periods of demand, the potential need to book a long time in advance, and indications of any restrictions on the choice resulting from the timeshare rights deposited into the exchange system by the consumer.

This is to prevent the sellers of exchange membership from overselling the benefits of the exchange service, thereby maintaining consumer satisfaction.

### **Excessive increases in annual service charge**

Does the legislation have provisions to curb or prohibit the increase in annual fees?

Paragraph 2 of Article L.121-63 of Section 9 of chapter I of title II of book I of the Consumer Code places an obligation on the salespeople and traders to provide prospective consumers with a written information document. This document must include, in addition to a general description of the timeshare property, the following particulars:<sup>56</sup>

5. an accurate and appropriate description of all costs associated with the timeshare contract,
6. how these costs will be allocated to the consumer,
7. how and when such costs may be increased,
8. and the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (e.g., taxes and fees) and the administrative overheads (e.g., management, maintenance and repairs).

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<sup>55</sup> Part 3 of Annex IV (Standard Information Form for Exchange Contracts) of the 2010 Decree.

<sup>56</sup> Part 3 of Annex 1 (Standard Information Form for Timeshare Contracts) of the 2010 Decree.

Moreover, the trader must include this information in the timeshare contract.<sup>57</sup>

Does the legal arrangement provide a solution to the potential for excessive increase in annual fees?

In consideration for the occupancy right, the timeshare holder must:

1. Pay an advance lump sum in return for his share in the company's capital.<sup>58</sup>
2. Contribute funds, in proportion to his share in the company's capital, when a call is made for funds to carry out the following actions:<sup>59</sup>
  - a. The acquisition of new land for developing the timeshare project.
  - b. The construction of the new land for developing the timeshare project.
  - c. The conversion of the current property or acquired property for developing the timeshare project.
  - d. Overhauling of the current buildings of the timeshare property.
3. Contribute towards maintenance and management costs.<sup>60</sup> Article 9 of the 1986 Timeshare Law divides the costs of maintenance and management into common costs and occupancy-related costs, as follows:
  - a. *Common costs*: they are the general running costs of the timeshare company and maintenance of the common parts together with related services including management costs, taxes, insurance, repayable on the common areas and the salary of the caretaker, the costs of services, materials and equipment common to the whole property together with the general upkeep of the property, the water rates, the costs of electricity in the common areas including that supplied to the caretaker's flat, and the costs of maintenance of the equipment required for the administration of timeshare property.
  - b. *Occupancy-related costs*: the costs relative to the occupation of individual residential premises (apartment) such as cleaning, etc.

A timeshare holder contributes towards the common costs in accordance with his share in the company's capital. Such a share would depend on not only the type of private premises (apartment) the timeshare holder is to occupy, but also on the duration and the time of year of

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<sup>57</sup> Paragraph 1 of Article L. 121-67 of Section 9 of Chapter I of Title II of Book I of the Consumer Code.

<sup>58</sup> Paragraph 1 of Article 3 of the 1986 Timeshare Law.

<sup>59</sup> Paragraph 1 of Article 3 of the 1986 Timeshare Law.

<sup>60</sup> Article 9 of the 1986 Timeshare Law.

his occupation.<sup>61</sup> Nevertheless, the timeshare holder is not have to contribute towards costs relating to occupation if he does not actually occupy the premises.<sup>62</sup>

Article 10 of the 1986 Timeshare Law requires that the articles of association must include the basis and mechanisms of the calculation and distribution of above-mentioned costs among the timeshare holders. Consequently, each timeshare holder may apply to the court within the jurisdiction of the timeshare property to review the distribution of the costs if he believes that his share of the costs is greater than what it should be according to the related rules of the articles of association. The court is empowered to redistribute the costs.

### **Declining Resort Standards**

[Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?](#)

There is no provision within the relevant legislation to deal with the above matter.

[Does the legislation impose penalties based on declining resort standards?](#)

There is no provision within the relevant legislation to deal with the above matter.

[Does the legal arrangement have a solution to the deterioration of resort standards?](#)

As explained in detail in Section 5.2.1, under this legal arrangement, a company is typically formed to own and operate the timeshare resort. The General Assembly of the company,<sup>63</sup> which includes all the timeshare holders in the company, appoint manager(s) to deal with the daily operation of the timeshare resort.<sup>64</sup> The manager(s) work under the supervision of the General Assembly and therefore the Assembly can dismiss them at any time.<sup>65</sup> This is vital to maintain the resort standard for two reasons: (1) the manager(s) will do their best so as not to be dismissed from their positions, (2) the Assembly can respond quickly in the case of the deterioration of the standard of services of the timeshare resort by the alteration of the manager(s) because of the mismanagement.<sup>66</sup>

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<sup>61</sup> Paragraph 2 of Article 9 of the 1986 Timeshare Law.

<sup>62</sup> Paragraph 3 of Article 9 of the 1986 Timeshare Law.

<sup>63</sup> The General Assembly is a general meeting of all the shareholders of the timeshare company. For more details concerning the General Assembly, please refer to the answer of the collective action questions.

<sup>64</sup> Article 5 of the 1986 Timeshare Law.

<sup>65</sup> Article 6 of the 1986 Timeshare Law.

<sup>66</sup> For more details regarding the managing bodies of the timeshare company, please refer to Phase IV of this Chapter.

## Resort Closure and the Security of Timeshare Holders

Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?

This varies from one timeshare company to another depending on the rules included in the articles of association with regard to the regulation of the exercise of the occupancy rights of the timeshare holders.

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

*The validity towards the developer's inheritors*

This part of the question is not applicable under the company share legal arrangement because the company as a legal person has no inheritors.

*The validity towards the developer's assigns*

According to Article 1 of the 1986 Timeshare Law, the timeshare company is not entitled to transfer the legal title of the timeshare project during its life because this falls outside the company's objects.<sup>67</sup> Therefore, this part of the question is also not applicable in accordance with the company share legal arrangement.

Does the legal arrangement prohibit the developer from revoking the agreement at will?

Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer's insolvency?

The following answer covers the above two questions.

According to Article 3 of 1986 Timeshare Law, if a timeshare holder does not contribute in proportion to his share in the capital when calls are made for funds required, in order to realise the objects of the company, or to pay his pro rata share of the management and maintenance costs, the provisions of Article L 212-4 of the Code of Construction and Dwelling apply. Pursuant to this Article, the company is entitled to deprive the defaulting timeshare holder of the exercise of his occupancy right. Furthermore, his share in the company's capital can be put for public sale by auction subject to the authorisation of the General Assembly which must vote by a majority representing two-thirds of the company

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<sup>67</sup> For more details concerning the object of the timeshare company, please refer to Section 5.2.1.

capital on being convened at first time and by two-thirds of members in attendance or voting by proxy, on being convened a second time.

The proceeds collected from the public sale are apportioned: initially, in the payment of the sums that are due to the company from the defaulting timeshare holder at the date of the sale. Thereafter, the rights of the company to the sums recovered take priority over all others including in particular, the rights of any creditor who has granted to the defaulting timeshare holder a loan secured on his share.

Notwithstanding the above specific provisions, the company is always entitled to sue the defaulting timeshare holder for payment under the general provisions of the French law governing debt collection.<sup>68</sup>

Accordingly, the timeshare company cannot revoke, forfeit or repossess the shares of the timeshare holders arbitrarily.

***Phase III Questions: Problems associated with the secondary market and termination by individual timeshare holders***

**Resale and Termination Problems faced by the individual**

Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?

This varies from one timeshare company to another in accordance with the rules laid down in the articles of association of each company concerning the ability of the timeshare holders to transfer their shares in the company's capital as explained in Section 5.2.1. However, the timeshare holder is entitled to let the unit which has been allocated for the period during which he is entitled to occupy the unit<sup>69</sup> regardless of any contrary provision laid down in the articles of association.<sup>70</sup>

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

*In perpetuity clauses*

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<sup>68</sup> James Edmonds, *International Timesharing* (3<sup>rd</sup> edn, Longman Group 1991) 20, 211.

<sup>69</sup> Paragraph 1 of Article 23 of the 1986 Timeshare Law.

<sup>70</sup> Paragraph 2 of Article 23 of the 1986 Timeshare Law.

This varies from one timeshare company to another in accordance with the wording used in the articles of association regarding the life of the timeshare project. Nevertheless, a timeshare holder may withdraw from the timeshare project, regardless of any contrary provision laid down in the articles of association, if he was able to obtain permission to withdraw from the General Assembly of the timeshare company or the competent court as explained in points 1 and 2 of the next question.

### *Estate binding clauses*

The shares in a timeshare company are considered an asset and therefore they are automatically transferred to the heirs of the deceased timeshare holder.<sup>71</sup> The heirs are entitled to leave the company within two years as of the date of being shareholders as explained in point 3 of the next question.

### Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?

The timeshare holder is entitled to withdraw from the timeshare company in three cases:

1. If he/ she managed to obtain the unanimous consent of the timeshare holders in the annual meeting of the General Assembly.<sup>72</sup> In this case, the timeshare holder needs to write to the management company to add his request of withdrawal to the agenda of the Assembly. Then, this request will be put to a vote during the meeting of the Assembly.
2. If he/ she is granted a judicial decision allowing him/ her to withdraw from the timeshare company. In this case, the timeshare holder needs to apply to the competent court to obtain such a decision. The court is empowered to approve the request of the timeshare holder to withdraw in the case of the availability of a legitimate reason for withdrawal. This occurs in two instances. First, when the timeshare holder can no longer enjoy his/her occupancy right due to financial or personal reasons. Second, when the resort becomes inaccessible or unfit for use. This is subject to the discretion of the court.<sup>73</sup>

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<sup>71</sup> Timeshare Consumer Association, Exiting French Timeshare, <http://www.timeshareconsumerassociation.org.uk/2015/11/27/exiting-french-timeshares/> accessed on 2/12/2016.

<sup>72</sup> Paragraph 1 of Article 19-1 of 1986 Timeshare Law.

<sup>73</sup> Paragraph 1 of Article 19-1 of 1986 Timeshare Law.

3. If he/ she obtains his/her timeshare by means of inheritance. In this case, the timeshare holder is entitled to withdraw from the company within two years as of the date of being a shareholder in the company. The withdrawal should be recorded on a deed drawn up by a notary and signed by the timeshare holder and the representative of the timeshare company.<sup>74</sup> The cost of the withdrawal shall be borne by the timeshare holder.<sup>75</sup> However, he/ she will be entitled to get a refund of the value of his/ her share in the company's capital.<sup>76</sup>

#### ***Phase IV Questions: Collective action problems***

##### **Does the legal arrangement have an owners' association, club or a company?**

As explained in Section 5.2.1, a company is typically formed for holding the legal title of the timeshare project as well as exercising general control over the timeshare resort. The administration of the company will generally depend on the form of the company which has been chosen by its founder members (the founder members are developers who subscribe to the shares for the purpose of selling them to public i.e. timeshare holders) taking into account the following issues concerning the management bodies:

##### *General Assembly*

The General Assembly is a general meeting of all the shareholders of the timeshare company. This meeting must be held at least once a year. The meeting can also be held at the request of the timeshare holders who collectively control more than one-fifth of the company's capital within three months of the date of such a request. The attendees at the meeting can only consider resolutions put on the agenda within a reasonable time beforehand and documents duly notified to the timeshare holders.<sup>77</sup> It should be noted that the number of votes of each timeshare holder must always in proportion to his/her share in the company's capital.<sup>78</sup>

As a rule, all decisions taken at general meetings are taken by a simple majority of the votes of timeshare holders in attendance, either personally or through their representatives.<sup>79</sup>

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<sup>74</sup> Paragraph 2 of Article 19-1 of 1986 Timeshare Law.

<sup>75</sup> Paragraph 3 of Article 19-1 of 1986 Timeshare Law.

<sup>76</sup> Paragraph 4 of Article 19-1 of 1986 Timeshare Law.

<sup>77</sup> Paragraphs 3 and 4 of Article 13 of 1986 Timeshare Law.

<sup>78</sup> Paragraph 1 of Article 15 of 1986 Timeshare Law.

<sup>79</sup> Paragraph 1 of Article 16 of 1986 Timeshare Law. Simple majority can be defined as 'a single vote more than half of the votes cast'. Collins Dictionary 'Definition of Simple Majority' <<https://www.collinsdictionary.com/dictionary/english/simple-majority>> accessed on 30/12/2016.

Nevertheless, decisions on certain matters require a greater majority. A majority of two-thirds of the votes of the timeshare holders in attendance, whether voting in person or by proxy, is required for decisions relating to the alteration of existing equipment, the addition of new equipment or the alteration or creation of the common parts of the timeshare building.<sup>80</sup> Furthermore, a majority of two-thirds of the share capital (timeshare holders' votes) is needed for any resolution relating to the amendment of the articles of association, amendment of the plan which sets out the extent and distribution of units in which the property is constituted, provisions affecting the rights of occupation of timeshare holders, extension the life or winding up of the timeshare company or charges allocated to the timeshare holders.<sup>81</sup>

It is worth pointing out that, in respect of the above decisions, the timeshare holders who are not founder members of the company shall exercise at least 40% of voting rights.

### *Managers*

According to Article 5 of the 1986 Timeshare Law, manager(s) must be appointed to deal with daily operational issues. The manager(s) is appointed for a term of up to three years renewable by a decision of the timeshare holders representing more than half the company's share capital, notwithstanding any contrary provisions of the company's articles of association. A majority of not less than 50% of the company's share capital can dismiss the manager(s), in accordance with Article 6. Any contrary provisions of the company's articles of association are void.<sup>82</sup>

### *Supervisory board*

Paragraph 1 of Article 18 of the 1986 Timeshare Law, provides for the construction of a supervisory board to be appointed by the General Assembly from among the shareholders. The company's managers, their spouses and employees cannot be appointed to the Supervisory Board. The members of the Supervisory Board are appointed for a term of a maximum duration of three years renewable, and they can be dismissed by the General Assembly during this period.<sup>83</sup> The Supervisory Board must elect its chairperson from among its members. The rules relating to the organisation and functioning of the Supervisory Board shall be set by the General Assembly unless the company's articles of association have set

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<sup>80</sup> Paragraph 2 of Article 16 of 1986 Timeshare Law.

<sup>81</sup> Paragraph 4 of Article 16 of 1986 Timeshare Law.

<sup>82</sup> Article 6 of 1986 Timeshare Law.

<sup>83</sup> Paragraph 2 of Article 18 of 1986 Timeshare Law.



these rules.<sup>84</sup> The Supervisory Board is responsible for giving advice to the company's managers or the General Assembly on any matter on which the Board has been consulted or on any matter on which the Board has decided to deliver an opinion.<sup>85</sup> Therefore, the Board is entitled to request a copy of any document relating to the company.<sup>86</sup> Furthermore, each year the Board is under an obligation to provide the General Assembly with a report detailing how he has executed the work entrusted to him.<sup>87</sup>

### *Auditor*

Article 18-1, provides that an external auditor of the company must be appointed by the General Assembly. The auditor is under an obligation to render a report about the financial situation of the company to the General Assembly on a yearly basis.

### [Does the legal arrangement require for a professional management company to be appointed?](#)

Article 7 of the 1986 Timeshare Law, makes null and void any clause of the articles of association providing for the appointment of a natural person or corporate body other than the representative of the company to carry out the company's duties. This provision prevents the timeshare company from entrusting a third party with carrying out the company's objects. Therefore, only the company's managers can carry out such duties.

### [Does the legal arrangement have provisions to arrange a meeting and decision-making process on a 'practical basis'?](#)

Usually it is difficult for the timeshare holders to attend the general meetings because their principal residences are widely distributed geographically and they live a great distance from each other. The 1986 Timeshare Law attempted to lessen such difficulty by allowing the timeshare holders to appoint a proxy or vote by correspondence.<sup>88</sup> However, the managers of the company, their spouses and their employees and any other person or body acting directly or indirectly on their behalf cannot be appointed as a timeshare holder's proxy.<sup>89</sup> Furthermore, the 1986 Timeshare Law requires that the articles of association of each timeshare company should provide that each group of timeshare holders exercising their

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<sup>84</sup> Paragraph 3 of Article 18 of 1986 Timeshare Law.

<sup>85</sup> Paragraph 4 of Article 18 of 1986 Timeshare Law.

<sup>86</sup> Paragraph 5 of Article 18 of 1986 Timeshare Law.

<sup>87</sup> Paragraph 6 of Article 18 of 1986 Timeshare Law.

<sup>88</sup> Paragraph 4 of Article 13 of 1986 Timeshare Law.

<sup>89</sup> Article 19 of 1986 Timeshare Law.

rights of occupancy within the same period may appoint one or several timeshare holders chosen among the members of such group in order to represent the group at general meetings. The managers of the company, their spouses and their employees and any other person or body, acting directly or indirectly on their behalf, cannot be appointed as a group representative.<sup>90</sup> Group' representatives shall be appointed by simple majority and each one of them is entitled to appoint one or several deputies chosen among the timeshare holders.<sup>91</sup> However, group representatives cannot appoint a proxy.<sup>92</sup> The representative of the group of timeshare holders may be appointed for not more than three years but such an appointment may be renewed.<sup>93</sup>

Notwithstanding the appointment of the representative of the group of timeshare holders, each timeshare holder may attend and vote at general meetings personally or by a proxy specifically appointed by him for this purpose.<sup>94</sup> The representative of the group may vote for any resolution at the general meetings except resolutions relating to amendments of articles of association, regulations, winding up the company and alteration of allocation of timeshare holders' rights.<sup>95</sup>

### 5.3 CONCLUSION

Optimal features for timeshare should strive to provide the consumers with a sufficient level of protection in each phase of the timeshare cycle. This Chapter concludes that the French model, largely, achieves these aims as it regulates timeshare, exchange and resale contracts and it succeeds in supplying the consumers with an advanced level of protection in many aspects of the timeshare cycle.

In the first phase, the French model requires developers to supply the consumers with accurate and comprehensive information to save them from falling prey to fraudulent transactions. Moreover, the model provides the consumers with the right of reflection which is necessary to curb the aggressive marketing techniques.

In the second phase, the model places an obligation on the developers to supply the consumers with accurate information on when, where and how the right of occupancy can be

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<sup>90</sup> Article 19 of 1986 Timeshare Law.

<sup>91</sup> Paragraph 1 of Article 14 of 1986 Timeshare Law.

<sup>92</sup> Paragraph 2 of Article 14 of 1986 Timeshare Law.

<sup>93</sup> Paragraph 2 of Article 14 of 1986 Timeshare Law.

<sup>94</sup> Paragraph 4 of Article 13 of 1986 Timeshare Law.

<sup>95</sup> Paragraph 3 of Article 14 and Paragraphs 2, 4 and 5 of Article 16 of 1986 Timeshare Law.

exercised, and the mechanism used to calculate and allocate service charges so as to limit any possible dissatisfaction. Furthermore, the French model prohibits the developer from revoking the timeshare contract by his own will or repossessing the timeshares arbitrarily in order to protect consumers.

In the third phase, the model permits each timeshare holder to let the unit during his occupancy period. In addition, the model allows each timeshare holder who can no longer use his timeshare because of the change in their circumstances to withdraw from the timeshare company if he is able to obtain permission of withdrawal from the General Assembly of the timeshare company or the competent court.

In the fourth phase, the French model adopts a logical mechanism for the management of the timeshare project represented by the creation of an owners' association (General Assembly), vesting the daily management issues in professional managers, providing for a practical quorum for annual and termination meeting.

These features are worthy of taking forward as optimal features. However, the French model fails in adopting some of the protection measures which are important to save the interests of the consumers across the timeshare cycle. For example, the French model does not include any provision placing a requirement for the establishment of a Governmental Agency for rating the timeshare resorts and the imposition of penalties on the management entity in the case of the declining of the resort standards. Such gaps must be addressed when establishing the optimal legal regime of timeshare.

## **CHAPTER SIX**

### **THE EGYPTIAN MODEL**

#### **6.1 INTRODUCTION**

In Egypt, the Decree No. 150 regarding the Conditions and Controls of the Timesharing System in the Hotel Establishments, Villages and Tourist Resorts regulates all timeshare projects. The Egyptian Ministry of Tourism enacted this Decree on 8 March 2010. It came into force on 30 April 2010 (henceforth to be referred to as the 2010 Decree).<sup>1</sup> This Decree does not regulate the resale contract. Moreover, it regulates the exchange contracts partially and briefly. This is because the main focus of the 2010 Decree is the regulation of the timeshare contracts.<sup>2</sup>

Under Article 8/1 of the 2010 Decree, a developer either has to structure his timeshare project based on the usufruct in common arrangement or on the usage in common arrangement (these arrangements are explained in detail in the next Section). The right of usufruct and the right of usage are traditional original real rights according to the Egyptian Civil Code No. 131 of 1948 and therefore, the provisions related to them in the Civil Code shall be applied in constructing, operating and terminating the timeshare projects without contrary to the provisions of the 2010 Decree. That is to say, the 2010 Decree will predominate when there is a conflict between its provisions and the provisions of the Civil Code relating to the usufruct and usage rights.

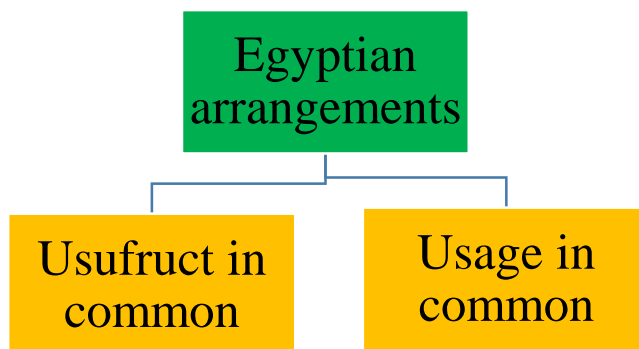
Consequently, there are two legal arrangements to regulate the relationship between the developers and timeshare holders: usufruct in common and usage in common. This is set out diagrammatically as follows:<sup>3</sup>

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<sup>1</sup> Article 36 of the 2010 Decree.

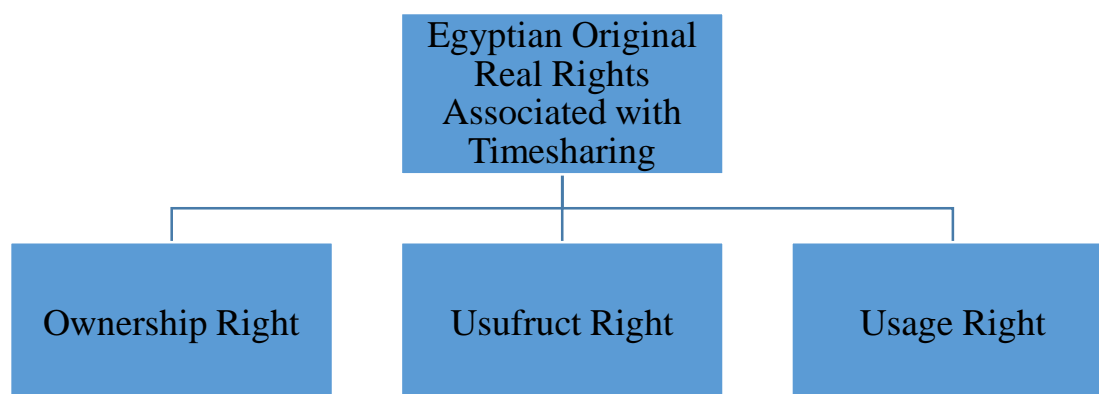
<sup>2</sup> The preamble of the 2010 Decree.

<sup>3</sup> Source of diagram: the author.



## 6.2 OVERVIEW OF THE EGYPTIAN ORIGINAL RIGHTS *IN REM*

Before examining the above-mentioned arrangements, it is necessary to provide a brief conceptual overview of the original real rights (*original rights in rem*) associated with timesharing from the perspective of the Egyptian Civil Code. By way of an overview, the position may be conveniently set out diagrammatically as follows:<sup>4</sup>



### 6.2.1 Ownership right (the definition, characteristics and powers of owner)

Under the Egyptian Civil Code, the ownership right is the king of the original real rights because it entitles the owner to exercise all the powers and privileges that can be granted by the law to a person over an object namely: (1) the power of usage, (2) the power of exploitation and (3) the power of disposition. Article 802 of the Egyptian Civil Code provides for these powers by stating ‘The owner of an object shall alone and within the limits of the

<sup>4</sup> Source of diagram: the author.

law have the right of using, exploiting and disposing of it'. Looking at matters from the perspective of ownership right, the owner's powers along with the characteristics of the ownership right under the Egyptian Civil Code are explained below.

#### **6.2.1.1 Owner's powers**

**1. The power of usage:** This power entitles the owner to use the object owned by him in accordance with its nature in order to get the benefit of the object, provided that the use is exercised without altering or exhausting the substance of the object. Thus, if the object which is owned is a house, the power of usage entitles the owner to live in it. If the object which is owned is a car, the owner has the right to drive it. If the owned object is a book, the owner is entitled to read it and so forth.<sup>5</sup>

**2. The power of exploitation:** This power entitles the owner to derive profit from the object by getting its products and fruits.<sup>6</sup> It is very important to distinguish between the products and fruits. Products are the yields which are produced by an object not on a periodic basis. The production of these yields needs the intervention of humans. The collection of the yields leads to a decrease in the substance of the object from which the yields are collected, such as the extraction of the coal and other minerals from the mines.<sup>7</sup> By way of contrast, fruits are what the object produces periodically. The collection of the fruits does not lead to a decrease in the substance of the object, such as seasonal crops.<sup>8</sup>

The importance of the distinction between products and fruits appears in the case of arranging usufruct right by the owner for the benefit of a third party due to the fact that the beneficiary is entitled to obtain the fruits of the thing but has no right to obtain its products.<sup>9</sup> Fruits are divided into three types. Firstly, there are natural fruits. These are fruits which are produced in fixed periodic dates *without* the intervention of humans, such as herbage and trees that grow in pastures, forests, mountains and valleys.<sup>10</sup> Secondly, there are developed fruits. These are produced by reference to fixed periodic dates *with* the intervention of humans, such

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<sup>5</sup> Reza Abdul-Halim Abdul Majeed, *Ownership and other Original Real Rights* (Benha University Press, without publishing date) 17.

<sup>6</sup> Article 804 of the Egyptian Civil Code No. 131 of 1948.

<sup>7</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 32.

<sup>8</sup> Reza Abdul-Halim Abdul Majeed, *Ownership and other Original Real Rights* (Benha University Press, without publishing date) 18.

<sup>9</sup> Article 987 of the Egyptian Civil Code No. 131 of 1948.

<sup>10</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 33.

as the seasonal crops and various kinds of fruit trees.<sup>11</sup> Thirdly, there are civil fruits which comprise the steady income that is produced by an object as a result of its exploitation, such as the monthly amount of rent that is obtained by the landlord from the tenant, and interest on money that is deposited in banks and dividends.<sup>12</sup>

**3. The power of disposition:** This power entitles the owner to dispose of his owned object. The power of disposition takes two forms. Firstly, the physical disposition which falls on the material of the owned object and leads to its exhaustion, such as when the owner eats his sandwich, or changes the features of the object owned by him. An example would be when the owner builds a house on his plot of land, or damages the object, such as when the owner destroys his own house. Secondly, legal disposition which falls on the right of ownership itself. The legal disposition either results in ending the ownership of the owner by transferring it to another person, as in the case of selling or donating the owned object to another person, or leads to a decrease in the legal powers. An example will be when the owner grants usufruct right to a third party on his object because this deprives the owner of the powers of using and exploiting his object as a result of the transfer of these powers to another person who is called the usufructuary.<sup>13</sup> This is explained in detail in section 6.2.2.

Pursuant to Article 985 of the Egyptian Civil Code, the owner is given the right to transfer some of the aforementioned powers for a specified period to one or more persons. In other words, the Egyptian civil law allows for the assimilation of all the aforementioned powers (the right of usage, the right of exploitation and the right of disposition) in the hands of the owner or the distribution of powers between the owner and one or more other persons. This distribution of the powers leads to the establishment of the other real original rights such as, the right of usufruct and the right of usage as will be explained below. It is important to bear in mind that the power of disposition, and in particular the power of physical disposition, comprises the cornerstone of the ownership right and it is this power which distinguishes the ownership right from the other original real rights. This is because the holders of the other original real rights are only entitled to benefit from an object owned by another person on condition that they maintain the substance and the material of that object, and return it to the

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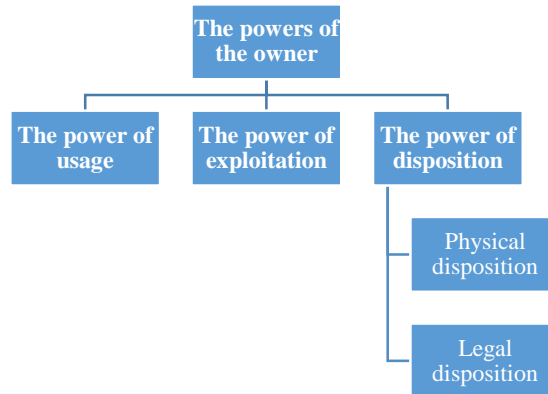
<sup>11</sup> Reza Abdul-Halim Abdul Majeed, *Ownership and other Original Real Rights* (Benha University Press, without publishing date) 18.

<sup>12</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 33.

<sup>13</sup> For more details regarding the power of disposition, please refer to Reza Abdul-Halim Abdul Majeed, *Ownership and other Original Real Rights* (Benha University Press, without publishing date) 20.

owner in the same condition as it was at the time of contracting.<sup>14</sup> Consequently, the power of disposition is inseparable from the ownership right and thus when the owner loses the power of disposition he will not be the owner after that.

The powers given to the owner according to the ownership right, described above, can be set out diagrammatically as follows:<sup>15</sup>



#### 6.2.1.2 The characteristics of the ownership right

Under the Egyptian civil law, the right of ownership has three characteristics. Firstly, it is a prohibitory right:<sup>16</sup> that is to say, the owner exclusively has right to use, exploit and dispose of what he owns. Thus, as a rule, a person is not permitted to exercise any of the above-mentioned powers over property owned by another person. However, two exceptions can be highlighted in this regard. (1) The owner's acceptance as when the owner rents out his property, or gives a usufruct to another person. (2) The provisions of law as in the case of easements, for example the owner of land which is isolated from the main road is granted a right-of-way by Article 812/1 of the Egyptian Civil Code. Secondly, right of ownership is a comprehensive right because it gives the owner all the necessary powers to gain all the advantages from what he owns. Hence, the owner has the right to use, exploit and dispose of the thing that he owns in a way that meets both public and private interests.<sup>17</sup> Finally, the right of ownership is a permanent right. That is, the right of ownership will last as long as his object (the owned thing) is still in existence. Consequently, the ownership right will not be

<sup>14</sup> Reza Abdul-Halim Abdul Majeed, *Ownership and other Original Real Rights* (Benha University Press, without publishing date) 21.

<sup>15</sup> Source of diagram: the author.

<sup>16</sup> For more details regarding this characteristic, please refer to Abdul Razzaq Ahmed Al Sanhoori, *The Explanation of the New Civil Code*, Part 8 (3rd edn, Nahdet Misr Publishing and Printing House 2011) 530.

<sup>17</sup> For more details regarding this characteristic, please refer to Abdul Razzaq Ahmed Al Sanhoori, *The Explanation of the New Civil Code*, Part 8 (3rd edn, Nahdet Misr Publishing and Printing House 2011) 529.



terminated because of the lack of use.<sup>18</sup> Furthermore, it is forbidden to transfer the ownership to a person for a specific period of time - say for twenty years - and then the ownership reverts to the grantor, because this will make ownership a temporal right which contradicts with the aforementioned characteristic of permanency.<sup>19</sup>

### 6.2.2 Usufruct right (the definition and powers of usufructuary)

Usufruct right is one of the original real rights deriving from ownership right. In the determination of the rights and obligations of a usufructuary (the owner of usufruct),<sup>20</sup> the instrument based on which the usufruct is established, and the provisions that are explained below must be observed.<sup>21</sup>

Looking at matters from the perspective of the owner of the usufruct right, this right entitles the usufructuary to enjoy and get the benefit of an object owned by another person for a specific period of time on condition that object is returned in good condition to his owner when the right of usufruct expires.<sup>22</sup> Hence, the arrangement of a usufruct right in favour of a third party over an object owned by another person deprives the owner from the powers of using and exploiting what he owns as a result of the transfer of these powers to another person who is called the usufructuary.<sup>23</sup> Nevertheless, the power of disposition is retained by the owner due to the fact that the owner retains the bare ownership of the property and does not end up transferring it to the usufructuary.<sup>24</sup> Therefore, when the usufruct right expires, the powers of use and exploitation revert to the owner.<sup>25</sup>

The usufruct right, as a general rule, is owned by one person. However, it can be owned in common i.e. owned by several persons as is the case under some of the Egyptian timeshare projects which will be discussed in section 6.3.

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<sup>18</sup> For more details regarding this characteristic, please refer to Abdul Razzaq Ahmed Al Sanhoori, *The Explanation of the New Civil Code*, Part 8 (3rd edn, Nahdet Misr Publishing and Printing House 2011) 534.

<sup>19</sup> Anees Alamar, *Property Ownership*, Part One (Al Majmaah University Press, without publishing date) 6; Mohamed Taha Al-Bashir and Gani Hassoun Taha, *Rights in Rem: Original Rights in Rem and Subsidiary Rights in Rem*, Part One (Baghdad University Press 1982) 43.

<sup>20</sup> A usufructuary can be defined as a person who has a usufruct of property, or a person who holds property by usufruct and has the right to make use of this property. Legal dictionary on <<http://www.thefreedictionary.com/usufructuary>> accessed on 29/10/2013.

<sup>21</sup> Article 986 of the Egyptian Civil Code No. 131 of 1948.

<sup>22</sup> Article 990 of the Egyptian Civil Code No. 131 of 1948.

<sup>23</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 27.

<sup>24</sup> The bare ownership is defined as 'ownership of a piece of property without the right to use and derive profit from that property; this right is held by the person with usufruct.' Collins dictionary on <<http://www.collinsdictionary.com/dictionary/english/bare-ownership>> accessed on 10/02/2014.

<sup>25</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 6.

Pursuant to the Egyptian Civil code, the usufruct right provides the usufructuary with three powers as follows:

**1. The power of usage:** Under this power, the usufructuary has the right to use the benefited object and its appurtenants<sup>26</sup> in accordance with what it is provided for. For example, if the object is a house which is to be used for residential purposes, the usufructuary is not authorised to use it for commercial purposes. Article 988/1 of the Egyptian Civil Code provides for that by saying ‘the usufructuary shall use the benefited object in its condition as handed over to him, and in accordance with it is allocated for...’.

**2. The power of exploitation:** Under this power, the usufructuary is entitled to exploit the object so as to get its fruits during the term of usufruct. Thus, the power of exploitation gives the usufructuary the right to derive profit from the benefited object in order to gain its fruits which are produced regularly, as long as taking these fruits do not lead to a decrease in the substance of the object itself. For example, if the benefited object is a grove, the usufructuary gets its fruits, and if the benefited object is a house, the usufructuary has the right to rent it out and take the rent as long as the period of lease does not exceeding the period of usufruct contract. Article 987 of the Egyptian Civil Code provides for this power in the following way: ‘The fruits and yields of enjoying the usufruct of an object shall accrue to the usufructuary in proportion of his usufruct term...’.

**3. The power of disposition:** As a rule, the usufructuary, as any right holder, may dispose of his right of usufruct to another person by way of sale or gift. However, the owner may deprive the usufructuary of this power by the inclusion of clause in the usufruct agreement provides for that.<sup>27</sup>

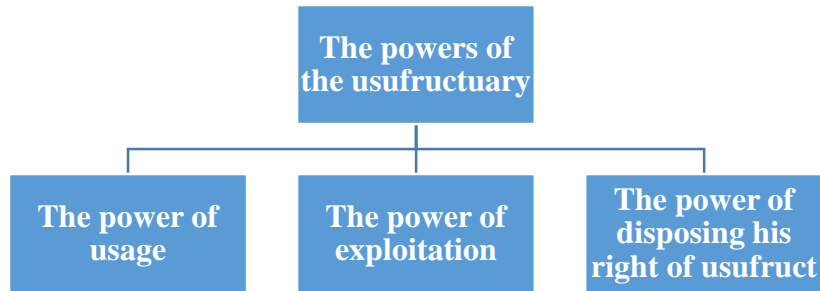
The powers given to the usufructuary according to the usufruct right can be set out diagrammatically as follows:<sup>28</sup>

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<sup>26</sup> For example, if the benefited object is a land served by right-of-way, the usufructuary is entitled to use the land in addition to the right-of-way.

<sup>27</sup> Abdel Moneim Farag Elsadda, *The Original Real Rights* (Dar Al Nahda for Printing and Publishing 1959) 568.

<sup>28</sup> Source of diagram: the author.



The usufructuary is under a duty to defray all maintenance costs of the property being enjoyed. Article 989/1 of the Egyptian Civil Code provides for that by saying ‘a usufructuary, during his usufruct of the property, shall meet all normal costs imposed on it, and all expenses required for maintenance’.

Under the Egyptian Civil Code, the usufruct right terminates by effluxion of time at the end of the period of usufruct. In addition, the usufruct right shall terminate upon the death of the usufructuary. However, if the death of the usufructuary occurs before the end of the period of usufruct, the usufruct terminates at that point. Consequently, the right of usufruct cannot be inherited by the successors of the usufructuary. This is stipulated in Article 993/1 of the Egyptian Civil Code which reads as follows:

The usufruct right shall terminate with the expiry of the defined term. If no term is defined for it, it shall be considered as determined for the whole life of the usufructuary. In all cases, it shall expire with the death of the usufructuary, even before the expiry of the determined term.

It is worth mentioning that there are many other ways which can lead to the termination of the usufruct right under the Egyptian Civil Code. However, only the instances relating to timesharing have been highlighted above.

### **6.2.3 Right of usage (the definition and powers of user)**

Right of usage is one of the original real rights deriving from ownership right. In the identification of the rights and obligations of a user (the owner of usage right), the provisions of the instrument which create the usage right together with the related provisions of the Egyptian Civil Code are to be observed.<sup>29</sup> Thus, this right entitles the user and his family to

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<sup>29</sup> Article 996 of the Egyptian Civil Code No. 131 of 1948.

use an object owned by another person for a specific period of time<sup>30</sup> on two conditions: first, not to destroy the substance of the object, and second, to return that object in good condition to his owner when the right of usage expires.<sup>31</sup> The family, in this regard, includes every person who is supplied with sustenance by the user such as his wife and children in addition to the domestic servants.<sup>32</sup>

The arrangement of a usage right in favour of someone over an object owned by another person deprives the owner of the power of using what he owns by reason of the transfer of this right to another person who is the user. However, the powers of exploitation and disposition are retained by the owner and therefore when the usage right expires, the power of use reverts to the owner.<sup>33</sup>

The usage right, as a general rule, is owned by one person. However, it can be owned in common i.e. owned by several persons as is the case under some of the Egyptian timeshare projects which will be discussed in Section 6.3.

The right of usage is a lesser right than the right of usufruct. Pursuant to the Egyptian Civil Code, the usage right provides the user with two powers as follows:

**1. The power of usage:** Under this power, the user has the right to use the object and its appurtenances in accordance with what it is provided for.<sup>34</sup> For example, if the object is a house devoted for residence, the user is not authorised to use it for commercial purposes.<sup>35</sup>

**2. The power of disposition:** As a general rule, the user is not entitled to cede his right of usage in favour of another person whether by sale or donation. However, the user shall be entitled to cede his right of usage to a third party when there is an explicit clause stipulated in the usage agreement or when there is a strong justification.<sup>36</sup> An example of this would be if the user is a governmental employee and could not exercise the right of usage due to the

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<sup>30</sup> Abdul Razzaq Ahmed Al Sanhoori, *The Explanation of the New Civil Code*, Part 9 (3rd edn, Nahdet Misr Publishing and Printing House 2011) 1275.

<sup>31</sup> Articles 989/1 and 990 of the Egyptian Civil Code No. 131 of 1948.

<sup>32</sup> Mohamed Taha Al-Bashir and Gani Hassoun Taha, *Rights in Rem: Original Rights in Rem and Subsidiary Rights in Rem*, Part One (Baghdad University Press, 1982) 314.

<sup>33</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 78.

<sup>34</sup> Article 988 of the Egyptian Civil Code No. 131 of 1948.

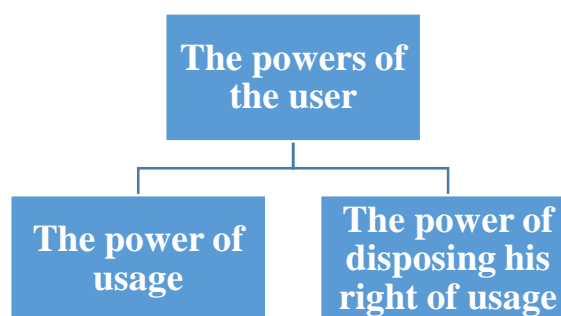
<sup>35</sup> Abdel Moneim Badrawi, *Original Real Rights*, (2ed edn, Dar Al kitab Al Arabi for Printing and Publishing) 255.

<sup>36</sup> Article 997 of the Egyptian Civil Code No. 131 of 1948.

agency for which he works has transferred him to another position located in another city.<sup>37</sup> The existence of the strong justification is subject to the discretion of the competent court.<sup>38</sup> Article 997 of the Egyptian Civil Code provides that by stating ‘the right of usage ... shall not be ceded to a third party except on the basis of an explicit clause or strong justification’.

It is worth mentioning that it is not permissible to grant the user the power of exploitation as this conflicts with Article 996 of the Egyptian Civil Code.

The powers given to the user according to the usage right can be set out diagrammatically as follows:<sup>39</sup>



It is of central importance to highlight that the legal provisions concerning the right of usufruct shall apply to the right of usage as long as those provisions do not conflict with the nature of the right of usage. This is provided by Article 998 of the Egyptian Civil which states that ‘...the provisions prescribed for the right of usufruct are applied to the right of usage where those provisions do not conflict with the nature of the right of usage..’

Consequently, all provisions that have been detailed in connection with the termination of the usufruct right and paying the costs of property maintenance by the usufructuary will be applied to the user by way of analogy.

#### **6.2.4 The differences between the usufruct right and the usage right under the Egyptian Civil Code No. 133 of 1948**

There are two main differences between the right of usage and usufruct right. Firstly, under the usufruct right, the owner transfers the powers of using and exploiting the benefited object to the usufructuary, and retains for himself the power of disposition (the bare ownership). By

<sup>37</sup> Abdul Razzaq Ahmed Al Sanhoori, *The Explanation of the New Civil Code*, Part 9 (3rd edn, Nahdet Misr Publishing and Printing House 2011) 1277.

<sup>38</sup> Abdel Moneim Farag Elsadda, *The Original Real Rights* (Dar Al Nahda for Printing and Publishing 1959) 568.

<sup>39</sup> Source of diagram: the author.

contrast, with the usage right, the owner only transfers the power of using the object to the user, and retains for himself the powers of disposition and exploitation.<sup>40</sup>

Secondly, under the usufruct right, the usufructuary, as a rule, is entitled to convey his right of usufruct to another person unless agreed differently in the usufruct agreement.<sup>41</sup> Conversely, with the usage right, the user is not entitled, as a rule, to convey his right of usage for another person. However, two exceptions are provided in this regard. (1) when there is an explicit clause stipulated in the usage agreement entitles the user to do that. (2) When there is a strong justification which is subject to the discretion of the court.<sup>42</sup>

The discussion will now turn to consider the position relating to usufruct in common and usage in common arrangements owing to the fact that they are allocated for structuring timeshare projects in Egypt pursuant to Article 8/1 of the 2010 Decree. These two arrangements will be considered concurrently to avoid repetition because they are governed by the same set of provisions in accordance with the 2010 Decree.

## 6.3 Usufruct in common and usage in common arrangements

### 6.3.1 Overview

Pursuant to the usufruct in common and usage in common arrangements, each timeshare holder in the project is granted an *undivided* interest in usufruct/ usage in a designated accommodation of the timeshare project together with an exclusive right of occupancy in that accommodation for a specified period of time each year and for a given number of years as stipulated in the contract.<sup>43</sup> However, the bare ownership of the entire timeshare project (the accommodations and the recreational facilities) remains in the hands of the developer as explained in detail in Sections 6.2.2 and 6.2.3.

At the point of purchase, each timeshare holder enters into a legal agreement, usually known as the ‘agreement of usufruct division’.<sup>44</sup> This agreement plays a fundamental role in

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<sup>40</sup> Edward Eid, *Original Real Rights*, Part 2 (Zine for Printing and Publishing, 1980) 31.

<sup>41</sup> Article 986 of the Egyptian Civil Code No. 131 of 1948.

<sup>42</sup> Article 997 of the Egyptian Civil Code No. 131 of 1948.

<sup>43</sup> Hassan Abdul Baset, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle Press 2005) 60.

<sup>44</sup> Under Egyptian Civil Code, the usufruct division is achieved either by way of spatial or temporal division, as follows:

1. According to Article 846/1, spatial division occurs when the usufructuaries in common agree that each one of them shall enjoy the benefit of parcelled part (i.e., a specific accommodation) commensurate with his share in the common property to the intent that he relinquishes in favour of his usufructuaries in common the benefit of the remaining parts of the common property.

structuring any timeshare project based on usufruct in common arrangement or usage in common arrangement. This is because it identifies the time period which is allocated to each timeshare holder to exercise his exclusive right of occupancy.<sup>45</sup> Pursuant to Article 9 of the 2010 Decree, the minimum period of occupancy that the developer is allowed to sell to each timeshare holder is a week while the maximum is three weeks per year. Moreover, the agreement sets aside a time period for overall maintenance and refurbishment of the timeshare property, and additionally some period of non-use between each timeshare holder's occupancy to allow for cleaning and maintenance between use periods.<sup>46</sup> Furthermore, the agreement includes provisions regulating the management of the timeshare property. According to Article 30/6 of the 2010 Decree, the developer, or an agent hired by him, most frequently the agent is a professional management company works under the control of the developer, will have complete control over the management of the timeshare property, due to the fact that he retains the bare ownership of the timeshare project.<sup>47</sup> Ultimately, the agreement defines the rights and obligations of the developer, management company and timeshare holders.<sup>48</sup>

According to Article 6/1 of the 2010 Decree, the timeshare contract comes into force from the actual date of using the accommodation or the date of the ratification of the contract by the Ministry of Tourism, whichever is earlier.

With these arrangements, each timeshare holder has the right to let his right of usufruct/ usage to another timeshare holder or to a third party in return for financial consideration on three conditions. First, the lease must not exceed the period of the original usufruct/ usage contract.<sup>49</sup> Second, the timeshare holder must notify the developer or the management company as his representative. The timeshare holder must send the notification at least two

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2. Pursuant to Article 847, temporal division can be achieved when the usufructuaries in common agree that each of them will exclusively enjoy the benefit of the whole common property (with regard to timeshare system, the allocated accommodation for the exercise of the occupancy right) for a period of time which is proportionate to his share in the common property. That is to say, under the temporal division, the usufructuaries in common divide the time of using and possessing the whole common property among themselves.

<sup>45</sup> By way of example, twelve timeshare holders are each granted an undivided one-twelfth interest in a timeshare property. The agreement of usufruct division shall provide that timeshare holder (A) will use the property during the month of January each year; timeshare holder (B) will use the property during the month of February, and so on.

<sup>46</sup> Hassan Abdul Baset, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle Press 2005) 60.

<sup>47</sup> Samir Kamel, *The Legal Characterization of the Beneficiaries' rights under Timesharing* (Al Nahda Al Arabia Publishing and Printing House 1991) 28.

<sup>48</sup> Hassan Abdul Baset, *Dealing on Real Estate Units by Timeshare System* (Gold Eagle Press 2005) 61.

<sup>49</sup> Samir Kamel, *The Legal Characterization of the Beneficiaries' rights under Timesharing* (Al Nahda Al Arabia Publishing and Printing House 1991) 54.

months prior to the date of exercising the occupancy right. The notification must include the name of the tenant and his companions, their jobs and places of residence, and the degree of kinship to the timeshare holder. Third, the timeshare holder must pay 10% of the rent to the developer unless the tenant is the spouse of the timeshare holder or one of his first-degree relatives (father, mother, sons and daughters).<sup>50</sup> The developer or his representative (management company), within two weeks from the date of receiving the notification, has the right to refuse the rental agreement concluded by the timeshare holder when the tenant is not one of the relatives of the timeshare holder.<sup>51</sup> In this case, the timeshare holder is entitled to propose another tenant but this will not deprive the developer or his representative of exercising his right of refusal again.<sup>52</sup>

Moreover, each timeshare holder has the right to convey his right of usufruct/ usage to another timeshare holder or to a third party in return for financial consideration<sup>53</sup> on the condition of the payment of 5% of value of the transaction to the developer.<sup>54</sup> In this case, the developer has to issue a new timeshare contract to the purchaser.<sup>55</sup>

Under the usufruct in common and usage in common arrangements, each timeshare holder has to pay a lump sum to the developer at the time of concluding the contract in return for getting the right of usufruct/ usage.<sup>56</sup> The purchase price varies according to the season which has been chosen by the timeshare holder. The price will go up in the high demand season, and it will be affordable in the mid-demand season. The price is cheaper in the low-demand season.<sup>57</sup> Furthermore, each timeshare holder has to pay his pro rata share of the common expenses, such as the maintenance and reconditioning charges, insurance, taxes, and utility costs. Moreover, each timeshare holder has to pay a percentage fee to the management company which is designated to manage the timeshare project.<sup>58</sup> However, the timeshare holder shall pay only 25% of the management and maintenance costs if he does not actually exercise his occupancy right provided that he notifies the developer or his representative

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<sup>50</sup> Article 20/1 of the 2010 Decree.

<sup>51</sup> Article 20/2 of the 2010 Decree.

<sup>52</sup> Article 20/3 of the 2010 Decree.

<sup>53</sup> Article 22 of the 2010 Decree.

<sup>54</sup> Article 23 of the 2010 Decree.

<sup>55</sup> Article 23 of the 2010 Decree.

<sup>56</sup> Article 17 of the 2010 Decree.

<sup>57</sup> According to Article 31/9 of the 2010 Decree, the developers has to divide the year into three seasons, first, the peak season which is typically represented by the colour red; second, the intermediary season which is usually represented by the colour white; and third, the low season which is usually represented by the colour blue.

<sup>58</sup> Article 17 of the 2010 Decree.



about his intention of not exercising his occupancy right in that year.<sup>59</sup> When the timeshare holder does not pay his share of the management and maintenance costs, the developer or his representative has the right to deprive him of exercising his occupancy right for that year.<sup>60</sup>

Furthermore, the timeshare holder has to use the accommodation in accordance with it has been allocated for, which is tourist occupancy. The timeshare holder also under the obligation of safekeeping and protecting the accommodation and its contents of furniture and other equipment as well as the common and recreational facilities of the timeshare complex and keep them free from damage during his period of occupancy. In addition, the timeshare holder, during his period of occupancy, must refrain from undertaking any action that leads to a nuisance, or that prevents the other timeshare holders from deriving benefit from their accommodation and the recreational facilities of the timeshare complex during their periods of occupancy. Moreover, the timeshare has to vacate the accommodation annually on the day and time stipulated in the timeshare agreement.<sup>61</sup>

The usufruct/ usage right shall terminate with the expiry of its defined term. In this case, the right of usufruct/ usage reverts to the developer. Notwithstanding the provisions of Article 993/1 Egyptian Civil Code, the right of usufruct/ usage shall not expire with the death of the timeshare holder. In this case, the right of usufruct will automatically transfer to the heirs of the timeshare holder.<sup>62</sup>

### 6.3.2 Functional analysis

#### *Phase I Questions: Problems associated with the initial sale and purchase of timeshare*

#### **Aggressive marketing**

#### Does the legislation provide the consumers with a cooling-off period for reconsideration?

The 2010 Decree provides the timeshare holder with a month's cooling-off period for reflection.<sup>63</sup> The cooling-off period will start from the date of submitting the timeshare

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<sup>59</sup> Article 31/12 of the 2010 Decree.

<sup>60</sup> Article 31/13 of the 2010 Decree.

<sup>61</sup> Article 19 of the 2010 Decree.

<sup>62</sup> Article 23 of the 2010 Decree.

<sup>63</sup> Article 31/17/1 of the 2010 Decree.

contract to the Ministry of Tourism/ Chamber of Hotels and Tourist Projects/ Department of Timesharing for ratification. However, if the developer's licence for exercising the timeshare business had expired at the time of conclusion the timeshare contract, the cooling-off period will start from the date of the renewal of the developer's licence.<sup>64</sup> Upon the receipt of the timeshare contract for ratification, the Timesharing Department has to inform the timeshare holder about his right of withdrawal during the cooling-off period, the duration of the cooling-off period and the terms and conditions of exercising the right of withdrawal in accordance with the Decree of 2010.<sup>65</sup>

Does the legislation provide the consumers with the right to withdraw from the timeshare contracts, exchange contracts and resale contracts during the cooling-off period, without any charges or justification?

The Decree of 2010 entitles the timeshare holder to withdraw from the contract during the cooling-off period without incurring the consequences of any penalty clause or giving any reason.<sup>66</sup> Nevertheless, when the timeshare holder exercises his withdrawal right during the cooling-off period, he will incur the administrative costs incurred by the developer for concluding the contract in addition to 10% of the *earnest money*<sup>67</sup> which has been paid to the developer.<sup>68</sup> It must be noted that if the timeshare holder occupied the accommodation during the cooling-off period and then wishes to withdraw, he will incur the value of the use of the accommodation as determined in the timeshare contract in addition to the above-mentioned charges.<sup>69</sup>

Does the legislation prohibit payments being collected prior to the end of the cooling-off period with regard to the timeshare and exchange contracts?

As just explained above, in accordance with Article 31/17/1 of the 2010 Decree, if the timeshare holder has withdrawn from the timeshare agreement, he will incur 10% of the *earnest money* which he has paid to the developer coupled with the administrative costs incurred by the developer for the conclusion of the contract. Thus, it can be concluded that

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<sup>64</sup> Article 31/17/2 of the 2010 Decree.

<sup>65</sup> Article 31/17/2 of the 2010 Decree.

<sup>66</sup> Article 31/17/2 of the 2010 Decree.

<sup>67</sup> Earnest money is 'a sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract. Normally such earnest money is applied against the purchase price. Often the contract provides for forfeiture of this sum if the buyer defaults'. Legal Dictionary 'Earnest Money' <<http://legal-dictionary.thefreedictionary.com/earnest+money>> accessed on 28/12/2016.

<sup>68</sup> Article 31/17/1 of the 2010 Decree.

<sup>69</sup> Article 31/17/3 of the 2010 Decree.

the 2010 Decree does not prohibit the collection of advance payments during the cooling-off period.

Does the legislation prohibit payments being collected prior to the actual sale taking place with regard to the resale contract?

As highlighted in the introduction of this Chapter, the 2010 Decree does not regulate the resale contracts. Therefore, such contracts will be governed by the general provisions of contracting provided for in the Egyptian Civil Code No. 131 of 1948. Article 103/1 of the Egyptian Civil Code permits the contracting parties to agree on the payment of the *earnest money* at the time of the conclusion of the contract. The Article considers the agreement on the payment of *earnest money* an indication that each party will have the right to withdraw from the contract unless otherwise prescribed by the contract. According to the second Paragraph of Article 103, if the transferee withdraws from the contract, the transferor will forfeit his *earnest money*, while if the transferor withdraws, he shall refund twice the amount of the *earnest money* to the transferee, even though there is no harm resulted from such withdrawal.

Consequently, there is nothing in the Egyptian law to prohibit the collection of an advance payment with regard to the resale contract, and if that has been stipulated in the resale contract, the provisions of above-mentioned Article 103 must be taken into consideration.

Does the legislation provide for the automatic termination of all the ancillary contracts in the case of the exercise of the right of withdrawal?

This matter is not regulated by the 2010 Decree. Nonetheless, pursuant to Article 160 of the Egyptian Civil Code ‘if the contract is dissolved, the contracting parties shall revert to the pre-contracting status’. Hence, if the timeshare holder has dissolved the timeshare contract by way of the exercise of the withdrawal right, the obligations of the parties under the timeshare contract and any contract ancillary to it are automatically terminated with effect from the date of dissolving the timeshare contract.

### **Lack of disclosure**

Does the legislation require the provision of written; accurate and comprehensive information, on paper or other durable medium, which is easily accessible to the consumer, in understandable language, both at pre-contractual and contractual stage?

Article 31 of the 2010 Decree places an obligation on the developer to give the timeshare holder accurate and sufficient information, written on paper, concerning the property or service for which he intends to contract. Thus, an offer to a timeshare contract must include:

1. Accurate and detailed description of the timeshare development and its facilities.<sup>70</sup>
2. Accurate and detailed information with regard to the developer and the management company.<sup>71</sup>
3. The division of the year into fifty-occupancy period on weekly basis.<sup>72</sup> As explained in Section 6.3.1, the minimum period of occupancy that the developer is allowed to sell to each timeshare holder is a week. Therefore, the year will be divided into 52 periods (weeks). According to the 2010 Decree, fifty periods (weeks) allocated to be sold for occupation, while the remaining two periods (weeks) must be retained by the developer for maintaining and repairing the timeshare property.
4. The division of the year into three seasons: the peak season, the intermediary season and the low season, and the consequences of this division.<sup>73</sup> For example, the developer needs to inform those who buy their occupancy periods in the intermediary season or low season that they will not be able to exchange with those who buy their occupancy periods in the peak season.
5. The price to be paid by the timeshare holder for acquiring the right of occupancy will vary in accordance with the season during which the occupancy right will be exercised.<sup>74</sup>
6. An outline of the additional obligatory costs imposed under the timeshare contract and related laws.<sup>75</sup>
7. The duration of the cooling-off right, its methods of exercise and its effects.<sup>76</sup>
8. The possibility to participate in an exchange scheme. If this is a possibility then the name of the exchange scheme and costs of membership must be provided.<sup>77</sup>

[Does the legislation stipulate that the pre-contractual information should form an integral part of the contract?](#)

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<sup>70</sup> Article 31/1 of the 2010 Decree.

<sup>71</sup> Article 31/2 of the 2010 Decree.

<sup>72</sup> Article 31/4 of the 2010 Decree.

<sup>73</sup> Article 31/4 of the 2010 Decree.

<sup>74</sup> Article 31/5 of the 2010 Decree.

<sup>75</sup> Article 31/5 of the 2010 Decree.

<sup>76</sup> Article 31/17 of the 2010 Decree.

<sup>77</sup> Article 31/6 of the 2010 Decree.

According to Article 31 of the 2010 Decree, the pre-contractual information is an integral part of the timeshare contract. However, this Article requires that the contract must include, in addition to the pre-contractual information detailed above, the following information:

1. The exact nature and content of the purchased right.<sup>78</sup>
2. The number of shares sold to the timeshare holder.<sup>79</sup>
3. An accurate and detailed description of the accommodation and its facilities.<sup>80</sup>
4. The price to be paid by the timeshare holder for acquiring the right of occupancy; an accurate and appropriate description of all costs associated with the timeshare contract, specifically the management and maintenance costs, and the consequences of the non-payment of these costs.<sup>81</sup>
5. The week during which the right of occupancy will be exercised.<sup>82</sup>
6. A statement that the developer is under an obligation to insure the timeshare resort against all dangers.<sup>83</sup>
7. A statement that the developer or his representative is obliged to maintain the resort standards.<sup>84</sup>
8. The duration of the cooling-off right, its methods of exercise and its effects.<sup>85</sup>
9. A statement that the timeshare holder is entitled to transfer, rent out, and exchange his right of occupancy in accordance with the provisions of the 2010 Decree.<sup>86</sup>
10. The mechanism that the contracting parties must follow to notify each other.<sup>87</sup>

It is worth pointing out that the 2010 Decree requires the developer to provide the timeshare holder with a copy of the timeshare contract at the time of its ratification by the Time-Sharing Department in the Ministry of Tourism in order to enable the consumer to reconsider the terms and conditions of the contract and to seek advice during the cooling-off period.<sup>88</sup>

### **Verbal Misrepresentation**

[Does the legislation require for promises to be made in writing / part of the contract?](#)

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<sup>78</sup> Article 31/2 of the 2010 Decree.

<sup>79</sup> Article 31/4 of the 2010 Decree.

<sup>80</sup> Article 31/3 of the 2010 Decree.

<sup>81</sup> Article 31/6 and 7 of the 2010 Decree.

<sup>82</sup> Article 31/8 of the 2010 Decree.

<sup>83</sup> Article 31/14 of the 2010 Decree.

<sup>84</sup> Article 31/15 of the 2010 Decree.

<sup>85</sup> Article 31/17 of the 2010 Decree.

<sup>86</sup> Article 31/20 of the 2010 Decree.

<sup>87</sup> Article 31/21 of the 2010 Decree.

<sup>88</sup> Article 31/17/2 of the 2010 Decree.

Does the legislation prohibit the marketing of timeshare as an investment?

There is no Article whether in the 2010 Decree or the Egyptian Civil Code covering the matters provided for in the above two questions.

### *Phase II Questions: Problems associated with ownership*

#### **Alleged Availability and Flexibility**

Does the legislation require the provision of clear and accurate information concerning the season during which the right of occupancy can be exercised, the duration of the right of occupancy, date on which the timeshare holder can start to exercise the right of occupancy and the restrictions on the consumer's ability to exercise the right of occupancy, specifically under the floating-weeks' pattern and points pattern?

The developers are obliged to provide the prospective timeshare holders with accurate contractual information concerning:

1. The duration of the timeshare contract.<sup>89</sup>
2. The season during which the occupancy rights will be exercised.<sup>90</sup>
3. The exact week during which the occupancy rights will be exercised.<sup>91</sup>
4. The restrictions on the ability of the timeshare holder to exercise the right of occupancy.<sup>92</sup>

This is to provide the prospective timeshare holders with a clear view concerning the possibilities of exercising the right of occupancy and thus minimise the chances of dissatisfaction.

Does the legislation require the provision of clear and accurate information relating to the possibilities, limitations and modes for exchange?

Article 21 of the 2010 Decree obliges the developer to include the conditions and modes for exchange in the timeshare contract. This Article also places three obligations on any timeshare holder who wants to exercise his right of exchange:

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<sup>89</sup> Article 31/17/5 of the 2010 Decree.

<sup>90</sup> Article 31/17/4 of the 2010 Decree.

<sup>91</sup> Article 31/17/9 of the 2010 Decree.

<sup>92</sup> Article 31/17/8 of the 2010 Decree.

1. The submission of the exchange request one month prior to the date that is allocated to him to exercise his right of occupancy.
2. The payment of his share of the management and maintenance costs to the developer.
3. The payment of exchange fees for the exchange company.

Furthermore, Article 31/9/2 of the 2010 Decree obliges the developer to clarify the following within the timeshare contract:

1. The timeshare holder who buys his timeshare in the peak season is entitled to exchange with those who buy their timeshares in any season.
2. The timeshare holder who buys his timeshare in the intermediary season will only be able to exchange with those who buy their timeshares in the intermediary and low seasons.
3. The timeshare holder who buys his timeshare in the low season will only be able to exchange with those who buy their timeshares in the low season.

This is to prevent the sellers of exchange membership from overselling the benefits and advantages of the exchange service and thus keep the timeshare holders satisfied with their exchange membership.

Consequently, the 2010 Decree requires the provision of clear and accurate information to the timeshare holders relating to the possibilities, limitations and modes for exchange.

### **Excessive increases in annual service charge**

[Does the legislation have provisions to curb or prohibit the increase in annual fees?](#)

[Does the legal arrangement provide a solution to the potential for excessive increase in annual fees?](#)

This answer covers the two above questions. According to Article 18 of 2010 Decree, the costs that must be paid for the management and maintenance of the timeshare resort by the timeshare holders must be stated clearly in the timeshare contract. This Article allows for the developer to increase the management and maintenance costs only every three years on condition that the amount of the increase does not exceed 5% of the last amount paid by the timeshare holder in return for his share of annual costs. In all cases, these costs must not exceed 2% of the value of the timeshare transaction.

It is worth pointing out that one of the reasons whereby the Minister of Tourism is entitled to withdraw the licence of the developer to exercise the timeshare business is the collection of management and maintenance costs more than what is allowed in accordance with the provisions of the 2010 Decree which are already explained above.<sup>93</sup>

### Declining Resort Standards

Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?

Does the legislation impose penalties based on declining resort standards?

Does the legal arrangement have a solution to the deterioration of resort standards?

The following answer covers the three above questions.

Pursuant to Article 15 of the 2010 Decree, the developer or his representative is obliged to hand over to the timeshare holder the accommodation comply with the specifications mentioned in the timeshare contract and the rating system of hotels and tourist projects adopted by the Ministry of Tourism. Moreover, the developer or his representative is under an obligation to manage and repair the accommodations, common areas and facilities of the timeshare project to maintain their quality standards.<sup>94</sup> Furthermore, the developer or his representative is obliged to provide the timeshare holders with the basic hotel services during their periods of occupancy in accordance with the degree of classification of the timeshare project (i.e., five-stars, four-stars, etc.).<sup>95</sup>

Therefore, the 2010 Decree obliges the chairperson of the Chamber of Hotels and Tourist Projects in the Ministry of Tourism to form a permanent committee for carrying out regular visits to the timeshare projects to be sure that their standards match what it should be according to the timeshare contract and rating system of hotels and tourist projects.<sup>96</sup> This committee shall be chaired by the representative of the chairperson of the Chamber and include two members, one to represent the Department of Inspection in the Ministry of Tourism, while the second member represents the Department of Timesharing in the Ministry of Tourism. The committee, every six months, must issue a report to include the names of the

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<sup>93</sup> Article 34/15 of the 2010 Decree.

<sup>94</sup> Articles 24 and 25 of the 2010 Decree.

<sup>95</sup> Articles 26 and 25 of the 2010 Decree.

<sup>96</sup> Article 32 of the 2010 Decree.



timeshare projects which failed to maintain their quality standards. The report must also include the penalties which are to be imposed on these projects. A copy of this report must be sent to the related projects. The developers of these projects are entitled to appeal against this report before the higher committee which is formed to deal with appeals. The Head of the Chamber of Hotels and Tourist Projects shall chair this committee (i.e., the second committee) and it includes three members; two members represent the Department of Inspection in the Ministry of Tourism; while the third member is the Head of the Department of Timesharing in the Ministry of Tourism. If the committee is not satisfied with the grounds of appeal, they shall propose an appropriate recommendation and send it to the Minister of Tourism, who is entitled to determine the matter in accordance with the provisions of the 2010 Decree. By reference to Article 34/3 of the 2010 Decree, the Minister of Tourism is entitled to take one of the following decisions:

1. To grant the developer a specified period to restore the required level of quality standards.
2. To withdraw the licence of the management company and asking the developer to employ another one to carry out the management operations.
3. To withdraw the licence of the developer to exercise the timeshare business and close down the resort.

Consequently, the 2010 Decree tackles the problem of the deterioration of resort standards by way of imposing administrative penalties on the developers and management companies, as representatives of the developers, who fail to maintain the quality standards of their resorts.

### **Resort Closure and the Security of Timeshare Holders**

[Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?](#)

One of the characteristics of the original rights *in rem* under the Egyptian law is that they provide the right holder with exclusive possession during the period of the enjoyment of the right.<sup>97</sup> Thus, each timeshare holder has exclusive possession during his period of occupancy under the usufruct in common and usage in common arrangements because they are original rights *in rem* as explained in detail in Section 6.2.

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<sup>97</sup> Abdul Hai Hijazi, *The Introduction to the Study of Legal Sciences: The Theory of Right*, Part 2 (Kuwait University Press 1975) Para 289, 290.

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

One of the characteristics of the original rights *in rem* under the Egyptian law is that they are enforceable against the world at large. In other words, they are valid against an indefinite class of persons.<sup>98</sup> Therefore, the occupancy rights under the usufruct in common and usage in common arrangements are valid against the inheritors and assigns of the developer owing to the fact that they are original rights *in rem* as explained in detail in Section 6.2.

Does the legal arrangement prohibit the developer from revoking the agreement at will?

According to Article 147/1 of the Egyptian Civil Code, ‘A contract is the law of the contracting parties. It shall never be revoked or amended except by sheer consent of both parties or for reasons to be provided by law’. Consequently, the developer cannot revoke the timeshare contract at will.

Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer’s insolvency?

The developer is entitled to ask the competent court to terminate the contract when the timeshare holder refrains from the implementation of his contractual and legal obligations.<sup>99</sup> For example, when the timeshare holder abstains from the payment of his share of the annual costs for two consecutive years;<sup>100</sup> or uses the accommodation illegally, such as prostitution; or use the accommodation in a way non-conforming with its nature, such as a clinic or a commercial office.<sup>101</sup> The judge may grant the timeshare holder a term for implementing his obligation;<sup>102</sup> he may also terminate the contract subject to the rights of third parties.<sup>103</sup> Consequently, the timeshare holder is protected against arbitrary forfeiture and re-entry under the usufruct in common and usage in common arrangements. Moreover, these arrangements protect the timeshare holders in the case of the developer’s insolvency because they are valid against the creditors of the developer. This is because the rights of occupancy, under the usufruct in common and usage in common arrangements, are original rights *in rem* which are effective against the world at large as explained above.

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<sup>98</sup> Hassan Kirh, *The Principles of Civil Law*, Part 1 (Al-Maaref Printing and Publishing Institution 1965) Para14.

<sup>99</sup> Article 157/1 of the Egyptian Civil Code No. 131 of 1948.

<sup>100</sup> Article 31/7 of the 2010 Decree.

<sup>101</sup> Article 988/2 of the Egyptian Civil Code No. 131 of 1948.

<sup>102</sup> Article 157/2 of the Egyptian Civil Code No. 131 of 1948.

<sup>103</sup> Article 988/2 of the Egyptian Civil Code No. 131 of 1948.

*Phase III Questions: Problems associated with the secondary market and termination by individual timeshare holders*

**Resale and Termination Problems faced by the individual**

Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?

Pursuant to the 2010 Decree, each timeshare holder or his inheritor(s) has the right to transfer his right of usufruct/ usage to another timeshare holder or to a third party in return for financial consideration on two conditions; first, the transfer must be through the developer or the management company as his representative;<sup>104</sup> second, the payment of 5% of value of the transaction to the developer.<sup>105</sup> In this case, the developer has to issue a new timeshare contract to the purchaser.<sup>106</sup>

It is worth pointing out that one of the reasons whereby the Minister of Tourism is entitled to withdraw the licence of the management company or the licence of the developer to exercise the timeshare business is when the developer or the management company refrains from the completion of the transfer of the usufruct/ usage in spite of the fact that the timeshare holder has paid his share of the annual costs as well as the above-mentioned commission.<sup>107</sup>

Consequently, the 2010 Decree allows for the timeshare holder or his inheritors to resell his occupancy right but in accordance with the aforementioned restrictions.

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

*In perpetuity clauses*

According to Article 10 of the 2010 Decree, the timeshare contract must be time-limited. However, in the case of the non-identification of the duration of the contract, it will be valid for the life of the timeshare holder. Nonetheless, the timeshare holder has the right of reselling the right of usufruct/ usage as explained above. Furthermore, he is entitled to rescind the timeshare contract at any time during the life of the project as will be explained in answering the next question.

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<sup>104</sup> Article 22 of the 2010 Decree.

<sup>105</sup> Article 23 of the 2010 Decree.

<sup>106</sup> Article 23 of the 2010 Decree.

<sup>107</sup> Article 34/17 of the 2010 Decree.

### *Estate binding clauses*

In accordance with Article 23 of the 2010 Decree, the right of usufruct/ usage shall automatically transfer to the inheritors of the timeshare holder upon his death. However, the inheritors are entitled to resell the right of usufruct/ usage as explained above. Moreover, they are entitled to rescind the timeshare contract at any time as from the date of being timeshare holders as will be explained in answering the next question.

[Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?](#)

Pursuant Article 31/ 18 of the 2010 Decree, the timeshare holder, upon the expiration of the cooling-off period, is entitled to rescind the timeshare contract at any time during the life of the project. In this case, he has to pay the following to the developer or his representative:

1. The administrative costs incurred by the developer for concluding the timeshare contract.
2. 10% of the value of the timeshare transaction.
3. The value of the occupancy periods which the timeshare holder has enjoyed prior to the rescission of the timeshare contract.

Thus, when the timeshare holder exercises his right of rescission, he has to pay pro rata for past enjoyment plus 10% of the total price. That mean the developer or his representative has to refund the timeshare holder as the price is usually paid up front in total.

Consequently, the 2010 Decree permits the timeshare holder to exit the timeshare contract but in accordance with aforementioned rules.

### ***Phase IV Questions: Collective action problems***

[Does the legal arrangement have an owners' association, club or a company?](#)

This question is not applicable under the usufruct in common or usage in common legal arrangements. This is because the developer or an agent hired by him has the complete control over the management of the timeshare resort due to the fact that he retains the bare ownership of the resort as explained under Section 6.3.1.

[Does the legal arrangement require for a professional management company to be appointed?](#)

According to the 2010 Decree, the developer is under an obligation to manage and maintain the timeshare resort. The developer shall do that by himself if he has the required experience and the trained staff, otherwise the developer has to employ a management company to operate the timeshare resort. The 2010 Decree requires that the management company must be professional, specialised and have licence in performing such business from the Ministry of Tourism.<sup>108</sup> Moreover, the developer is obliged to employ an Administrator for customer service. The Administrator must reside permanently in the resort and has licence in performing such business from the Ministry of Tourism.<sup>109</sup>

Accordingly, the 2010 Decree necessitates the employment of a management company when the developer has not the required experience for operating the timeshare resort.

[Does the legal arrangement have provisions to arrange a meeting and decision-making process on a ‘practical basis’?](#)

As explained in section 6.3.1, the developer is the party who is obliged to manage and maintain the timeshare property because he retains the bare ownership of the property. Therefore, the 2010 Decree does not require the formation of owners’ association. Inasmuch as there is no association of owners, there is no provisions in the 2010 Decree with regard to the meeting, decision-making process etc.

## **6.4 CONCLUSION**

An optimal timeshare legal regime should regulate the exchange and resale contracts and the timeshare contracts so as to provide consumers with the same level of protection as the timeshare holders. It should also provide consumers with a sufficient level of protection in each phase of the timeshare cycle.

This Chapter concludes that the Egyptian model regulates all aspects of timeshare contracts. However, the model does not regulate the resale contract, nor some aspects of exchange contracts. For example, the consumers of the exchange services are not supplied with the right of withdrawal. Such loopholes must be addressed when proposing the optimal legal regime of timeshare.

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<sup>108</sup> Article 30/6 of the 2010 Decree.

<sup>109</sup> Article 30/9 of the 2010 Decree.

In the first phase, the model provides consumers with a low level of protection. Three examples can be presented here: the model does not prohibit the collection of advance payments during the cooling-off period; it does not prohibit the marketing of timeshare as an investment and it does not require promises to be made in writing and to be part of the timeshare contract. These defects must be avoided when considering the optimal timeshare legal regime. However, the model provides for some protective measures which are worthy of being taken forward as optimal features, specifically, it provides consumers with a cooling-off period and places an obligation on developers to supply the consumers with written comprehensive and accurate information at both of pre-contractual and contractual stages to save them from being misled whether by developers or salespersons.

In the second phase, the model provides the consumers with an advanced level of protection. It provides the consumers with an exclusive right of occupancy. It also places an obligation on the developer to supply consumers with accurate information on when, where and how the right of occupancy can be exercised. In addition to that, the model places an obligation on the developer to supply consumers with details of the mechanism for calculating and the allocation of service charges, as well as setting the maximum level for the allowed increase in annual service charges. Moreover, under the Egyptian model, the interests of the consumers cannot be forfeited or revoked by the developer, or any other person, because they acquire original rights *in rem* which are valid against the world at large. Furthermore, the model establishes a Governmental Agency to rate the timeshare resorts and to impose relevant penalties on the management entity in the case of the declining of the resort standards which is vital to maintain the quality standards of the timeshare resorts. These feature are worthy of taking forward as an optimal features.

In the third phase, the model provides consumers with a mid-level of flexibility. It empowers each timeshare holder to rescind the timeshare contract at any time during the life of the project if his circumstances change, which is vital to solve the problems associated with the long-term timeshare contracts. This feature should be taken on board when drafting the optimal legal regime. However, the model entitles the developer to restrict the exercise of the right to resell. This lacuna must be filled when drafting the optimal timeshare legal regime.

In the fourth phase, the Egyptian model does not adopt any mechanism to facilitate the participation of the timeshare holders in the decision-making process with regard to the issues which affect their interests, such as the employment of the management company. This gap

must be addressed when contemplating the optimal legal regime of timeshare. However, the model provides for some measures which are worthy of being taken forward as optimal features, specifically placing an obligation on the developer to employ a professional management company to manage the timeshare project and a professional administrator for customer service which is vital to maintain the quality of the services provided to the timeshare holders.

## CHAPTER SEVEN

### THE AMERICAN MODEL

#### 7.1 INTRODUCTION

The aim of this Chapter is to carry out a functional analysis for the timeshare model in America.<sup>1</sup> This analysis shall be carried out by applying the evaluative framework established in Chapter Three to the timeshare legislation and legal arrangements that operate in America. This analysis is crucial because it will lead to the identification of the optimal features present in the legal regime for timeshare in America that could be used to provide the optimal system of a timeshare operation in any jurisdiction.

Although there is no enacted uniform timeshare legislation, two model Acts have been proposed for regulating timeshare ownership in the United States of America. The first was proposed by the National Conference of Commissioners of Uniform State Law, *Uniform Real Estate Timeshare Act (URETSA)*,<sup>2</sup> the second is the Model Timeshare Ownership Act, adopted by the Resort Time-Sharing Council of the American Land Development Association and the National Association of Real Estate License Law Officials (hereinafter cited as NTC/ NARELLO Act).<sup>3</sup>

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<sup>1</sup> In this thesis, the timeshare model means both the legislation and the legal arrangements which are in use to regulate the timeshare projects in a certain country.

<sup>2</sup> The Uniform Real Estate Timeshare Act (URETSA) was developed by the National Conference of Commissioners on Uniform State Law in 1980 as a model act. See, the Prefatory Note of the URETSA Model timeshare Act.

<sup>3</sup> In common parlance, this is referred to as the NTC/NARELLO Model timeshare Act, after the acronyms of its sponsoring organisations' title, to distinguish it from the URETSA Model timeshare Act.

The National Time-Sharing Council (NTC) (formally known as the Resort Time-Sharing Council or RTC) is composed of developers of time-sharing projects located throughout the United States and abroad, and is one of eight councils comprising the American Land Development Association (ALDA). ALDA represent the recreation, resort and residential real estate development industry from its headquarters in Washington, D.C.

The National Association of Real Estate License Law Officials (NARELLO) is headquartered in Omaha, Nebraska, and is made up representatives of state governments who are responsible for administrating real estate license laws in each of the fifty states.

In October 1979, the NTC and NARELLO jointly promulgate the original version of the NTC/NARELLO model act. Responding to the need for further regulatory reforms, ALDA's Board of Directors mandated preparation of a new revised model act in January 1982. The revised act formally adopted in December 1982. The revised act, which has also been endorsed by the National Association of Realtors, places compliance-type requirements, in addition to disclosure-type requirements on developers. See, Mark E. Henze, *The Law and Business of Timeshare Resorts* (Clark Boardman Company, Ltd. New York 1984) 5-1.



In this chapter, the American Model that will be analysed in accordance with the provisions of the NTC/ NARELLO Act because it has formed the backbone for many state's timeshare legislation. Peirce and Mann expressed this fact by saying 'the NTC/ NARELLO has had a greater influence than the URETSA on the drafting of state's timeshare legislation'.<sup>4</sup> The report No. (14) of Wisconsin Legislative Council to the Legislature also affirmed this fact by stating ' It appears that NTC/ NARELLO has had a greater influence than the URETSA on the drafting of specific timeshare legislation'. Moreover, Henze confirmed this by saying 'the revised model (NTC/ NARELLO) were being incorporated into the legislation of several states, such as Nevada'.<sup>5</sup> Furthermore, Edmonds stressed on this fact by saying 'the Model (NTC/ NARELLO) has been the basis for so much state legislation'.<sup>6</sup> For example, Nebraska, Nevada and Tennessee, have adopted NTC/ NARELLO Act in its entirety.<sup>7</sup> Florida, Hawaii and Virginia have substantially adopted the NTC/ NARELLO Act.<sup>8</sup>

## 7.2 OVERVIEW OF THE NTC/ NARELLO ACT

### 7.2.1 Timeshare permit and licensing

The NTC/ NARELLO Act placed an obligation on any person who wishes to offer or dispose of any timeshare to obtain a timeshare permit from the relevant Governmental Agency.<sup>9</sup> Thus, any developer who desires to exercise timeshare business has to file an application for a timeshare permit with the Agency accompanied by the appropriate filling fee.<sup>10</sup> The application must include the following:

1. A current preliminary title report<sup>11</sup> or commitment to issue a title policy<sup>12</sup> for the timeshare property.<sup>13</sup>

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<sup>4</sup> Ellen R. Peirce and Richard A. Mann, 'Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment' (1983-1984) 59 Notre Dame Law Review 39.

<sup>5</sup> . Mark E. Henze, *The Law and Business of Timeshare Resorts* (Clark Boardman Company, Ltd. New York 1984) 5-2

<sup>6</sup> James Edmonds, *International Timesharing* (3rd edn Longman Group 1991) 179.

<sup>7</sup> Nori Gerardo, 'Regulating Vacation Timesharing: A More Effective Approach' (1981-1982) 29 UCLA Law Review 935; Ellen R. Peirce and Richard A. Mann, 'Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment' (1983-1984) 59 Notre Dame Law Review 40; Karen K. Duke, 'Timesharing: A Unique Property Concept Creates the Need for Comprehensive Legislation' (1981-1982) 25 Saint Louis University Law Journal 653.

<sup>8</sup> Patrick J. Rohan and Daniel A. Furlong, 'Timesharing and Consumer Protection: A Precise for Attorneys' (1984) 10 William Mitchell Law Review 32.

<sup>9</sup> Section 2-101 of the NTC/ NARELLO Act.

<sup>10</sup> Section 2-104 (A) of the NTC/ NARELLO Act.

<sup>11</sup> A preliminary title report is

the written analysis of the status of title to real property, including a property description, names of titleholders and how title is held (joint tenancy, etc.), tax rate, encumbrances (mortgages, liens, deeds of trusts, recorded judgments), and real property taxes due. A title report made when the report is

2. Copies of project documents: all of the documents that establish the timeshare project; that create and govern the rights and relationships of timeshare holders; and that govern the use and operation of the timeshare property.<sup>14</sup>
3. Copies of the escrow contract (if different from the contract of sale), sale contract and all other written materials to be used in the normal course of the sale of the timeshares.<sup>15</sup>
4. A statement concerning how the local taxing authority is currently assessing the timeshare property for property tax purposes.<sup>16</sup>
5. Evidence that the use of the property for timeshare purposes complies with zoning laws of the local government in which the timeshare property is situated.<sup>17</sup>
6. The budget for the association of owners.<sup>18</sup>
7. The name and address of the project's broker(s).<sup>19</sup>
8. Evidence of acceptance by an exchange program if such a program is to be part of the timeshare offer.<sup>20</sup>
9. Any other information and documents the Agency shall, in accordance with its rules and regulations, require to be presented, or the developer may desire to present.<sup>21</sup>

Within twenty days of the receipt of the application, the Agency must determine and notify the developer whether or not it is a complete application. If the application is not complete, the Agency has to inform the developer about the requirements which must be met in order

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ordered is called a "preliminary report," or a "prelim," and at time of recording an up-to-date report is issued which is the final title report. The history of the title is called an "abstract." A title report is prepared by a title company, an abstractor, attorney, or an escrow company, depending on local practice. Normally a title report's accuracy is insured by title insurance which will require the insurance company to either correct any error or pay damages resulting from a "cloud on title," encumbrance or title flaw in the title which was not reported.

Legal Dictionary, 'Preliminary Title Report' on <<http://legal-dictionary.thefreedictionary.com/title+report>> accessed on 23 December 2016.

<sup>12</sup> A title policy is defined as

a policy issued by an insurance company guaranteeing that the title to a parcel of real property is clear and properly in the name of the title owner, and that the owner has the right to deed the property (convey or sell) to another. Should a problem later arise with the title (such as an inaccurate description), the insurance company will pay the damages to the new title holder or take steps to correct the problem.

Legal Dictionary, 'Title Insurance' on <<http://legal-dictionary.thefreedictionary.com/Title+Insurance>> accessed on 23 December 2016.

<sup>13</sup> Section 2-104 (A) (1) of the NTC/ NARELLO Act.

<sup>14</sup> Section 1-102 (34) of the NTC/ NARELLO Act.

<sup>15</sup> Section 2-104 (A) (3) of the NTC/ NARELLO Act.

<sup>16</sup> Section 2-104 (A) (5) of the NTC/ NARELLO Act.

<sup>17</sup> Section 2-104 (A) (6) of the NTC/ NARELLO Act.

<sup>18</sup> Section 2-104 (A) (7) of the NTC/ NARELLO Act.

<sup>19</sup> Section 2-104 (A) (10) of the NTC/ NARELLO Act.

<sup>20</sup> Section 2-104 (A) (11) of the NTC/ NARELLO Act.

<sup>21</sup> Section 2-104 (A) (12) of the NTC/ NARELLO Act.

that his application become complete. The Agency must similarly respond within twenty days following any additional submissions to the Agency made by the developer to correct his application.<sup>22</sup>

Within forty five days of mailing the notice to the developer that the application is complete or not, the Agency must take one of the following actions:<sup>23</sup>

1. Issue a timeshare permit.
2. Deny the application or advise the developer of the agency's intention to deny the application. In this case, the Agency must notify the developer of the grounds for denial.

Pursuant to Section 105 (D) of the NTC/ NARELLO Act, the grounds for denial of a timeshare permit are the following:

1. The failure of the developer to provide the Agency with the aforesaid requirements.
2. The determination that the developer has within five years before the date of filing the application for a timeshare permit or, at any time thereafter, has been convicted of a felony involving fraud or misrepresentation.
3. The determination that the developer has within five years before the date of filing the application for a timeshare permit or, at any time thereafter, has been banned by decree of a court of competent jurisdiction from engaging in the sale of timeshares, real estate or securities or entered into a consent decree of other stipulation to such effect.<sup>24</sup>
4. The determination that the developer within five years before the date of filing the application for a timeshare permit or, at any time thereafter, has had a license to act as real estate broker or salesperson, securities broker or dealer, project broker or sale agent revoked.

The NTC/ NARELLO Act placed an obligation upon the developer to deliver a copy of the timeshare permit to each timeshare holder before the conclusion of the sale contract. The Act, also, obliged the developer to obtain from the timeshare holder a receipt for the timeshare

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<sup>22</sup> Section 2-105 (A) and (B) of the NTC/ NARELLO Act.

<sup>23</sup> Section 2-105 (C) of the NTC/ NARELLO Act.

<sup>24</sup> Consent decree is 'a settlement of a lawsuit or criminal case in which a person or company agrees to take specific actions without admitting fault or guilt for the situation that led to the lawsuit'. Legal Dictionary, Consent Decree, <<http://legal-dictionary.thefreedictionary.com/consent+decree>> accessed on 23 December 2016.

permit and to retain each receipt for a period of twenty-four months from the date of receipt.<sup>25</sup>

It is worth pointing out that the role of the Timeshare Governmental Agency in accordance with the provisions of the NTC/ NARELLO Act will be revisited in section 7.3 when analysing the problem of the declining of resort standards.

### **7.2.2 Timeshare instruments**

Section 10-101 of the NTC/ NARELLO Act stipulated that timeshares should be created only by timeshare instruments which consisting of three main types of documents:

1. The sale contract (timeshare contract).
2. The escrow instructions if not incorporated in the sale contract.
3. The project documents.

The above-mentioned documents, as a rule, shall contain: (1) a description of the timeshare property. (2) Provisions for the regulation of the management and maintenance of the timeshare project, specifically, the division of the possessory and occupancy rights of the timeshare units among the timeshare holders, the method of the calculation and collection of the timeshare expenses from the timeshare holders, and the mechanism of voting and decision-making. (3) Provisions for the determination of the rights and obligations of all the involving parties, mainly the developer and timeshare holder. (4) Provisions for the regulation of the relationships of timeshare holders (5) provisions for the termination of the timeshare project.<sup>26</sup>

The timeshare instruments will be revisited in various places in Section 7.3 such as when analysing the lack of disclosure problem and the collective action problem.

### **7.2.3 Legal arrangements**

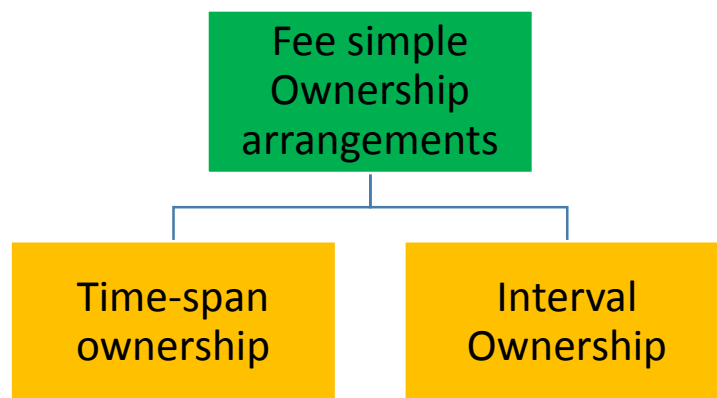
There are two main forms of fee simple ownership timesharing: (1) time-span ownership and (2) interval ownership. This is set out diagrammatically as follows:<sup>27</sup>

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<sup>25</sup> Section 2-108 of the NTC/ NARELLO Act.

<sup>26</sup> More details about the content of the timeshare instruments is available under the answer of the lack of disclosure questions.

<sup>27</sup> Source of diagram: the author.



***Time span ownership (Time span estate)***

Time-span ownership is ‘an undivided interest in fee simple in a designated parcel of real estate together with the exclusive right of occupancy in that parcel of real estate for a designated recurring period of time’.<sup>28</sup> Under the time-span ownership arrangement, the timeshare holders are sold undivided ownership interests in a specific unit of the timeshare development, together with an undivided ownership interest in the recreational facilities and the other common areas of the timeshare resort. The time-span ownership comprises of a tenancy in common coupled with a right to occupy the unit exclusively during a designated period each year.<sup>29</sup> In effect, according to the time-span ownership arrangement, the developer transfers to a number of timeshare holders an undivided share (a percentage interest) in the timeshare real estate in fee simple. Concurrently, the developer divides the possessory and occupancy rights to the commonly owned timeshare property by a legal document called the ‘Declaration’.<sup>30</sup> This Declaration plays a fundamental role in structuring the timeshare project because it identifies the period which is allocated to each timeshare holder to exercise his exclusive right of occupancy. By way of example, twelve timeshare holders are each granted an undivided one-twelfth interest in a timeshare property. The Declaration shall provide that timeshare holder (A) will use the property during the month of

<sup>28</sup> Anthony S. Burek, ‘Uniform Real Estate Time-Share Act’ (1979) 14 Real Property, Probate and Trust Journal 684. The ownership interest of each timeshare holder in the timeshare property is corresponding to the number of periods that he acquires. See, Hilary J. MacLeod, ‘An Introduction to Timesharing’ (1984) 25 New Zealand Valuer 497. It is worth pointing out that this article discussed the American model in addition to the New Zealand model.

<sup>29</sup> Stephen G Johnakin, ‘Legislation for Time Share Ownership Projects’ (1975) 10 Real Property, Probate and Trust Journal 606.

<sup>30</sup> Section 10-101 of the NTC/ NARELLO Act.

January each year; timeshare holder (B) will use the property during the month of February, and so on. The Declaration, also, sets aside ‘a time period for overall maintenance and refurbishment of the property, and additionally, some period of non-use between each owner’s occupancy is set up to allow cleaning and maintenance between use periods’.<sup>31</sup> In addition, it determines the method of calculation, allocation and collection of the common timeshare expenses from timeshare holders. Moreover, it identifies the method of the allocation of voting rights to each timeshare holder. Further, it contains an irrevocable and enforceable waiver of the right of each timeshare holder to demand a judicial partition of the timeshare property during the life of the project.<sup>32</sup> In addition, it defines the term of the timeshare project.<sup>33</sup> The term usually coincides with the useful lifetime of the timeshare development.<sup>34</sup>

In essence, the timespan ownership involves the conveyance to each purchaser (timeshare holder) of a percentage of an undivided tenancy in common in fee simple, coupled with a right to occupy a specified unit during designated times.<sup>35</sup>

### ***Interval ownership***

The interval ownership arrangement is achieved by way of a recurring or revolving defeasible fee simple ownership which is subject to a shifting executory interest for a specific number of years which typically corresponds to the useful life of the timeshare project.<sup>36</sup> Consequently, in accordance with this arrangement, all of the timeshare holders are granted two distinct and separate vested interests in a unit of accommodation in the timeshare property.<sup>37</sup> The first interest which is granted to each timeshare holder in the property is a defeasible fee simple ownership for the period of time during which he is entitled to occupy the accommodation each year.<sup>38</sup> This defeasible fee simple ownership will continue to vest in the timeshare

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<sup>31</sup> Thomas J. Davis, ‘Time-Sharing Ownership: Possibilities and Pitfalls’ (1976) 5 Real Estate Review 50.

<sup>32</sup> Section 10-104 of the NTC/ NARELLO Act. .

<sup>33</sup> Section 10-102 of the NTC/ NARELLO Act.

<sup>34</sup> Peter M. Gunnar, ‘Regulation of Resort Time-Sharing’ (1977) 57 Oregon Law Review 33.

<sup>35</sup> Grant S. Nelson and Dale A. Whitman, *Land Transactions and Finance* (4<sup>th</sup> edn, Black Letter Outlines) 581.

<sup>36</sup> Lisa A. Weixelman, ‘Time-Sharing: The Need for Legislation’ (1982) 50 UMKC Law Review 305. Katherine A. McDowell, ‘Recent Developments in Florida Timesharing: Good News and Bad News for the Timeshare Consumer’ (1984) 13 Stetson Law Review 591.

<sup>37</sup> Daniel T. Engle, ‘Legal Challenges to Time sharing Ownership’ (1980) 45 Missouri Law Review 427; Stephen G Johnakin, ‘Legislation for Time Share Ownership Projects’ (1975) 10 Real Property, Probate and Trust Journal 607.

<sup>38</sup> A defeasible interest is ‘an estate in land that is created when a grantor transfers his real property with respect to some conditions. This means that the estate is subject to the occurrence or non-occurrence of some events specified by the grantor’. This definition is taken from Real Properties Information - Land, Ownership & Conveyance<<http://www.real-property-biz.com/defeasible-estate.html>> accessed on 18<sup>th</sup> of June 2012. In other

holder for a fixed term of years, usually calculated according to the estimated useful lifetime of the timeshare property. The defeasible fee simple ownership which is granted to each timeshare holder is subject to a shifting executory interest.<sup>39</sup> This means that ownership of the accommodation passes to the next timeshare holder at the start of that next person's occupancy period.<sup>40</sup> The second interest which is granted to each timeshare holder in the property is termed a vested remainder.<sup>41</sup> The owner of such vested remainder interest is a co-tenant with the other timeshare holders in the accommodation. In other words, at the termination of the useful lifetime of the timeshare property, all the timeshare holders who occupy the same accommodation in the timeshare project will own that accommodation as co-tenants with each other, and at the same time own the common areas of the timeshare project as co-tenants with co-tenants of the other accommodations.<sup>42</sup> One of the aims behind the establishment of a vested and collective remainder, and adding it to the defeasible fee simple ownership, is to keep clear of the problems linked to rule against perpetuities.<sup>43</sup>

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words, a defeasible interest is established when "a grantor transfers land conditionally. Upon the happening of the event or condition stated by the grantor, the transfer may be void or at least subject to annulment". This definition is quoted from Legal Dictionary- the Free Dictionary <<http://encyclopedia.thefreedictionary.com/Defeasible+estate>> accessed on 18<sup>th</sup> of June 2012. The important thing is that the event that leads to terminate the interest of the timeshare holder in the property is the end of his occupancy period and the commencement of the next timeshare holder occupancy period. It is worth mentioning that any estate not subject to such conditions is called an indefeasible estate.

<sup>39</sup> Executory interest is 'a legal right to property ownership that does not include the right to present possession or enjoyment of the property. Future interests are created on the formation of a defeasible estate'. In other words, an executory interest is a future interest which 'either cuts off another's interest or begins after the natural termination of a preceding estate'. This definition is taken from Answer.com <<http://www.answers.com/topic/future-interest#ixzz1yAeVtPPg>> accessed on 18<sup>th</sup> of June 2012 and USLEGAL.com <<http://definitions.uslegal.com/e/executory-interest/>> accessed on 18<sup>th</sup> of June 2012. A shifting executory interest is 'a real property interest which shifts title from one transferee to another'. See, Comments, 'Regulating Timeshare Interests in Minnesota' (1984) 10 William Mitchell Law Review 125. A fee simple ownership subject to a shifting executory interest is 'an estate where, upon the happening of an event specified in the grant, the fee simple is automatically transferred to a third person, and not to the original grantor or his heirs'. See, Daniel T. Engle, 'Legal Challenges to Time sharing Ownership' (1980) 45 Missouri Law Review 427. In the case of interval timesharing the right of ownership of each timeshare holder starts at the end of the right of the other timeshare holder.

<sup>40</sup> Lisa A. Weixelman, 'Time-Sharing: The Need for Legislation' (1982) 50 UMKC Law Review 305.

<sup>41</sup> An estate in possession is 'an estate gives an immediate right to possession and enjoyment of the land' see Charles Harpum, Stuart Birdge, and Martin Dixon, *the Law of Real Property* (8<sup>th</sup> edn, Sweet and Maxwell 2012) 44. On the other hand, the remainder is 'a future interest so created as to take effect at the end of another estate, as when property is conveyed to one person for life and then to another' this definition quoted from Dictionary. Com <<http://dictionary.reference.com/browse/remainder>> accessed on 12 June 2012, same meaning can be found in Charles Harpum, Stuart Birdge, and Martin Dixon, *the Law of Real Property* (8<sup>th</sup> edn, Sweet and Maxwell 2012) 43.

<sup>42</sup> Mary Ann Flynn, 'North Carolina's Time-Share Act: Guidelines for Those Who Buy and Sell' 20 Wake Forest Law Review 935.

<sup>43</sup> The Rule against Perpetuities Provides that 'no interest in property subject to a condition precedent (i.e., a condition which must be fulfilled prior to the interest passing to the grantee) is good unless the condition must be satisfied, if at all, within 21 years after a designated life in being at the creation of the property interest. When the Rule is violated, the conveyance is void'. See, Thomas J. Davis, 'Time-Sharing Ownership: Possibilities and Pitfalls' (1976) 5 Real Estate Review 51. For a concise explanation about this purely common law principle,



This interval ownership arrangement may be explained by way of the following example:

The developer (O) grants the timeshare holders (A, B, C, and D) a recurring defeasible fee simple ownership, subject to a shifting executory interest to unit one of the resort (X) in order to enable each of them to occupy this unit in rotation for three months every year for 20 years. The developer also grants those timeshare holders undivided interests in the remainder over in fee simple at the end of those years. Therefore:

(A) occupies the unit during the first three months of each year, which are months (1, 2, and 3).

(B) occupies the unit during the second three months of each year, which are months (4, 5, and 6).

(C) occupies the unit during the third three months of each year, which are months (7, 8, and 9).

(D) occupies the unit during the last three months of each year, which are months (10, 11, and 12).

According to the first model of the interval arrangement, (A) will be the *sole owner* during his period of occupancy. However, his right of ownership will be subject to termination (defeasible) at the end of his period of occupancy. In the meantime (i.e., the period during which (A) exercises his right of occupancy) the rest of the timeshare holders (B, C, and D) have a future interest in the unit, termed an executory interest. This interest entitles each one of them to exercise their respective rights of occupancy in the future according to their pre-determined periods as mentioned above.

After the termination of the first three months, the ownership of A comes to an end. However, he acquires a future interest (executory interest) in the Unit which entitles him to exercise his right of occupancy in the first three months of the next year. After the termination of the period of occupancy of A, B will be the sole owner. That will entitle B to enjoy the unit during his period of occupancy which starts at the beginning of month 4 and terminates at the end of month 6. Just like A, B's ownership will be terminated at the end of his period of occupancy and he will get a future interest (executory interest) in the Unit which

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please refer to Rich Klarman, 'The Rule Against Perpetuities- Demystified' on < <http://pub.testguru.com/rule-against-perpetuities-demystified.pdf>> accessed on 25 June 2013.



entitles him to exercise his right of occupancy in the second three months of next year. This process will continue for the rest of the timeshare holders, and will continue for 20 years. At the end of the twenty-year period, the timeshare holders (A, B, C, and D), who were occupying the same accommodation (Unit One) in the timeshare resort (X), will jointly own that accommodation as co-tenants, and at the same time own the common areas of the timeshare resort as co-tenants with co-tenants of the other accommodations of that resort.

Accordingly, interval ownership can be defined as ‘an exclusive ownership of the premises during a certain time period for a predetermined number of years together with an undivided interest in the remainder over in fee simple at the end of those years’.<sup>44</sup>

#### **7.2.4 The management of the timeshare project<sup>45</sup>**

Pursuant to the NTC/ NARELLO Act, regardless of the legal arrangement used for structuring the timeshare project, in all timeshare projects which contain more than twelve timeshares, an association of owners must be formed for exercising general control over the timeshare resort. However, the formation of the owners’ association would not be compulsory when the number of timeshares in the project is twelve or fewer.<sup>46</sup>

The Act, also, places an obligation on the members of the association to elect a board of directors, from among themselves, for exercising the powers of the owner’s association and conducting the business and affairs of the association.<sup>47</sup> Moreover, the Act stipulated that the responsibility for the day-to-day details of managing the project must be entrusted to a professional management company to be selected by the board of directors and be employed by the owners’ association.<sup>48</sup> Since in a timeshare project the timeshare holders have little opportunity to become acquainted with one another, the NTC/ NARELLO Act attempted to provide some measure of democratic government by setting up three methods for fostering self-control. A referendum vote is to be used whenever the timeshare instruments or the provisions of the NTC / NARELLO Act require the approval of timeshare holders regarding

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<sup>44</sup> Stephen G. Johnakin, ‘Legislation for Time Share Ownership Projects’ (1975) 10 Real Property, Probate and Trust Journal 607. Same meaning can be found in Anthony S. Burek, ‘Uniform Real Estate Time-Share Act’ (1979) 14 Real Property, Probate and Trust Journal 607.

<sup>45</sup> The management of the timeshare projects are addressed in detail under the answer of the questions of the collective action problems.

<sup>46</sup> Sections 11-101 (A) and 11-102 of the NTC/ NARELLO Act.

<sup>47</sup> Section 11-103 of the NTC/ NARELLO Act.

<sup>48</sup> Section 11-109 of the NTC/ NARELLO Act.

an action of the board of directors.<sup>49</sup> Recall would be used by timeshare holders for discharging the management company especially when there is a proof that the management company is unresponsive or irresponsible.<sup>50</sup> An initiative would be for the amendment of any of the timeshare instruments or take any action which the board of directors could lawfully take as in the case when a significant number of timeshare holders desire a change which the board of directors either dislikes or believes to be contrary to majority opinion.<sup>51</sup>

It is worth noting that self-control methods will be addressed in detail under the answer of the questions of the collective action problem.

### **7.2.5 The warranties**

The NTC/ NARELLO Act, in both the time span ownership and interval ownership arrangements, created express and implied warranties in the sale of a timeshare. The express warranties relate to any affirmation or promise relating to the timeshare, the unit or improvements, any model or description of physical characteristics and any description of quantity or extent of the real estate constituting the timeshare property. If the developer includes a provision that the use of the unit is restricted, the developer ensures that the restriction on use is lawful.<sup>52</sup> The implied warranties provide that the developer warrants the unit to be suitable for ordinary uses of real estate of its type and that the improvements will be free from defects and constructed in a workmanlike manner according to sound engineering and construction standards.<sup>53</sup>

### **7.2.6 The termination of timeshares**

In each of the time-span ownership arrangement and interval ownership arrangement, the timeshare project shall terminate at the end of its term, or before the end of its term as prescribed in the timeshare instruments.<sup>54</sup> However, if the timeshare instruments do not regulate the termination, the project shall terminate ‘upon entry of a final judgment by a court

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<sup>49</sup> Section 11-107 (B) of the NTC/ NARELLO Act.

<sup>50</sup> Section 11-108 (A) of the NTC/ NARELLO Act.

<sup>51</sup> Section 11-106 (A) of the NTC/ NARELLO Act.

<sup>52</sup> Section 5-101 of the NTC/ NARELLO Act.

<sup>53</sup> Section 5-102 of the NTC/ NARELLO Act.

<sup>54</sup> Section 10-110 (A) (1) of the NTC/ NARELLO Act.

of competent jurisdiction in an action brought by the association declaring that the useful life of the improvements has ended'.<sup>55</sup>

The termination of the timeshare project shall not terminate the existence of the owners' association as the association shall continue for as long is necessary to implement the procedures of termination.<sup>56</sup> Thus, upon the termination of the timeshare project, owners' association shall sell, transfer or otherwise dispose of the interests of the timeshare holders in the timeshare property. The timeshare property may be transferred by deed or other appropriate instrument of transfer signed and acknowledged by two officers of the association who are authorised to do so in accordance with the timeshare instruments. Such transfer shall vest good and marketable title in the grantee. Therefore, any timeshare holder cannot institute an action to invalidate any transfer so made.<sup>57</sup>

The proceeds received by the association of owners in connection with the sale of the timeshare property shall be distributed to the timeshare holders in accordance with each timeshare holder's share in the timeshare property.<sup>58</sup>

## 7.3 FUNCTIONAL ANALYSIS

### *Phase I Questions: Problems associated with the initial sale and purchase of timeshare*

#### **Aggressive marketing**

Does the legislation provide the consumers with a cooling-off period for reconsideration?

The NTC/ NARELLO Act provides the timeshare holder with a five-day cooling-off period for reconsideration. The cooling-off period shall start from the date of the conclusion of the sale contract (timeshare contract), and shall end on the midnight of the fifth calendar day following the date on which the timeshare holder concluded the contract.<sup>59</sup>

Does the legislation provide the consumers with the right to withdraw from the timeshare contracts, exchange contracts and resale contracts during the cooling-off period, without any charges or justification?

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<sup>55</sup> Section 10-110 (A) (2) of the NTC/ NARELLO Act.

<sup>56</sup> Section 10-110 (B) of the NTC/ NARELLO Act.

<sup>57</sup> Section 10-110 (C) (2) of the NTC/ NARELLO Act.

<sup>58</sup> Section 10-110 (D) of the NTC/ NARELLO Act.

<sup>59</sup> Section 3-101 of the NTC/ NARELLO Act.

Pursuant to Section 3-101 of the NTC/ NARELLO Act, the timeshare holder is entitled to cancel the timeshare contract during the cooling-off period without incurring any costs or giving any reason. The cancellation right must be stipulated clearly in boldface type on the first page of any timeshare permit and immediately above the signature of the timeshare holder on any timeshare contract. In each case, the right of cancellation must contain an explanation of the conditions and manner of exercising such right. The developer is obliged to provide each timeshare holder with a form for the purpose of exercising the right of cancellation as prescribed by the Agency.

In accordance with the NTC/ NARELLO Act, any notice of cancellation sent by mail will be effective on the date postmarked or when transmitted from the place of origin, respectively, if actually received by the developer or escrow agent within fifteen days of the date of the conclusion of the timeshare contract. Thus, a notice which is not actually received within the aforesaid period will not be effective. Furthermore, any written notice of cancellation delivered other than by way of mail will be effective at the time of delivery at the place of business of the developer or the escrow agent designated in the form of notice of cancellation.<sup>60</sup>

Consequently, the NTC/ NARELLO Act provides the timeshare holders with the right of cancellation with regard to the timeshare contracts. As for the exchange contracts, the timeshare holders are not provided with such right. That is to say, the consumers of the exchange services, unlike the consumers of the timeshare services, are not provided with a cooling-off period for reconsideration. This can be attributed to the fact that the main focus of the NTC/ NARELLO Act is the regulation of the sale and purchase of timeshares. The preface of the Act refers to this fact by stating 'This Model law is designed primarily to regulate the sale of timeshared real estate'.

[Does the legislation prohibit payments being collected prior to the end of the cooling-off period with regard to the timeshare and exchange contracts?](#)

The NTC/ NARELLO Act permits the collection of payments during the cooling-off period on the condition that these payments are delivered to an escrow agent pursuant to an escrow

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<sup>60</sup> Section 3-101 of the NTC/ NARELLO Act.

agreement approved by the Agency.<sup>61</sup> These payments shall be released from escrow when one of the following cases occurs.<sup>62</sup>

1. Giving a valid notice of cancellation of the timeshare contract as explained above. In such a case, all payments must be returned to the timeshare holder no later than fifteen days after receiving the notice by the developer or the escrow agent.
2. The close of escrow. In this case, all payments must be delivered to the developer. However, no payments shall be delivered to the developer unless one of the following cases happen:<sup>63</sup>
  - A. The escrow has received written confirmation from the timeshare holder given after the expiration of the cooling-off period evidencing that the timeshare holder did not exercise his cancellation right.
  - B. The expiration of at least sixteen days from the date of the conclusion of the timeshare contract and the escrow agent has not received any cancellation notice given within the five-day cooling-off period and has received a sworn statement from the developer that the developer has not received any cancellation notice given within the five-day cooling-off period.

Accordingly, the NTC/ NARELLO Act does not prohibit the collection of advance payments during the cooling-off period. Nonetheless, it requires the delivery of such payments to an escrow agent.

[Does the legislation prohibit payments being collected prior to the actual sale taking place with regard to the resale contract?](#)

As highlighted in the introduction of this Chapter, the NTC/ NARELLO Act does not regulate the resale contracts. Therefore, there is no Article in the Act which makes provision for this.

[Does the legislation provide for the automatic termination of all the ancillary contracts in the case of the exercise of the right of withdrawal?](#)

There is no Article in the NTC/ NARELLO Act which makes provision for this.

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<sup>61</sup> Section 3-103 of the NTC/ NARELLO Act.

<sup>62</sup> Section 3-104 of the NTC/ NARELLO Act.

<sup>63</sup> Section 3-105 of the NTC/ NARELLO Act.

## Lack of disclosure

Does the legislation require the provision of written; accurate and comprehensive information, on paper or other durable medium, which is easily accessible to the consumer, in understandable language, both at pre-contractual and contractual stage?

Does the legislation stipulate that the pre-contractual information should form an integral part of the contract?

The following answer will cover the two above questions.

Pursuant to Section 3-102, it shall be unlawful for any developer, affiliate or agent to conclude a contract for the disposition of a timeshare without first delivering true copies of timeshare instruments to the timeshare holder. In accordance with Section 10-102, the timeshare instruments must state, contain and incorporated by the following:

1. The name and address of the timeshare project.
2. Sufficient description of the timeshare property.
3. Recorded project map.
4. The plan for the use and possession of the timeshare units by the timeshare holders.
5. Schedule of occupancy periods for each unit in the project.
6. An annual maintenance period for each timeshare unit in the project.
7. The establishment of an owners' association which must employ a management company to perform the daily administration issues and ensure the timeshare project against perils.
8. The method by which the timeshare expenses shall be allocated to each timeshare and by which timeshare expenses and personal charges shall be assessed to and collected from timeshare holders.
9. The method by which voting rights shall be allocated to each timeshare.
10. The method by which the timeshare instruments may be enforced such as the right of the owners' association to enforce the collection of the timeshare expenses and personal charges.
11. The term of the timeshare project.
12. The events and procedures by which the timeshare project shall be terminated before the expiration of its full term and the consequences of such termination.

13. The manner of the disposition of the timeshare project and distribution the proceeds among the timeshare holders.
14. Any other provision necessary to make the timeshare project comply with the requirements of the NTC/ NARELLO Act.

Moreover, Section 2-103 places an obligation on the developer to include a provision in the sale contract (timeshare contract) whereby the purchaser (timeshare holder) will not be bound unless the previously mentioned documents have been delivered to the timeshare holder before the conclusion of the sale contract (timeshare contract).

Furthermore, the NTC/ NARELLO places an obligation on the developer to provide the timeshare holder with accurate information regarding the exchange program in case the developer offer an exchange program in conjunction with the offer of timeshares. The offer must include, in addition to the information stated under the answer of the questions of phase II, the following information:<sup>64</sup>

1. The name and address of the exchange company.
2. A statement that the timeshare holder contract with the exchange company is separate and distinct from the timeshare contract.
3. Whether the participation in the exchange program is voluntary or compulsory.
4. Whether the exchange company has any legal or beneficial interest in the developers company. If yes, the nature of the interest.
5. Whether the participation of the timeshare holder in the exchange program is dependent on the continued affiliation of the timeshare project with the exchange program.
6. The name and address of each timeshare project which is participating in the exchange program.
7. The number of the units in each timeshare project participating in the exchange program that are qualify for participation in the exchange program.
8. The number of the timeshare holders in each timeshare project who are eligible to participate in the exchange program.
9. The fee or range of fees for participation by timeshare holders in the exchange program as well as a statement whether any such fees may be altered by the exchange company and the circumstances under which alterations can be made.

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<sup>64</sup> Section 8-101 (A) of the NTC/ NARELLO Act.

The NTC/ NARELLO Act places the same obligation on the exchange company in the event that it offers the exchange services directly to the timeshare holders.<sup>65</sup>

Consequently, the NTC/ NARELLO Act requires the provision of the timeshare holder with written accurate and comprehensive information both at pre-contractual and contractual stage.

### **Verbal Misrepresentation**

[Does the legislation require for promises to be made in writing / part of the contract?](#)

The NTC/ NARELLO Act stipulates that advertising for the offer or disposition of timeshares must not:

1. Contain any representation regarding the availability of a resale program offered by the developer or its affiliate unless the resale program has been made a part of the offering and submitted to the Agency.<sup>66</sup>
2. Contain an offer to buy which purports to be limited with regard to the quantity or restricted with respect of the time unless the numerical quantity and/ or time applicable to the offer is clearly disclosed.<sup>67</sup>
3. Misrepresent the size, nature, qualities or characteristics of the accommodations or facilities of the timeshare project.<sup>68</sup>
4. Misrepresent the nature or extent of any services attach to the timeshare project.<sup>69</sup>
5. Misrepresent that the service or facility is available for the exclusive use of timeshare holders while it is open for the public.<sup>70</sup>
6. Make any misleading statements concerning the contents of the timeshare permit, timeshare contract, the rights and obligations of the timeshare holder under the timeshare contract or the NTC/ NARELLO Act.<sup>71</sup>
7. Misrepresent the conditions whereby the timeshare holder may participate in an exchange program.<sup>72</sup>

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<sup>65</sup> Section 8-101 (C) of the NTC/ NARELLO Act.

<sup>66</sup> Section 4-104 (1) of the NTC/ NARELLO Act.

<sup>67</sup> Section 4-104 (2) of the NTC/ NARELLO Act.

<sup>68</sup> Section 4-104 (6) of the NTC/ NARELLO Act.

<sup>69</sup> Section 4-104 (7) of the NTC/ NARELLO Act.

<sup>70</sup> Section 4-104 (8) of the NTC/ NARELLO Act.

<sup>71</sup> Section 4-104 (9) of the NTC/ NARELLO Act.

<sup>72</sup> Section 4-104 (10) of the NTC/ NARELLO Act.



8. Describe any uncompleted facility/ building in the timeshare project unless the estimated date of completion is set forth and evidence has been provided to the Agency that the completion and operation of the facility/ building is reasonably guaranteed within time represented in the advertisement.<sup>73</sup>

Moreover, the NTC/ NARELLO Act prevents the developers and salespersons ‘to use any promotional device, including but not limited to sweepstakes, gift, awards, lodging certificates or discounts, with the intent to solicit the deposition of timeshares without disclosing in a clear and unequivocal manner, the purpose of soliciting the disposition of timeshare’.<sup>74</sup> It is worth noting that when a sales agent performs any of the previously-mentioned acts or making any material misrepresentation or any false promises of a character likely to convince the timeshare holder to conclude the contract, the Agency is empowered the to issue an order to temporarily suspend or permanently revoke the licence of the sales agent.<sup>75</sup>

Consequently, the NTC/ NARELLO Act did not require the promises to be part of the contract. However, it prohibited all the types of false misrepresentations and promises.

#### [Does the legislation prohibit the marketing of timeshare as an investment?](#)

Section 1-106 of the NTC/ NARELLO Act prohibits the consideration of the timeshare as an investment by stating ‘an owner shall not be considered to hold an investment contract’.

### *Phase II Questions: Problems associated with ownership*

#### **Alleged Availability and Flexibility**

[Does the legislation require the provision of clear and accurate information concerning the season during which the right of occupancy can be exercised, the duration of the right of occupancy, date on which the timeshare holder can start to exercise the right of occupancy and the restrictions on the consumer’s ability to exercise the right of occupancy, specifically under the floating-weeks’ pattern and points pattern?](#)

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<sup>73</sup> Section 4-104 (11) and (12) of the NTC/ NARELLO Act.

<sup>74</sup> Section 4-105 of the NTC/ NARELLO Act.

<sup>75</sup> Section 7-105 of the NTC/ NARELLO Act.

Pursuant to the NTC/ NARELLO Act, the salespeople and developers are under an obligation to provide the prospective timeshare holders with pre-contractual information which must contain, inter alia, the plan for the occupancy and possession of the timeshare units by the timeshare holders,<sup>76</sup> and a schedule of use periods identifying the use periods and use seasons for each timeshare unit by letter, name, number or any other device or any combination thereof.<sup>77</sup> Furthermore, the Act necessitates that the timeshare instrument must include provisions to identify the time during which each timeshare holder is entitled to exercise his exclusive right of occupancy as explained in sections 7.2.2 and 7.2.3.

[Does the legislation require the provision of clear and accurate information relating to the possibilities, limitations and modes for exchange?](#)

Pursuant to the NTC/ NARELLO Act, when a developer offers a timeshare holder the opportunity to subscribe to any exchange program in conjunction with the sale of timeshares, the developer is under an obligation to provide him with the following information with regard to such an exchange program:<sup>78</sup>

1. A complete and accurate description of the terms and conditions of the timeshare holder's contractual relationship with the exchange company and the procedure by which changes thereto may be made.
2. A complete and accurate description of the procedure to qualify for and effectuate exchanges.
3. A complete and accurate description of all limitations, restrictions, or priorities employed in the operation of exchange program, including, but not limited to, limitations on exchanges based on seasonality, unit size, or levels of occupancy, expressed in boldfaced type, and, in the event that such limitations, restrictions, or priorities are not uniformly applied by the exchange program, a clear description of the manner in which they are applied.

The developer must deliver the above-mentioned information to the timeshare holder prior to conclusion of (1) any contract between the timeshare holder and the exchange company, and (2) the timeshare contract. The timeshare holder has to confirm in writing to the receipt of these information.<sup>79</sup>

Furthermore, when an exchange company offers an exchange program directly to the timeshare holder, the exchange company is obliged to deliver to him, prior to the conclusion

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<sup>76</sup> Section 10-102 (A) (7) of the NTC/ NARELLO Act.

<sup>77</sup> Section 10-102 (A) (8) of the NTC/ NARELLO Act.

<sup>78</sup> Section 8-101 (A) (7), (8) and (9) of the NTC/ NARELLO Act.

<sup>79</sup> Section 8-101 (A) of the NTC/ NARELLO Act.

of the exchange contract, the information set forth above.<sup>80</sup> This is to prevent the developers and exchange companies from overselling the benefits of the exchange service, thereby maintaining the satisfaction of the timeshare holders.

### **Excessive increases in annual service charge**

Does the legislation have provisions to curb or prohibit the increase in annual fees?

Does the legal arrangement provide a solution to the potential for excessive increase in annual fees?

This answer covers the two above questions.

The NTC/ NARELLO Act required that the timeshare instruments must specify the method or formula by which timeshare expenses shall be allocated to each timeshare in the project and by which timeshare expenses and personal charges shall be assessed to and collected from the timeshare holders.<sup>81</sup> Thus, the board of directors is obliged to prepare and adopt, in each fiscal year, an estimate of all expenses to be incurred with regard to the operation and maintenance of the timeshare project for such fiscal year.<sup>82</sup> The budget, for example and not as a limitation, shall include:

1. Funds for a contingency account in such amount as the board of directors determines to be sufficient to provide financial stability in the management of the timeshare project. The funds in the contingency account shall be considered to be savings of the individual timeshare holders held by the board of directors for their benefit to pay timeshare expenses not payable or paid from regular assessments.<sup>83</sup>
2. Funds for capital improvements reserve account in such annual amounts as the board of directors determines to be adequate to provide for specific capital improvements, whether it be the repair, remodelling, restoration, upgrading or replacement of the timeshare units or the common property , or such other improvements as the board of directors decides to be necessary, appropriate or desirable. The funds in the capital improvements reserve account shall be deemed to be savings of the individual

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<sup>80</sup> Section 8-101 (C) of the NTC/ NARELLO Act.

<sup>81</sup> Section 10-102 (A) (14) of the NTC/ NARELLO Act.

<sup>82</sup> Section 11-115 of the NTC/ NARELLO Act.

<sup>83</sup> Section 11-115 (1) of the NTC/ NARELLO Act.

timeshare holders held by the board of directors for their benefit for expenses of capital nature.<sup>84</sup>

The owners' association is the party who is empowered to levy annual assessments against timeshare holders to pay for the timeshare expenses. However, the board of directors is the party who is entitled to decide whether the annual assessments levied against each timeshare holder shall be paid in a lump sum or in instalments.<sup>85</sup> All the timeshare expenses must be assessed against all timeshares in accordance with the allocation of timeshare expense liability stipulated in the timeshare instruments.<sup>86</sup> However, any timeshare expense benefiting fewer than all of timeshare holders in the project must be assessed exclusively to the timeshares of the benefited timeshare holders.<sup>87</sup> Moreover, if the timeshare expense emanates from the act or omission by a timeshare holder or his guest, the amount of such expense must be assessed only to the timeshare of such timeshare holder.<sup>88</sup>

The NTC/ NARELLO Act places an obligation on the developer to pay assessments on all the unsold timeshares. This obligation must be secured by an irrevocable letter-of-credit, assets of the developer acceptable by the Agency, security bond, or any other arrangement satisfactory to the Agency. Any security given by the developer shall be held by the Agency for the benefit of the timeshare holders and shall remain in force until 80% of the project's timeshares are sold to timeshare holders.<sup>89</sup>

According to the NTC/ NARELLO Act, any surplus funds derived from timeshare holders and held by the board of directors after payment of timeshare expenses must be paid to the timeshare holders in proportion to their timeshare expense liability or credited to them in the said proportion to reduce their future timeshare expense assessments.<sup>90</sup>

In accordance with the NTC/ NARELLO Act, all amounts assessed for timeshare expenses or personal charges constitute a lien on the timeshare from the time the assessment becomes due. However, if an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment becomes due. The lien may be foreclosed in a like

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<sup>84</sup> Section 11-115 (2) of the NTC/ NARELLO Act.

<sup>85</sup> Section 11-116 (A) of the NTC/ NARELLO Act.

<sup>86</sup> Section 11-116 (B) of the NTC/ NARELLO Act.

<sup>87</sup> Section 11-116 (C) of the NTC/ NARELLO Act.

<sup>88</sup> Section 11-116 (G) of the NTC/ NARELLO Act.

<sup>89</sup> Section 11-116 (D) of the NTC/ NARELLO Act.

<sup>90</sup> Section 11-116 (F) of the NTC/ NARELLO Act.

manner as a mortgage on real estate.<sup>91</sup> This lien has priority on all other liens and encumbrances on a timeshare except the following:<sup>92</sup>

1. Liens and encumbrances recorded before the date on which the assessment sought to be enforced.
2. Liens for real estate taxes and other governmental assessments or charges against the timeshare.

It is worth pointing out that a lien for unpaid assessment shall be extinguished unless proceeding to enforce the lien are established within three years after full amount of the assessment becomes due.<sup>93</sup>

Accordingly, the NTC/ NARELLO Act provides two solutions to curb the increase in annual fees. First, the Act necessitates that timeshare instruments must include the method of the calculation and distribution of the annual fees. Second, the Act requires the formation of an owners' association. This is vital because it empowers the timeshare holders, as members in the association, to take general control of the management and maintenance of the timeshare project, and thus become wholly responsible for all decision-making in project, specifically concerning budgets and reserve funds. This largely protects the timeshare holders against any potential increase in annual fees because they will not impose on themselves exaggerated annual fees.

### **Declining Resort Standards**

[Does the legislation set out provisions for the establishment of a Government agency or department for rating and inspecting the timeshare resorts to maintain their quality standards?](#)

[Does the legislation impose penalties based on declining resort standards?](#)

This following answer covers the two above questions.

The NTC/ NARELLO Act provides for the establishment of a Government agency for providing the required permission to the developers who desire to exercise the timeshare business as detailed in subsection 7.2.1. Nonetheless, the Act did not empower the agency to take any legal action towards the management company in the case of the deterioration of the

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<sup>91</sup> Section 11-117 (A) of the NTC/ NARELLO Act.

<sup>92</sup> Section 11-117 (B) of the NTC/ NARELLO Act.

<sup>93</sup> Section 11-117 (D) of the NTC/ NARELLO Act.

resort standards. This is because the Act provides for another solution as explained hereunder.

### Does the legal arrangement have a solution to the deterioration of resort standards?

The NTC/ NARELLO Act necessitated the formation of owners' association for exercising general control over the timeshare resort.<sup>94</sup> The Act, also, places an obligation on the members of the association to elect a board of directors, from among themselves, for the purpose of exercising the powers of the owner's association.<sup>95</sup> The owner's association shall employ the management company which is elected by the board of directors. The management company shall work under the supervision of the board of directors.<sup>96</sup> The board of directors are entitled to terminate the management agreement at any time even before its expiration.<sup>97</sup> Moreover, the NTC/ NARELLO Act allows each timeshare holder in the project to ask for the discharge of the management company by way of recall especially when there is a proof that the management company is unresponsive or irresponsible.<sup>98</sup> This is vital to maintain the resort standard for two reasons. First, the management company will be keen to do its job as best as it can to avoid the termination of the timeshare contract. Second, the board of directors or any timeshare holder can respond quickly in the case of the deterioration of the standard of services of the timeshare resort by the alteration of the management company because of the mismanagement.

## Resort Closure and the Security of Timeshare Holders

### Does the legal arrangement provide the timeshare holder with the right to exclusive possession during the period of occupancy?

As stated in sections 7.2.2 and 7.2.3, the NTC/ NARELLO Act necessitates that the timeshare instruments must contain provisions determining the unit and time in which each timeshare holder is entitled to exercise his exclusive right of occupancy. Thus, the time timeshare holder, whether under the time span ownership arrangement or the interval ownership

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<sup>94</sup> Sections 11-101 (A) and 11-102 of the NTC/ NARELLO Act. More detail regarding the role of the owners' association and board of directors can be found under the answer of the collective action questions.

<sup>95</sup> Section 11-103 of the NTC/ NARELLO Act.

<sup>96</sup> Section 11-109 of the NTC/ NARELLO Act.

<sup>97</sup> Section 11-110 of the NTC/ NARELLO Act

<sup>98</sup> Section 11-108 of the NTC/ NARELLO Act. For more detail with regard to this method (recall), Please refer to the answer of the collective action questions.

arrangement, gets an exclusive right to occupy the designated unit during a specified time period each year.<sup>99</sup>

Does the legal arrangement provide the timeshare holder with the occupancy right valid against the inheritors and assigns of the developer?

Does the legal arrangement prohibit the developer from revoking the agreement at will?

Does the legal arrangement provide protection to the timeshare holder against arbitrary forfeiture; re-entry by the developer and the developer's insolvency?

As explained in section 7.2.3, the developer transfers the ownership of the timeshare property to the timeshare holders free from encumbrances. Therefore, the three questions above cannot be applied to each of the time span ownership arrangement and the interval ownership arrangement.

***Phase III Questions: Problems associated with the secondary market and termination by individual timeshare holders***

**Resale and Termination Problems faced by the individual**

Does the legal arrangement allow timeshares to be resold without limits such as applying high resale fees?

Each timeshare holder, under each of the time-span ownership arrangement and interval ownership arrangement, is entitled to resell his timeshare without limits. This is due to the fact that the timeshare holder obtains a document of title to the timeshare property which enables him to rent, sell, gift, devise, or otherwise dispose of his estate in the timeshare property to another person.<sup>100</sup>

Does the legal arrangement have provisions for effectively dealing with clauses such as in perpetuity clauses and estate binding clauses?

Does the legal arrangement allow for the timeshare holder to exit the agreement if their circumstances change?

This answer covers the two above questions. The timeshares in each of the time-span ownership arrangement and interval ownership arrangement are considered to be an asset. Therefore, they are automatically transferred to the heirs of the deceased timeshare holder.

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<sup>99</sup> Kathleen Conroy, 'Assessing the Fee Timeshare Property' (1984) 25 New Zealand Valuer 504.

<sup>100</sup> David A Bowen, 'Timeshare ownership: Regulation and Common Sense' (2006) 18 Loyola Consumer Law Review 465. Conroy (n 99) 503.

However, the heirs are entitled to divest themselves of inherited timeshares by selling or donating them to another person as explained above.

***Phase IV Questions: Collective action problems***

Does the legal arrangement have an owners' association, club or a company?

Does the legal arrangement require for a professional management company to be appointed?

Does the legal arrangement have provisions to arrange a meeting and decision-making process on a 'practical basis'?

The following answer shall cover the three above questions.

As stated in Section 7.2.4, an association of owners must be formed for exercising general control over the timeshare resort. The owners' association may be organised as a non-profit corporation.<sup>101</sup> The owners' association shall exercise the following powers:<sup>102</sup>

1. Institute, defend and intervene in legal proceedings in its own name on behalf of itself or two or more timeshare holders affecting timeshare property or timeshares.
2. Compensate its directors and officers and maintain liability insurance on behalf of its directors and officers.
3. Exercise necessary and proper powers for the management and maintenance of the timeshare project.
4. The employment of a management company selected by the board of directors.
5. Exercise any other powers vested in it by the timeshare instruments.

In addition, the NTC/ NARELLO Act necessitates the election of a board of directors by the timeshare holders from among their peers. This board shall exercise all the powers of the owner's association. Furthermore, the board of directors shall conduct the business and affairs of the association of the owners.<sup>103</sup>

The voting rights allocated to each timeshare holder, including unsold timeshares held by the developer, shall be regulated by the timeshare instruments. However, the vote allocated to each timeshare holder can be determined by the use of one of the following methods:<sup>104</sup>

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<sup>101</sup> Section 11-101 (B) of the NTC/ NARELLO Act.

<sup>102</sup> Sections 11-102 and 11-109 of the NTC/ NARELLO Act.

<sup>103</sup> Section 11-103 of the NTC/ NARELLO Act.

<sup>104</sup> Section 11-104 (A) of the NTC/ NARELLO Act.



1. One vote per timeshare.
2. A single percentage or fractional vote for each timeshare proportionate to the size of its corresponding timeshare unit or type of unit as compared to other timeshare units or types of units in the timeshare project.
3. A single percentage or fractional vote for each timeshare proportionate to the cost of and expenses of operating its corresponding timeshare unit or type of unit as compared to the cost and expenses of operating other timeshare units or types of units in the timeshare project.

The NTC/ NARELLO Act allows the use of mixed methods in the determination of the votes allocated to each timeshare. That is to say, in some matters, the vote allocated to each timeshare can be determined in accordance with one of the above-mentioned methods, as for other matters, by a different method provided above. In addition, the NTC/ NARELLO Act permits the utilisation of the cumulative voting but only for electing the board of directors.<sup>105</sup> Furthermore, the NTC/ NARELLO Act regulates the mechanism of voting regarding co-owned timeshares (i.e., timeshare owned by more than one person). The vote for such timeshare shall be exercised as stipulated in the timeshare instruments. However, the total votes allocated to the co-owners must not be more than the vote allocated to such timeshare.<sup>106</sup>

In accordance with the provisions of the NTC/ NARELLO Act, the daily management of the timeshare project as well as the maintenance of the timeshare property shall be performed by a professional management company. This company shall be selected by the board of directors and employed by the owners' association pursuant to a written management agreement.<sup>107</sup> The management agreement shall place an obligation upon the management company to provide, under the direction and control of the board of directors, all services required to manage the timeshare project and the affairs of the owners' association and maintain the timeshare property.<sup>108</sup> The term of the first management agreement must not exceed three years, whereas the term of the subsequent management agreements must not exceed one year. Nevertheless, a management agreement may provide for automatic annual renewals upon the expiration of each successive term. In such a case, the agreement may be

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<sup>105</sup> Section 11-104 (B) of the NTC/ NARELLO Act.

<sup>106</sup> Section 11-104 (C) of the NTC/ NARELLO Act.

<sup>107</sup> Section 11-109 of the NTC/ NARELLO Act.

<sup>108</sup> Section 11-110 (A) of the NTC/ NARELLO Act.

terminated by giving written notice of termination by the board of directors or the management company at least ninety days before the end of the term. Moreover, the term of the management agreement may be brought to an end prior to its expiration in the following cases:<sup>109</sup>

1. By the board of directors or the management company, for cause, by at least thirty days written notice.
2. By recall as will be explained bellow.
3. By the management company, without cause, by at least ninety days written notice.

In the case of terminating the management agreement prior to its expiration, the term of the agreement shall be extended until the board of directors shall have agreed with another management company to act as the successor management company and the timeshare holders have approved the action of the board of directors.<sup>110</sup> It is worth pointing out that the management company has to retain records concerning the management and maintenance of the timeshare project. These records will be the property of the owners' association.<sup>111</sup>

Accordingly, the NTC/ NARELLO Act provides for the formation of an owners' association, and places an obligation on the members of the association to elect a board of directors from among themselves. Responsibility for the day-to-day details of managing the project are entrusted to a professional management company, but policy decisions are properly reserved to the board of directors. However, in practice, there are two significant obstacles to effective self-government by the timeshare owners. First, each timeshare owner is physically present at the project for only a short time each year. Ordinarily, their principal residences are widely distributed geographically, so that there is no one time each year when all (or even a substantial minority) of the timeshare owners can conveniently meet to transact any business as a group. Second, timeshare purchasers are attracted to timesharing by the vacation feature and therefore very few of them are likely to be willing to assume the burdens that service on the board of directors of an owners' association inevitably entails.<sup>112</sup>

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<sup>109</sup> Section 11-110 (B) (3) of the NTC/ NARELLO Act.

<sup>110</sup> Section 11-110 (C) (4) of the NTC/ NARELLO Act.

<sup>111</sup> Section 11-110 (D) of the NTC/ NARELLO Act.

<sup>112</sup> Stephen G. Johnakin, 'Self-Governance in Timeshare Projects: Mail-Order Democracy' (1984) 19 Real Property and Trust Journal 705.

For ensuring a reasonable degree of self-government in a timeshare project, the NTC/ NARELLO Act resorts to a system known as ‘mail-order democracy’. This system uses three traditional methods for fostering direct democracy: referendum, initiative and recall. These methods are implemented by way of ballots which must be mailed to all timeshare holders. Each ballot must contain a statement that the ballot will not be counted unless signed by a timeshare holder and returned by a specified deadline date to a designated address.<sup>113</sup>

The board of directors is responsible for receiving and counting the votes in a recall, referendum or an initiative.<sup>114</sup> The deadline for returning ballots must be at least 20 but no more than 60 days after the date the ballots are mailed.<sup>115</sup> The board of directors, as it receives the ballots, must keep available for inspection for at least one year after the ballots are counted a certificate of mailing for each ballot and the original or a photocopy of each ballot returned by the deadline.<sup>116</sup>

The NTC/ NARELLO Act requires the management company to keep available, for inspection and copying by any timeshare holder, a current record of the principal residence address of all the timeshare holders.<sup>117</sup> The Act also expressly provides that the rights of the timeshare holders to use a referendum, initiative or recall may not ‘be waived, limited or delegated by contract, power of attorney, proxy or otherwise, in favor of the developer, an affiliate of a developer, a managing agent, or any person designated by any of them’.<sup>118</sup> Furthermore, the Act provides that the board of directors shall take action reasonably calculated to notify all timeshare holders of the resolution of any matters resolved by a referendum, initiative or recall.<sup>119</sup>

### ***Referendum***

Pursuant to the NTC/ NARELLO Act, a referendum is to be used whenever the approval of timeshare holders regarding an action of the board of directors is required by the timeshare instruments, the provisions of this Act,<sup>120</sup> or the board of directors wants to get such

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<sup>113</sup> Section 11-105 (B) (1) and (2) of the NTC/ NARELLO Act.

<sup>114</sup> Sections 11-105 (C), 11-107 (D) and 11-108 (C) of the NTC/ NARELLO Act.

<sup>115</sup> Section 11-105 (B) (2) of the NTC/ NARELLO Act.

<sup>116</sup> Section 11-105 (C) of the NTC/ NARELLO Act.

<sup>117</sup> Section 11-105 (A) of the NTC/ NARELLO Act.

<sup>118</sup> Section 11-105 (H) of the NTC/ NARELLO Act.

<sup>119</sup> Section 11-105 (F) of the NTC/ NARELLO Act.

<sup>120</sup> According to Section 10-103 (B) of the NTC/ NARELLO Act, the amendment of the recorded documents governing the timeshare project such, as declaration, shall not be valid unless approved by timeshare holders through referendum or adopted by initiative.

approval.<sup>121</sup> The ballot will be mailed to each timeshare holder must describe the action of board of directors for which approval is sought.<sup>122</sup> It, also, must state the vote of the board of directors on this action, and if less than unanimous vote, the ballot should list the board members in favour and those opposed.<sup>123</sup> In addition, the ballot must state whether the approval required by the timeshare instruments or this Act.<sup>124</sup> Moreover, the ballot must mention the vote required for approval if that is other than a majority of the voting power of all timeshare holders casting in the referendum.<sup>125</sup> Furthermore, the ballot must provide the opportunity to indicate a preference between approval or disapproval of the action.<sup>126</sup>

It is permitted for the ballot to be accompanied by a letter of not more than 750 words recommending approval of the action from the members of the board of directors supporting such approval. It is, also, permitted that the ballot accompanied by another letter of not more than 750 words recommending disapproval of the action from the members of the board of directors opposing such approval.<sup>127</sup>

The board of directors, within ten days after the date specified for the return of ballots, shall examine the ballots that have been returned and determine the vote. The action of the board of directors that have been submitted for approval by way of referendum shall be approved only when the following requirements are fulfilled:<sup>128</sup>

1. Ballots were cast in the referendum representing at least 10% of the voting power of the owners' association unless the ballot stated a larger majority for approval.
2. Ballots representing at least 50% of the voting power of all owners casting ballots in the referendum support approval unless the ballot stated a larger majority for approval.

It must be noted that if the ballot stated requirements for approval other those mentioned above, such requirements must be fulfilled.<sup>129</sup>

### ***Initiative***

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<sup>121</sup> Section 11-107 (A) of the NTC/ NARELLO Act.

<sup>122</sup> Section 11-107 (B) (1) of the NTC/ NARELLO Act.

<sup>123</sup> Section 11-107 (B) (2) of the NTC/ NARELLO Act.

<sup>124</sup> Section 11-107 (B) (3) of the NTC/ NARELLO Act.

<sup>125</sup> Section 11-107 (B) (4) of the NTC/ NARELLO Act.

<sup>126</sup> Section 11-107 (B) (5) of the NTC/ NARELLO Act.

<sup>127</sup> Section 11-107 (C) (5) of the NTC/ NARELLO Act.

<sup>128</sup> Section 11-107 (D) (1) (2) of the NTC/ NARELLO Act.

<sup>129</sup> Section 11-107 (D) (3) of the NTC/ NARELLO Act.

According to the NTC/ NARELLO Act, initiative is to be used for the amendment of any of the timeshare instruments or take any action which the board of directors could lawfully take as in the case when a significant number of timeshare holders desire a change which the board of directors either dislikes or believes to be contrary to majority opinion.<sup>130</sup> Thus, any timeshare holder in the timeshare project is entitled to deliver to the board of directors a petition containing a proposal to be determined by initiative. The petition should be signed by timeshare holders owning at least 5% of the voting power of the owners' association. The petitioner is entitled to attach to his petition a letter of not more than 750 words to support his proposal. The board of directors, within twenty days after receiving the petition, must mail to each timeshare holder a ballot setting forth the language of the proposal, and affording the opportunity to indicate a preference between approval and disapproval of the proposal. The ballot may also accompanied by a letter of not more than 750 words from the board of directors recommending approval or disapproval of the proposal.<sup>131</sup>

The board of directors, within ten days after the date specified for the return of ballots, must examines the ballots that have been returned and determine the vote. The proposal that have been submitted for determination by way of initiative shall be adopted only when the following requirements are fulfilled:<sup>132</sup>

1. The proposal does not conflict with the provisions of the NTC/ NARELLO Act or any other valid law.
2. Ballots were cast in the initiative representing at least 20% of the voting power of the owners' association and the proposal was supported by at least 15% of the voting power of the owners' association and by at least 50% of the voting power of all timeshare holders casting ballots in the initiative supported the proposal.

It is worth pointing out that any proposal adopted by way of initiative cannot be modified or repealed within three years except by another initiative. Thus, the board of directors cannot modify or repeal the result without the approval of the timeshare holders.<sup>133</sup>

### ***Recall***

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<sup>130</sup> Section 11-106 (A) of the NTC/ NARELLO Act.

<sup>131</sup> Section 11-106 (B) of the NTC/ NARELLO Act.

<sup>132</sup> Section 11-106 (C) of the NTC/ NARELLO Act.

<sup>133</sup> Section 11-106 (D) of the NTC/ NARELLO Act.

The recall, in accordance with the NTC/ NARELLO Act, is to be used by timeshare holders for discharging the management company especially when there is a proof that the management company is unresponsive or irresponsible.<sup>134</sup>

The NTC/ NARELLO Act permits any timeshare holder to deliver to the board of directors a petition containing the language of a proposed ballot affording the opportunity to indicate a preference between retaining and discharging the present management company. Timeshare holders who own at least 5% of the voting power of the owners' association must sign such petition. The petitioner is entitled to enclose to his petition a letter of not more than 750 words to support his proposal of discharging the management company. The petitioner must hand over a copy of the petition and the supporting letter to the board of directors who in turn must deliver a copy of the petition to the management company within five days as of its receipt. The board of directors, not earlier than twenty days nor later than thirty days after receipt of the petition, must mail to each timeshare holder (1) a ballot affording an opportunity to indicate a preference between retaining and discharging of the management company, (2) a copy of the letter enclosed with the petition by the petitioner, (3) a reply from the management company of not more than 750 words, and (4) a letter of not more than 750 words from the board of directors recommending retention or discharge of management company.<sup>135</sup>

The board of directors, within ten days after the date specified for the return of ballots, must examines the ballots that have been returned and determine the vote. The vote shall be determined to be in favour of discharge of the management company only when the following requirements are fulfilled:<sup>136</sup>

1. Ballots were cast representing at least 50% of the voting power of the owners' association.
2. Ballots representing at least 66% of all timeshare holders casting ballots favoured discharge of the management company.

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<sup>134</sup> Section 11-108 (A) of the NTC/ NARELLO Act.

<sup>135</sup> Section 11-108 (B) of the NTC/ NARELLO Act.

<sup>136</sup> Section 11-108 (C) of the NTC/ NARELLO Act.

It is worth mentioning that the discharged management company is not entitled to any penalty or other charges payable by any timeshare holder except to the extent the developer is obligated under the management agreement to pay any such charge or penalty.<sup>137</sup>

Consequently, the NTC/ NARELLO Act provides for the formation of owners' association and the employment of a professional management company for handling the daily operation issues. Furthermore, the Act arranges a meeting and decision-making process on a practical basis by identifying the method by which voting rights shall be allocated to each timeshare and giving the timeshare holders practical way to exercise a high level of control over their own project - referendum, initiative and recall, as detailed above.

## 7.4 CONCLUSION

An optimal timeshare legal regime should regulate the exchange and resale contracts and the timeshare contracts so as to provide consumers with the same level of protection as the timeshare holders. It should also provide consumers with a sufficient level of protection in each phase of the timeshare cycle.

This Chapter concludes that the American model regulates all the aspects of timeshare contracts. However, the model does not regulate some of the aspects of the exchange and resale contracts. For example, the consumers of the exchange services are not supplied with the right of cancellation. Such loopholes must be addressed when enacting the optimal legal regime of timeshare.

In the first phase, the model provides the consumers with a low level of protection. Three examples can be presented here: the model does not prohibit the collection of payments during the cooling-off period; it does not provide for the automatic termination of all the ancillary contracts in the case of the exercise of the right of cancellation and it does not require promises to be made in writing and to be part of the timeshare contract. These defects must be avoid when enacting the optimal timeshare legal regime. However, the model provides for some protective measures which are worthy of being taken forward as optimal features, specifically, providing the consumers with a cooling-off period for reconsideration and placing an obligation on the developers to supply the consumers with comprehensive and accurate information to save them from falling prey to fraudulent transactions.

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<sup>137</sup> Section 11-108 (E) of the NTC/ NARELLO Act.

In the second phase, the model provides the consumers with an advanced level of protection, mainly by: providing the consumers with an exclusive right of occupancy and placing an obligation on the developers to supply the consumers with accurate information on when, where and how the right of occupancy can be exercised. In addition the developer must supply details of the mechanism for calculating and allocating service charges so as to limit any possible dissatisfaction. Moreover, under the American model, the interests of the consumers cannot be forfeited or revoked by the developer, or any other person, because they acquire proprietary estates which are valid against the world at large. Therefore, these features are worthy of taking forward as optimal features. Nonetheless, the model does not include any provision entitling the timeshare Governmental Agency to rate the timeshare resorts and to impose relevant penalties on the management entity in the case of the declining of the resort standards which is a matter which must be considered when enacting the optimal timeshare legal regime.

In the third phase, the model provides the consumers with a low level of flexibility because the consumer cannot exit the timeshare project if his circumstances changed as he acquired proprietary estate in the timeshare property. This lacuna must be filled when drafting the optimal timeshare legal regime. Nevertheless, the model empowers each consumer to resell his timeshare without restrictions. This feature should be taken on board when drafting the optimal legal regime.

In the fourth phase, the American model adopts a feasible mechanism for the management of the timeshare project. The model requires the creation of an owners' association and board of directors to enable the timeshare holders to exercise general control over the timeshare project. In addition, the model vests the daily management issues in professional management company to reduce the chances of the deterioration of the resort's standards. Moreover, the model setting up three methods for fostering self-government in the timeshare project namely referendum, initiative and recall. Furthermore, the model practically regulates the method by which voting rights shall be allocated to each timeshare in each of the owners' association and the board of directors as well as clearly identifies the powers of said management bodies to facilitate the decision-making process in the timeshare projects. Additionally, the model regulates the cases and procedures under which the management agreement can be terminated and the consequences of such termination which vital to maintain the quality standards of the timeshare project. Besides that the model regulates the events and procedures by which the



timeshare project shall be terminated and the consequences of such termination which is crucial to overcome the collective action problems associated with ending the life of the timeshare projects. These features are worthy of taking forward as optimal features.

## OVERARCHING CONCLUSION

Part II of the thesis examined the legal models which are in use in the common law jurisdictions of England and Wales and some of the States in America because a significant proportion of the world's timesharing projects are exercised in those countries. It also examined the legal models which are in use in the civil law jurisdictions of France and Egypt as timeshare projects are also prevalent in those countries. This was also relevant research for this thesis as the Iraqi Civil Code is based upon the civil codes of France and Egypt. The aim behind this examination is to extract the most advantageous features of each timeshare legal regime, which are likely to provide the optimal system of a timeshare operation in any jurisdiction. This is crucial for this thesis as these features will be proposed to the Iraq legislature so as to be included in the legislative reform which is planned to regulate the current and future timeshare projects in Iraq.

The concept of a timeshare cycle will be used to provide the structure of this conclusion and therefore it will be in four sections as follows:

### **Phase I: The initial sale and purchase of timeshare**

The optimal timeshare legislation must place an obligation on developers to provide timeshare holders with written information which is free of charge; accurate and comprehensive; written on paper or other durable medium; which is easily accessible, and written in understandable language. This should be presented both at pre-contractual and contractual stages of the transaction. This is to avoid any form of misrepresentation and to enable the timeshare holders to make an informed decision concerning the purchase of the timeshare.

A reasonable period must set out between the delivery of the pre-contractual information document and the conclusion of the timeshare contract in order to provide the prospective timeshare holders with enough time to consider their rights and obligations before the conclusion of the contract. It must be clearly stipulated that the pre-contractual information is an integral part of the timeshare contract so as to ensure compliance by developers to provide correct and accurate information to the prospective timeshare holders. Each timeshare holder must be provided with a copy or copies of the timeshare contract at the time of its conclusion

in order to enable them to reconsider the terms and conditions of the timeshare contract and to seek advice during the cooling-off period.

The optimal timeshare legislation must also provide the timeshare holders with a reasonable cooling-off period, during which they can change their mind and withdraw from the timeshare contract without any charges or justification, so as to curb the hard sale techniques which are systematically adopted by unscrupulous developers and salespeople. The length of the cooling-off period and the ban of the collection of advance payments during the cooling-off period must be stated in each of the per-contractual and contractual documents in an obvious manner. At the time of contracting, each timeshare holder must be supplied with a withdrawal form to facilitate the exercise of the right of withdrawal. The collection of advance payments from the timeshare holders must be prohibited before the expiry of the cooling-off period to guarantee the purchaser's right of withdrawal without pressure and to avoid practical problems associated with reimbursement of advance payments. All ancillary contracts must be terminated automatically in the case of the exercise of the right of withdrawal so as to ease the exercise of this right.

Moreover, the optimal timeshare legislation must also stipulate that all promises provided by the developers and salespeople are made in writing and form an integral part of the contract. Legislation should also prohibit the marketing of timeshare as an investment for return. This is to restrict unscrupulous developers and salespeople from making false *verbal* promises to the potential timeshare holders so as to lure them to conclude the contract.

## **Phase II: Ownership of timeshare**

The optimal timeshare legislation must place an obligation on the developers to supply the timeshare holders with accurate and comprehensive information on when, where and how the right of occupancy can be exercised. This is vital to limit any possible dissatisfaction by timeshare holders with regard to the flexibility in certain types of the timeshare products and services, namely: the floating-weeks' pattern, points' pattern and exchange service.

The legislation must also place an obligation on the developers to supply the timeshare holders with accurate and complete information on all charges associated with the timeshare contract. The developer should set out the mechanism used to calculate service charges and provide details on how the charges will be allocated, as well as how and when such charges may be increased. The cost of any annual service charges associated with unsold timeshares

must be met by the developer, and not the timeshare holders. Besides that, a written summary of the incurred charges must be provided to the timeshare holders by the developer. The summary must be certified by a qualified accountant as a fair summary and sufficiently supported by accounts, receipts and other relevant documents produced to the accountant. Consequently, each timeshare holder in the project must be entitled to (1) access and inspect the accounts, receipts and any other documents relevant to the service charge information in the summary, and to be provided with the appropriate facilities for the purpose of making copies of such documents, and (2) to challenge the service charges before the appropriate court if they believe that their share of the charges is greater than what it should be in accordance with the related rules of the timeshare legislation and the terms of the timeshare contract. All of that is vital to prevent, or at least curb, the over-estimation of the service charges whether by the developer or their management company.

Moreover, the optimal timeshare legislation must provide for the establishment of a Government agency for rating and inspecting the timeshare resorts. This agency must be empowered to impose penalties on the management entity in the case of deterioration in resort standards because of mismanagement. The management entity must be under three main obligations. First, to deliver each timeshare holder in the project the accommodation in accordance with the specifications mentioned in the timeshare contract and the rating system of timeshare resorts adopted by the said Government agency. Second, to manage and repair the accommodations, common areas and facilities of the timeshare resort in order to maintain their quality standards. Third, to provide the timeshare holders with the basic hotel services during their periods of occupancy in accordance with the rating system of timeshare resorts adopted by the said Government agency. Each timeshare holder in the project must be empowered to ask for the discharge of the management entity when there is evidence that the management entity is unresponsive or irresponsible. All of that is crucial to maintain the quality standards of the timeshare resorts.

Furthermore, the optimal timeshare legislation must adopt one legal arrangement to regulate the timeshare projects in a country so as to ensure that all the timeshare holders in the country will enjoy the same rights and be subject to the same obligations regardless of which project they decide to join. This legal arrangement should include the following features (1) it should provide the timeshare holders with the right of exclusive possession over the accommodation during the period of occupancy, (2) it should provide the timeshare holders with a

considerable degree of security against arbitrary forfeiture or repossession exercised by the developer, or any person claiming through or for the benefit of him such as the liquidator in the case of the developer's insolvency and (3) prevent the developers being able to revoke the timeshare agreement by his single will. This is crucial to ensure the exercise of the occupancy right for the full period of the timeshare agreement to maintain stability and continuity of the timeshare project and hence ensure a dynamic life for the timeshare project.

### **Phase III: Secondary market and termination of timeshare by individual timeshare holders**

The optimal timeshare legislation must also include terms to empower the timeshare holders to resell their occupancy rights without limitations. In addition, it must prohibit the inclusion of clauses in timeshare contracts under which timeshare holders are locked into the timeshare project, such as the perpetuity and estate-binding clauses. Furthermore, it must include terms to empower the timeshare holders and their inheritors to exit long-term timeshare contracts when they can no longer use their occupancy rights or keep it because of the change in their circumstances. This is very important to ensure ease of resale and termination of the timeshare products in order to establish an active second-hand market.

### **Phase IV: Collective action**

Under the fee ownership arrangements and quasi-ownership arrangements, the optimal timeshare legislation must adopt a feasible mechanism for the management of the timeshare projects. This can be achieved by (1) the formation of an association which includes all the timeshare holders in the project for the purpose of enabling them to participate in making the decisions which impact upon their interests, (2) the employment of a professional management company to carry out the daily management issues, (3) and the employment of a chartered accountant for auditing the project accounts. Moreover, the legislation must adopt a feasible mechanism for the decision-making. For example, the allocation of voting rights to each timeshare holder, and allowing for the timeshare holders to appoint a proxy and/or vote by correspondence. Ultimately, the optimal timeshare legislation must include provisions regulating, in detail, the events and procedures by which the timeshare project shall be terminated and the consequences of such termination.

Now the thesis will turn to make a legislative proposal for Iraq in respect of timeshare in the light of the above-mentioned optimal features which have been extracted from the countries analysed in Part II.

## **PART III**

### **The Discrete Analysis in Respect of Iraq: Leading to a Legislative Proposal**

This Part is allocated to examine the compatibility of the extracted optimal features with the Iraqi law in order to make a legislative proposal for Iraq in respect of timeshare.

## CHAPTER EIGHT

### THE COMPATIBILITY OF THE OPTIMAL FEATURES WITH THE IRAQI LEGAL SYSTEM

This Chapter is allocated to answer the sub question ‘Are the optimal features compatible with the Iraqi legal system?’ Thus, this Chapter will go through each feature suggested within the four phases, as summarised at the end of Part II, and examine their compatibility with the Iraqi Civil Code No. 40 of 1951. Consequently, the concept of a timeshare cycle will be used to provide the structure of this Chapter.

#### **Phase I: The initial sale and purchase of timeshare**

This Section is aimed at considering the extent of compatibility between the general contractual principles according to the Iraqi Civil Code No. 40 of 1951 on the one hand, and the optimal features extracted at the first phase of the timeshare cycle (the initial sale and purchase of timeshare) as explained in the overarching conclusion on the other hand, as follows:

##### *Written information to avoid misrepresentation*

The optimal timeshare legislation must place an obligation on developers to provide timeshare holders with written information which is free of charge; accurate and comprehensive; written on paper or other durable medium; which is easily accessible, and written in understandable language. This should be presented both at the pre-contractual and contractual stages of the transaction. This is to avoid any form of misrepresentation and to enable the timeshare holders to make an informed decision concerning the purchase of the timeshare.

Starting with the pre-contractual stage, the Iraqi Civil Code is free of any provision placing an obligation on the ‘obligor’<sup>1</sup> (the developer in the case of the timeshare transaction) to provide the ‘obligee’<sup>2</sup> (the timeshare holder in the case of the timeshare transaction) with pre-contractual information. As for the contractual stage, the Iraqi Civil Code places an

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<sup>1</sup> The obligor means 'a person who owes or undertakes an obligation to another by contract or other legal procedure'.

<sup>2</sup> The obligee means 'a person to whom an obligation is owed under a contract or other legal procedure'.



obligation on the ‘obligor’ to provide the ‘obligee’ with sufficient information concerning the object of the obligation by describing it adequately in order to avoid ignorance and ambiguity.<sup>3</sup> Article 128 of the Iraqi Civil Code provides for that by stating:

(1) The object of the obligation must be designated in a manner which negates excessive ignorance regardless of whether the designation was by pointing out the object or its specific place if it is present (available) at the time of the contract or by stating its distinctive features and quantity if it is quantitative or in such other way which negates such excessive ignorance; mentioning the kind rather than the quantity and the description will not be adequate.

(2) It would however be adequate if the object is known to the contracting parties where the need does not arise for describing and identifying it in another manner.

(3) Where the object has not been designated in the aforementioned manner, the contract is null and void.

Consequently, if the object of the obligation is to do work or abstain from doing work, the object must be designated in a manner which negates excessive ignorance. For example, when a contractor undertakes to build a hospital, the specifications of the hospital must be stated thoroughly and adequately in the contract. However, if the object of the obligation is the transfer of a right *in rem*, we must differentiate between fungible and non-fungible things. If the object of the obligation is a *non-fungible* thing, it must be designated in an adequate way that distinguishes it from the other things. For example, if the object of the obligation is a plot of land, its location, borders and area must be clearly set in the contract. As for *fungible* things, they must be designated by stating its type and quantity, as is the case when selling fifty tons of Iraqi wheat. The Iraqi Civil Code applies this principle when regulating the nominate contracts.<sup>4</sup> For example, Article 514 (1) of the Iraqi Civil Code deals with a contract of sale stipulates that 'the object of the sale must be designated in a manner which negates excessive ignorance (indefiniteness)'. Hence, this feature would be compatible with the Iraqi Civil Code, and therefore any timeshare legislation which is proposed for Iraq must include provisions under which state that the developer is obliged to provide the timeshare holders with complete and accurate information about the timeshare transaction.

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<sup>3</sup> According to Article 126 of the Iraqi Civil Code every obligation which has resulted from the contract must have an object attached to it which is susceptible of its legal consequence; the object may be property be it an object of material value, a debt, a benefit, or any other pecuniary right; it may also be work (to be done) or abstention from doing work.

<sup>4</sup> A nominate contract is a standardised contractual relationship which has a special name attached to it whereby the promisor and promisee have rights and obligations specially prescribed by the Iraqi Civil Code such as purchase and sale, lease, and insurance. By contrast, innominate contracts whose content and form are not regulated by the Iraqi Civil Code.

### *Cooling off period and right of withdrawal*

The optimal timeshare legislation must also provide the timeshare holders with a reasonable cooling-off period, during which they can change their mind and withdraw from the timeshare contract without any charges or justification, so as to curb the hard sale techniques which are systematically adopted by unscrupulous developers and salespeople.

The right to withdraw from the time-sharing contract may appear close to some of the options stipulated in the Iraqi Civil Code, namely: 'option of viewing' and 'option of condition'. However, comparing these provisions with the right of withdrawal shows us some key differences:

#### **The withdrawal right and option of viewing**

The option of viewing is defined as an authority granted by the law only to the buyer who has not seen the sold thing at the time of the conclusion of the sale's contract or before this time. This authority entitles the buyer when he sees the sold thing to revoke the contract or to accept it.<sup>5</sup> This option is provided for in Article 517 (1) of the Iraqi Civil Code which reads as: ' He who has purchased a thing which he did not see will have discretion either to accept it or to revoke (rescind) the (contract of) sale when he sees it ...'. The seeing (viewing) is meant to be 'learning (comprehending) the attributes and characteristics of the thing by looking at, touching, smelling, hearing, or tasting the thing'.<sup>6</sup>

Some scholars tried to equalize between the right of withdrawal and the option of viewing on the basis of two arguments.<sup>7</sup> First, the similarity of the purpose in each of the withdrawal right and the option of viewing as both of them are designed to ensure that the consent of the purchaser is free of defects. Second, the purchaser, in each of the withdrawal right and the option of viewing, is entitled to rescind the contract without (1) any charges, (2) justification and (3) obtaining the approval of the other party in the contract. However, this viewpoint can be challenged on three grounds when considering timeshare. First, the purchaser will be granted the option of viewing only when the object of the sale's contract is a *non-fungible thing*<sup>8</sup> which is not the case under the timeshare contract because the object of the contract here is providing a *service* represented by enabling the timeshare holder from occupying an

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<sup>5</sup> Saadoun Al Ameri, the explanation of the nominated contracts part 1 (3<sup>rd</sup> edn, Al-Ani Press Bagdad 1974) 38.

<sup>6</sup> Article 517(2) of the Iraqi Civil Code.

<sup>7</sup> Abdel Fattah Bayoumi Hijazi, *The Protection of Consumer over the Internet* (1st ed, Dar Al Fikr Printing and publishing House, 2006) 42.

<sup>8</sup> Jafar Al Fadhli, *Nominated Contracts* (The House of Books for Printing and Publishing, 1989) 34.

accommodation in the timeshare project and enjoying its recreational facilities. Second, the viewing option lapses by describing the thing in the contract in such manner which replaces viewing and when found to conform to said description,<sup>9</sup> while the withdrawal right does not lapse when the timeshare is fully described in the contract and then found to be in conformity with its description provided in the contract. Third, the Iraqi legislature does not determine a specific period to facilitate the viewing option because this period is left to be determined by the judge in accordance with the circumstances of each case,<sup>10</sup> whereas the withdrawal period is usually determined by the timeshare legislation as we saw in detail when analysing the timeshare legislation of the countries under consideration.

### **The withdrawal right and option of condition**

The option of condition is meant to be that one or both of the contracting parties put a condition in the contract under which he (one of the contracting parties), they (both of the contracting parties) or a third party have the option of revoking the contract or accepting it within a certain period agreed upon by the contracting parties in the contract.<sup>11</sup> This option is provided for in Article 509 of the Iraqi Civil Code:

A sale which is conditional upon an option to be exercised within a specified period of time is valid; this condition does prevent the transference of title to the purchaser regardless of whether the option is exercisable by the vendor or the purchaser or by both of them or by a third party.

When the option of condition was for both contracting parties, the contract will be rescinded if either of them has rescinded it during the time limit fixed for exercising the option. However, if either party has accepted the contract his option lapses (is extinguished) and the option of the other party remains valid to the expiration of the time limited fixed.<sup>12</sup> If the time limit for exercising the option has expired, the contract shall be binding if the person who has the option failed to rescind the contract.<sup>13</sup> It is worth pointing out that the condition of exercising an option is not hereditary. That is to say, if the person having the option has died his option is extinguished.<sup>14</sup>

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<sup>9</sup> Article 523 (1) of the Iraqi Civil Code No. 40 of 1951.

<sup>10</sup> Article 523 (1) of the Iraqi Civil Code No. 40 of 1951.

<sup>11</sup> Mahmoud Jamal al-Din Zaki, *The contract of Sale* (Kuwait University Press, 1975) 35.

<sup>12</sup> Article 510 Of the Iraqi Civil Code No. 40 of the 1951.

<sup>13</sup> Article 511 Of the Iraqi Civil Code No. 40 of the 1951.

<sup>14</sup> Article 512 Of the Iraqi Civil Code No. 40 of the 1951.

Some scholars tried to argue that the right of withdrawal and the option of condition are coextensive, on the basis that they both provide the consumer with protection at the contractual stage by giving the consumer an opportunity to reconsider the concluded transaction. Thus, if the consumer found that the transaction was favorable to him then he would accept the contract, but if he found it to be unfavorable then they would rescind the contract.<sup>15</sup>

However, this point of view cannot be accepted for two reasons when applying this argument to timeshare. First, under the timeshare legislation, the right of withdrawal is granted only to one of the contracting parties, namely the timeshare holder, while under the option of condition, the right to rescind the contract can be granted to both of the contracting parties as detailed above. Second, the withdrawal right shall be granted to the timeshare holder without the need to stipulate this in the timeshare contract, as detailed in Chapter Three. In contrast, the source of the option of condition is the agreement of the contracting parties. In other words, the option of revoking the contract shall be granted to one or both of the contracting parties only when there is a clause fixed in the contract providing for that.

Accordingly, this feature would be compatible with the Iraqi Civil Code as similar ideas currently exist in the Code as explained above. Therefore any timeshare legislation which is proposed for Iraq must include specific provisions under which the timeshare holder is entitled to withdraw from the timeshare contract without any charges or justification.

#### *Prohibition of advance payments*

The optimal timeshare legislation must prohibit the collection of advance payments from the timeshare holders before the expiry of the cooling-off period to guarantee the purchaser's right of withdrawal without pressure and to avoid practical problems associated with reimbursement of advance payments.

Timeshare contracts would currently be governed by the general provisions of contract provided for in the Iraqi Civil Code. Article 92(1) of the Iraqi Civil Code permits the contracting parties to agree on the payment of the '*earnest money*' (deposit) at the time of the conclusion of the contract. The Article considers that the payment of *earnest money* is an indication that the contract has become final and may not be repudiated unless otherwise

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<sup>15</sup> Omar Mohamed Abdel Baqi, *The Contractual Protection for Consumers* (Al-Maarif House for Printing and Publishing 2004) 799.

prescribed by the contract. According to the second Paragraph of Article 92, where both parties have agreed that the *earnest money* is a penalty for repudiation of contract. The payer who repudiates will forfeit the *earnest money*, and the receiver who repudiates will pay double the amount of the *earnest money* to the payer, even though there is no harm resulted from such repudiation.

Consequently, there is nothing in the Iraqi law to prohibit the collection of an advance payment with regard to timeshare contracts. Furthermore, if this has been stipulated in the timeshare contract, the provisions of above-mentioned Article 92 must be taken into consideration. Therefore, in order to be compatible, any timeshare legislation which is proposed for Iraq must include provisions to prohibit the collection of advance payments from the timeshare holders before the expiry of the cooling-off period.

#### *Automatic termination of ancillary contracts*

This matter is not regulated by the Iraqi Civil Code. Therefore, any timeshare legislation which is proposed for Iraq must include provisions under which state that all ancillary contracts must be terminated automatically in the case of the exercise of the right of withdrawal.

#### *Promises to form part of the contract*

The Iraqi Civil Code does not regulate this matter. Therefore, any timeshare legislation which is proposed for Iraq must include provisions under which all promises provided by the developers and salespeople must be made in writing and form an integral part of the contract.

## **Phase II: Ownership of timeshare**

This Section is allocated to consider to what extent the optimal features which have been extracted at the second phase of the timeshare cycle (ownership of timeshare) are compatible with the general contractual principles according to the Iraqi Civil Code No. 40 of 1951.

#### *Supply information regarding pattern / exchange*

The optimal timeshare legislation must place an obligation on developers to supply timeshare holders with accurate and comprehensive information on when, where and how the right of occupancy can be exercised. All the analysis which has been highlighted under Phase I concerning the provision of written information on the object of the obligation can also be

seen here. Hence, this feature would be compatible with the Iraqi Civil Code, therefore, any timeshare legislation which is proposed for Iraq must include provisions whereby the developer is obliged to provide the timeshare holders with complete and accurate information on when, where and how the right of occupancy can be exercised. This is vital to limit any possible dissatisfaction by timeshare holders regarding the flexibility in certain types of the timeshare products and services, namely: the floating-weeks' pattern, points' pattern and exchange service.

#### *Information regarding charges*

If money is the object of the contract, the amount must be clearly stated in the contract, as is the case when designating any other object of contract. Article 128 (1) of the Iraqi Civil Code states: 'The object of the obligation must be designated in a manner which negates excessive ignorance ... by stating its distinctive features and quantity if it is quantitative ...'. The Iraqi Civil Code applies this rule when regulating the nominate contracts. For example Article 526 (2) of the Iraqi Civil Code, which deals with contracts of sale and purchase, sets out: 'the price must be definite in that it must be designated in such manner negates excessive ignorance (indefiniteness)'. As a consequence, this feature would be compatible with the Iraqi Civil Code, and therefore any timeshare legislation which is proposed for Iraq must include provisions by which the developer is obliged to provide the timeshare holders with complete and accurate information on all charges associated with the timeshare contract.

#### *Rating / inspection*

The optimal timeshare legislation must provide for the establishment of a Government agency for rating and inspecting the timeshare resorts. This agency must be empowered to impose penalties on the management company in the case of deterioration in resort standards because of mismanagement.

Starting with the inspection, in Iraq, the Tourism Authority, which is one of the departments of the Ministry of Tourism and Antiquities, is responsible for inspecting and rating the tourist facilities throughout Iraq. This is provided for in Article 3(4) of the Act of the Tourism Authority No.14 of 1996 which reads as

The Authority, to achieve its objectives, shall do the following:

4. Monitoring and inspecting the tourist facilities and take legal action against their owners and managers in the event that they committing an act which is contrary to the valid laws.

Pursuant to Article 10 (I) (D) of the Act No. 14 of 1996, the Tourism Authority consists of many departments, one of them is the Inspection and Follow-up Department. This Department, through its affiliated inspection teams, is responsible for inspecting the tourist facilities on a periodic basis so as to ensure that the specifications to be met in the tourist facility still exist,<sup>16</sup> and the tourist facility is still capable to provide its beneficiaries with the required level of services.<sup>17</sup> Therefore, in each tourist facility, there must be a record in which the inspection team records its observations and violations that must be remedied and the time needed to so. If the specifications are not fulfilled and the violations are not dealt with within the time limit granted by the inspection team, a penalty shall be imposed on the tourist facility, its owner or its manager.<sup>18</sup> According to Article 17 of the Act No. 14 of 1996, the Tourist Authority is empowered to impose the following penalties:

1. Fine: a fine of not less than 25,000 dinars and not more than 500,000 dinars with forcing the owner or the manager of the tourist facility to remove the infraction within a period determined by the inspection team.
2. Closure of the tourist facility: the tourist facility may be closed for a period of not more than 30 days, and in the event of the continuation of the infraction after the end of the said period, the closure will be extended for another 30 days. This penalty shall be imposed if the owner or the manager of the tourist facility fails to remove the infraction despite the fact that the tourist facility has been subject to a penalty of fine as detailed in paragraph 1 above.
3. Cancellation of the license: If the owner of the tourist facility or its manager fails to remove the infraction during the period referred to in paragraph 2 above, the tourist facility's license shall be cancelled permanently.

The owner of the tourist facility or its manager are entitled to challenge the decision of closing the tourist facility or cancelling its license before the Appeals Committee formed by the Ministry of Tourism and Antiquities.<sup>19</sup> The decision of the Appeals Committee shall be final.<sup>20</sup> The report submitted by the inspection team which carried out the on-site inspection is a sufficient evidence to prosecute unless otherwise is proved.<sup>21</sup> It is worth pointing out that

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<sup>16</sup> Article 13 of the Tourism Authority Law No. 14 of 1996.

<sup>17</sup> Article 14 of the Tourism Authority Law No. 14 of 1996.

<sup>18</sup> Article 15 of the Tourism Authority Law No. 14 of 1996.

<sup>19</sup> Article 18 (1) of the Tourism Authority Law No. 14 of 1996.

<sup>20</sup> Article 18 (2) of the Tourism Authority Law No. 14 of 1996.

<sup>21</sup> Article 18 (3) of the Tourism Authority Law No. 14 of 1996.

the closure of the tourist facility in accordance with the provisions of the Act No.14 of 1996 shall not prejudice the legal obligations incurred by the owner of the facility in relation to each of his employees and the beneficiaries of the facility as stipulated in laws, regulations and instructions.<sup>22</sup>

Since the timeshare resorts are considered as a tourist facility, the above mentioned provisions shall apply to them in the case of deterioration in resort standards. Accordingly, this feature would be compatible with the Act of the Tourism Authority No.14 of 1996, and therefore any timeshare legislation which is proposed for Iraq must include provisions referring to and consistent with this Act.

Turning to the rating, the Regulations of the Classification of Tourist Facilities No.35 of 1968 set out, in a detailed manner, the basis on which the tourist facilities are classified into the third, second, first and excellent classes. Consequently, this feature would be compatible with the aforesaid Regulations. Therefore, any timeshare legislation which is proposed for Iraq must include provisions referring to and consistent with these Regulation due to the fact that the timeshare resorts are considered as tourist facilities and these regulations will be applied to them.

### *One legal arrangement per country to deal with ownership problems*

#### **One legal arrangement**

The optimal timeshare legislation must adopt one legal arrangement to regulate the timeshare projects in any country so as to ensure that all the timeshare holders in the country will enjoy the same rights and be subject to the same obligations regardless of which project they decide to join. This particular feature would be compatible with the approach of the Iraqi legal system in regulating the legal relationships between individuals. This approach rests on an important principle: the application of the same legal provisions on each group of individuals who are exercising the same legal activity so as to maintain the stability of transactions in society through providing the individuals with same rights and subject them to the same obligations. Two example can be presented here. First, all persons who are engaged in sale and purchase transactions are subject to the same legal provisions governing the sale contracts stipulated in articles 506-596 of the Iraqi Civil Code No. 40 of 1951. Second, all

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<sup>22</sup> Article 19 of the Tourism Authority Law No. 14 of 1996.



persons who are intended to set up a company will be governed by the same set of legal provisions provided for in the Iraqi Company Act No. 21 of 1997.

Accordingly, any timeshare legislation which is proposed for Iraq must use one legal approach to regulate all the timeshare projects in Iraq, unlike the countries under discussion as several legal approaches are used to regulate the timeshare projects there. The use of one legal approach is better as this will lead to several positive outcomes. Most notably, it provides the timeshare holders and developers with an accurate understanding of the concept of timesharing, it provides the timeshare holders with an adequate knowledge about the nature of their interests in the timeshare project, and it ensures that all the timeshare holders in Iraq will enjoy the same rights and be subject to the same obligations regardless of which project they decide to join. These positive outcomes will lead to protect the interests of both developers and timeshare holders and this will encourage them to participate in the timeshare projects which in turn will lead to increase the chances of the flourish of the industry of timesharing in Iraq.

#### **Exclusive possession during the period of occupancy**

The legal arrangement should provide the timeshare holders with the right of exclusive possession over the accommodation during the period of occupancy. This particular feature would be compatible with the Iraqi Civil Code as one of the characteristics of the original rights *in rem* under the Iraqi Civil Code is that they provide the right holder with exclusive possession during the period of the enjoyment of the right. For example, the usufructuary is exclusively entitled to use and possess the property which is the subject matter of the usufruct during the period of the enjoyment of the usufruct right. This provided for in Article 1252 of the Iraqi Civil Code by saying 'the usufructuary may use the thing the subject matter of the usufruct and its accessories, he may acquire the fruits thereof during the period of enjoyment and the products of chattel belong to it...'. Consequently, any timeshare legislation which is proposed for Iraq must provide the timeshare holders with the right of exclusive possession over the accommodation during the period of occupancy.

#### **Protecting to the timeshare holder against arbitrary forfeiture and re-entry**

The legal arrangement should also provide the timeshare holders with a considerable degree of security against arbitrary forfeiture or repossession exercised by the developer, or any

person claiming through or for the benefit of him such as the liquidator in the case of the developer's insolvency.

In Iraq, the bilateral contract is a reciprocal arrangement between two parties under which both parties promise to perform an act in exchange for the other party's act. Each is an obligor on its own promise, and an obligee on the other party's promise. Therefore, if one of the contracting parties does not fulfill his promises, the other contracting party, if no specific performance is required, may request the dissolution of the contract. This is stipulated in Article 177 (1) of the Iraqi Civil Code Which reads as:

In bilateral contracts, if one of the parties thereto does not fulfill his obligation the other contracting party, after notifying the obligor, may claim rescission of the contract without prejudice to his right to compensation if necessary. The court may grant the obligor a term for implementation, if necessary. The court may also refuse rescission of the contract if what has not been performed by the obligor is trivial compared to the total obligation.

Hence, when applying this Article to timeshare because it is a bilateral contracts, the developer is entitled to ask the competent court to rescind the contract when the timeshare holder refrains from the implementation of his contractual obligations, as when the timeshare holder abstains from the payment of his share of the annual costs; or uses the accommodation illegally, such as prostitution; or use the accommodation in a way non-conforming with its nature, such as a clinic or a commercial office. The judge may grant the timeshare holder a term for implementing his obligation; he may also rescind the contract subject to the rights of third parties. Consequently, the timeshare holder is protected against arbitrary forfeiture and re-entry under the current provisions of the Iraqi Civil Code. Therefore, this particular feature is compatible with the Iraqi Civil Code.

### **Prohibiting the developer from revoking the agreement at will**

Moreover, the legal arrangement should not entitle the developer to revoke the timeshare agreement by his own single will. Pursuant to Article 146/1 of the Iraqi Civil Code, 'A contract is the law of the contracting parties. It shall never be revoked or amended except by sheer consent of both parties or for reasons to be provided by law'. Consequently, the developer cannot revoke the timeshare contract at will. Thus, this particular feature is compatible with the Iraqi Civil Code No.40 of 1951.

### Phase III: Secondary market and termination of timeshare by individual timeshare holders

This Section is allocated to consider the extent of compatibility between the general contractual principles according to the Iraqi Civil Code No. 40 of 1951 on the one hand, and the optimal features extracted at the third phase of the timeshare cycle (secondary market and termination of timeshare by individual timeshare holders).

Below a glance of clauses coupled with contracts is given as this is vital in testing the compatibility of the optimal features in this Phase.

In Iraq, clauses associated with contracts are divided into three types:

1. Valid (legitimate) clause: this means a clause which must be fulfilled by the contracting parties if they are included in the contract. The valid clauses are grouped into three categories. First, clauses that confirm the purpose of the contract as is the case when the seller agrees with the buyer on paying the price of the sold thing instantly (at the time of the conclusion of the contract). Second, clauses which are compatible with the object of the contract as is the case when the seller agrees with the buyer on the payment of the price at some specified time in the future provided that buyer provides the seller with a security. This clause is compatible with the object of the contract because it assures the payment of the price. Third, clauses which are consistent with custom as when a person enters into an agreement with a tailor whereby the tailor is obliged to sew a suit on condition that he (the tailor) bear the cost of putting the lining, threads and buttons to the suit.
2. Rotten clauses: They are the clauses which are legally prohibited or prejudicial to the public order and morals provided that they are *not* the motive for the contracting. If this type of clause is inserted in a contract, the clause will be void, but the contract will be valid. For example, if someone enters into a 'gift contract'<sup>23</sup> with someone else under which the grantor is obliged to give the grantee an amount of money on the condition that the grantee uses a portion of the money to buy slaves, or that part of the

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<sup>23</sup>Article 601(1) of the Iraqi Civil Code defines the Gift as the transfer of the ownership of a property to another person without any consideration. However, the grantor, without divesting himself of the will to donate, may impose on the grantee to perform a specific obligation, as for example when the grantor stipulating that the grantee must pay his debt the amount of which is known then the gift is binding (Article 611 of the Iraqi Civil Code No. 40 of 1951).

amount is to be spent in gambling. In this case the gift contract is valid and the clause is void because it is contrary to the public order in the first example, and the morals in the second example.

3. Revoking clauses: they are meant to be the clauses which are legally prohibited or prejudicial to the public order and morals provided that they are the motive for concluding the contract, such as when someone gives a woman a sum of money on condition that she has sex with him illegally (out of wedlock). It is worth pointing out that such type of clauses will invalidate the contract if they are inserted in the contract.

All of that is stipulated in Article 131 of the Iraqi Civil Code which reads as:

1. The contract may be linked (coupled) with a stipulation which confirms or is compatible with its object or is in consonance with custom and usage.
2. The contract may also be linked (coupled) with a stipulation which is beneficial to either contracting party or to a third party provided it is not legally prohibited or prejudicial to the public order and morals as otherwise the stipulation will be revoked and the contract will be valid save where the stipulation was the motive for the contracting in which case the contract will also be void.

#### *Resale occupancy rights without limitations*

The optimal timeshare legislation must prohibit the restraint on an alienation clause (a clause usually included by developers in timeshare contracts under which the timeshare holders are unable to dispose of their occupancy rights freely either for the life of the timeshare project or for an extremely long period of time).

In Iraq, this matter is governed by contractual principles with regard to clauses coupled with contracts as set out in detail above. According to these principles, any clause that is not prohibited by law and is not contrary to public order and morals is valid and must be fulfilled. Consequently, such a restraint on the freedom to transfer occupancy rights is generally lawful (valid) if it is based on legitimate motive and confined to a reasonable term. The motive shall be legitimate once the intent of restraining the disposal of the occupancy rights is to protect a legitimate interest of the person who disposes, the one disposed to, or third parties. The

determination of whether there is a legitimate motive or a reasonable term is a matter subject to the discretion of judge of the trial court in each case.<sup>24</sup>

The Iraqi Civil Code contains some provisions allowing for restraint in the transfer of property. Two examples can be presented here. First, Article 611, which deals with contract of donation (gift), permits the inclusion of a clause in the donation contract whereby the donee is not allowed to dispose of the donated object as long as the donor is alive. Second, Article, 1070, which deals with common ownership (tenancy in common), permits for co-owners to agree among themselves to waive their rights to partition and stay in common property for a term *not* exceeding five years.

As a consequence, this feature is not *fully* compatible with the Iraqi Civil Code, and therefore any timeshare legislation which is proposed for Iraq must include provisions empower the timeshare holders to re-sell their occupancy rights without restraints and limitations.

#### *Perpetuity / Estate binding clauses*

The optimal timeshare legislation must also include provisions to prohibit the inclusion of clauses in timeshare contracts under which timeshare holders are locked into the timeshare project, such as the perpetuity and estate-binding clauses.

In Iraq the rule is that the heirs acquire only rights. In other words, they are not responsible for paying the debts of the deceased from their own money, because these debts must be paid from his money (estate). This is provided for in Article 1106 of the Iraqi Civil Code which reads as:

1. An heir will acquire by inheritance the movable and immovable property of and the rights which exist in the estate.
2. Determining the heirs and fixing their shares of the inheritance and the conveyance of the property of the estate will be governed by the provisions of the Islamic sharia and the specific laws.

Therefore, upon the death, the debts of the deceased must be settled from the entirety of his own money, and then distributing the rest (estate) among the heirs. This is provided for in Article 87 of the Personal Status Act No. 188 of 1959 which reads as:

The rights related to the inheritance after the death of the legator (testator) are four and prioritized as follows:

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<sup>24</sup> Mohamed Taha Al-Bashir and Gani Hassoun Taha, *Rights in Rem: Original Rights in Rem and Subsidiary Rights in Rem*, Part One (Baghdad University Press 1982) 91.

1. Preparing the body for burial according to the Shari'a.
2. Settling his debts from the entirety of his own money.
3. Executing his will from one third of his estate.
4. Giving the rest to those who are entitled to it (heirs).

Accordingly, it can be said that the perpetuity and estate-binding clauses are incompatible with the general principles of the Iraqi Civil Code. This is due to the fact that the inclusion of such clauses in timeshare contracts will lead to two important outcomes. First, passing the obligations of the timeshare contracts upon the death of the timeshare holders to their heirs because the contracts are tailored to last forever. This contradicts with Article 1106 of the Iraqi Civil Code which stipulates that only rights can be passed to the heirs as detailed above. Second, making the estate of the timeshare holders continue to be liable for payment of the management and maintenance fees after their death. This contradicts with the aforementioned Article 87 of the Personal Status Act which requires settling the debts of the deceased and distributing his estate among the heirs upon the death. However, any timeshare legislation which is proposed for Iraq must include provisions prohibit the inclusion of perpetuity and estate-binding clauses so as to not leave the whole matter to the discretionary authority of the trial court in interpreting the aforesaid provisions in each case.

#### *Right to rescind if circumstance change*

The optimal timeshare legislation must empower the timeshare holders and their inheritors to rescind long-term timeshare contracts when they can no longer use their occupancy rights or keep it because of the change in their circumstances. Pursuant to Article 146/1 of the Iraqi Civil Code, 'A contract is the law of the contracting parties. It shall never be revoked or amended except by sheer consent of both parties or for reasons to be provided by law'. Consequently, the timeshare holder cannot rescind the timeshare contract at will. Thus, this particular feature is *not* compatible with the Iraqi Civil Code No.40 of 1951. Therefore, any timeshare legislation which is proposed for Iraq must provide the timeshare holders with the right of rescinding the timeshare contract if their circumstances are changed.

#### **Phase IV: Collective action**

This Section is allocated to consider to what extent the optimal features which have been extracted at the fourth phase of the timeshare cycle (collective action) are compatible with the general principles based on which the Iraqi Civil Code No. 40 of 1951 are established.

#### *Mechanism for management and termination*

The optimal timeshare legislation must adopt a feasible mechanism for the management of the timeshare projects. Moreover, the legislation must include provisions regulating, in detail, the events and procedures by which the timeshare project shall be terminated and the consequences of such termination. This is if one of the fee ownership or quasi-ownership arrangements is used to regulate timeshare projects in a country. This because with right-to-use arrangements and non-ownership arrangements there is no collective action problem concerning each of the mechanism of the management of the timeshare project and the termination of the life of the timeshare project for two main reasons. First, the management of the project is the responsibility of the developer and thus the timeshare holders do not need to act collectively to manage and maintain the timeshare project as explained in detail in Chapter Three, Phase IV. Second, the date of termination is stipulated in the documents of the project in advance as explained in detail in Chapter Three, Phase IV.

### **Fee ownership arrangements**

With the fee ownership arrangements, a timeshare purchaser receives an infinite possessory ownership interest, which can be sold, devised, transferred, encumbered, and mortgaged as detailed in Chapter Seven.

In Iraq, when two or more persons own an object in which the share of each one of them is not sorted out, they will be co-owners.<sup>25</sup> The management of the common property shall be the right of co-owners jointly unless otherwise prescribed by agreement.<sup>26</sup> In the normal course of management, the view of the majority shall obligate all co-owners even the minority which had dissented. The majority shall be counted on the basis of the value of the shares of co-owners. The majority may also elect a manager and fix the extent of his powers of management. In the absence of majority, the court shall upon being petitioned by a co-owner take such action as is necessitated by the circumstances and may in the case of necessity appoint someone to manage the common property.<sup>27</sup> If a co-owner undertakes the charge of management without objection from the rest of co-owners, he shall be considered proxy for them.<sup>28</sup> The management and maintenance expenses of the common property as well as the taxes levied thereon and such other costs which result from the communality or

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<sup>25</sup> Article 1061 of the Iraqi Civil Code No.40 of 1951.

<sup>26</sup> Article 1064 (1) of the Iraqi Civil Code No.40 of 1951.

<sup>27</sup> Article 1064 (2) of the Iraqi Civil Code No.40 of 1951.

<sup>28</sup> Article 1064 (3) of the Iraqi Civil Code No.40 of 1951.

which are prescribed on the property shall be borne by all the co-owners each according to his share.<sup>29</sup>

The common property shall be terminated by division. The co-owners, in the case they reach an unanimous decision, divide the common property the way they choose. However, if the co-owners differ in dividing the common property those who wish to exit from the status of common property shall bring an action before the trial court asking it to dissolve the common property and free themselves from the burdens of the co-owned property. Thus, under the Iraqi law, the court will physically divide up the common property among the co-owners by giving each one of them the fee simple to his particular pro rata portion of the property. However, if the court deems that physical division is either impractical or inequitable, the court is authorised to order a sale of the common property and divide the proceeds among the co-owners and in proportion to their share in the common property.<sup>30</sup>

Accordingly, this feature would be compatible with the Iraqi Civil Code if one of the fee simple arrangements is adopted to regulate timeshare projects in Iraq. This is because similar ideas currently exist in the Code as explained above. Therefore any timeshare legislation which is proposed for Iraq must include specific provisions regulating, in detail, the mechanism of the management of the timeshare projects. The legislation must also include detailed provisions regulating the events and procedures by which the timeshare project shall be terminated and the consequences of such termination.

### **Quasi-ownership arrangements**

With quasi-ownership arrangements, the developer forms a company or club consisting of the timeshare holders.<sup>31</sup>

#### Company arrangement

Pursuant to the company arrangement, timeshare holders purchase shares in the company entitling them to the right to occupy a unit of the timeshare project owned by the company. In this case, the timeshare projects will be governed by the Iraqi Company Act No. 21 of 1997. However, the provisions which will govern the management and termination of each

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<sup>29</sup> Article 1067 of the Iraqi Civil Code No.40 of 1951.

<sup>30</sup> Articles 1070-1077 of the Iraqi Civil Code No.40 of 1951.

<sup>31</sup> The quasi-ownership arrangements are examined in detail in Chapters Four and Six.



timeshare project will vary from a project to another depending on the type of the company each project takes (joint-stock company, limited liability company ...etc.).

### Club-trustee arrangement

Under the club arrangement, the trustee holds the units upon trust for the benefit of the timeshare holders as club members. Thus, members acquire a right to use a unit of the timeshare property managed by the club through the payment of membership and maintenance fees.

The trusteeship arrangement relies on the division of rights into legal and equitable.<sup>32</sup> However, this division is inconsistent with the principles of the Iraqi legal system as it only recognises the legal rights established under 'statutory law' enacted by a legislature and 'regulatory law' promulgated by executive branch agencies pursuant to delegation of rule-making authority from the legislature. This principle is stipulated in Article (1/1) of the Iraqi Civil Code No. 40 of 1951 which reads as 'The legislative provisions shall apply to all matters which are covered by these provisions in letter and spirit.' Consequently, in Iraq, only legal rights which are established under valid legislations and regulations are recognised by courts, quasi-judicial tribunals within agencies, and the other governmental agencies. Consequently, the club-trustee arrangement is incompatible with the main principles of based on which the Iraqi Civil Code is established.

Accordingly, this feature would be compatible with the Iraqi Civil Code if the company arrangement is adopted to regulate timeshare projects in Iraq. This is because similar ideas currently exist in the Iraqi Company Act. However, some specific provision that are consistent with the nature of the projects would be needed in any legislation which is proposed for Iraq. Therefore, such legislation must include provisions regulating, in detail, the mechanism of the management of the timeshare projects. The legislation must also include detailed provisions regulating the events and procedures by which the timeshare project shall be terminated and the consequences of such termination.

## **CONCLUSION**

This Chapter concludes that majority of the extracted optimal features are compatible with the Iraqi legal system.

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<sup>32</sup> Alastair Hudson, *Equity and Trust* (8<sup>th</sup> edn Routledge 2015) 47, 51.

In the first phase, the Iraqi legal system does not have existing provisions to accommodate four features, namely: placing an obligation on developers to provide timeshare holders with pre-contractual information, requiring the promises to be made in writing and form an integral part of the contract, prohibiting the advance payments during the cooling-off period and requiring the automatic termination of ancillary contracts in the case of exercising the withdrawal right. These issues must be addressed when enacting the Iraqi timeshare legislation and therefore these are going to be new aspects in the Iraqi law. However, the Iraqi legal system is compatible with some of the important optimal features specifically, providing the timeshare holders with a cooling-off period for reconsideration and placing an obligation on the developers to supply the timeshare holders with comprehensive and accurate information during the contractual stage to save them from falling prey to fraudulent transactions. These features of timeshare legislation would be in harmony with existing laws in Iraq.

In the second phase, all the extracted features are compatible with the Iraqi legal system, mainly: providing the timeshare holders with an exclusive right of occupancy, placing an obligation on the developers to supply the timeshare holders with accurate information on when, where and how the right of occupancy can be exercised and obliging the developer to provide the timeshare holders with details of the mechanism for calculating and allocating service charges. Moreover, the interests of the timeshare holders are protected against arbitrary forfeiture and revocation under the current provisions of the Iraqi Civil Code. Thus, these features are compatible with the Iraqi Civil Code and will be proposed as features for specific provisions dealing with timeshare. Furthermore, the Iraqi Tourist Authority is entitled to rate and inspect the timeshare resorts. Therefore, any proposed timeshare legislation must take that into consideration.

In the third phase, placing a restraint on the freedom to transfer occupancy rights is generally lawful. Consequently, this feature is not fully compatible with the Iraqi law, and therefore any timeshare legislation which is proposed for Iraq must include provisions empower the timeshare holders to re-sell their occupancy rights without restraints and limitations. Moreover, the perpetuity and estate-binding clauses are incompatible with the general principles of the Iraqi law because the inclusion of such clauses in timeshare contracts will lead to pass the obligations of the timeshare contracts upon the death of the timeshare holders to their heirs which contravenes Article 1106 of the Iraqi Civil Code and Article 87 of the

Personal Status Act as they stipulate that only rights can be passed to the heirs. However, any timeshare legislation which is proposed for Iraq must include provisions prohibiting the inclusion of perpetuity and estate-binding clauses so as to not leave the whole matter to the discretionary authority of the trial court in interpreting the aforesaid provisions in each case.

In the fourth phase, the Iraqi legal system upholds the adoption of a feasible mechanism for the management of timeshare projects as well as comprehensive regulation of the events and procedures by which a timeshare project shall be terminated and the consequences of such termination. Therefore, these features are compatible with the Iraqi law and thus they will be carried into the proposed timeshare legislation.

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## **APPENDIX I**

# **THE RIGHT OF OCCUPANCY IN ROTATION AS A PROPOSED RIGHT *IN REM* TO REGULATE THE RELATIONSHIP BETWEEN DEVELOPERS AND TIMESHARE HOLDERS IN IRAQ**

### **1.1 INTRODUCTION**

The Iraqi Civil Code No.40 of 1951 makes no provision for regulating timeshare agreements as highlighted in Chapter One. Thus, this appendix is allocated to make a legislative proposal to regulate timeshare projects in Iraq in a way that protects the rights of both of developers and timeshare holders as well as being consistent with the Iraqi legal regime. This proposal will be designed in light of the optimal features which have been extracted from the countries analysed in Part II. This is vital to achieve two main objectives. First, providing the Iraqi timeshare holders with the latest means of protection so as to stand on an equal footing with the European and American timeshare holders. Second, encourage the foreign developers to invest in the timeshare sector in Iraq as well as the foreign timeshare holders to take part in the Iraqi timeshare projects. This in turn will lead to enhancing the chances of success of the timeshare industry in Iraq and thus achieve one of the strategic goals of the Iraqi government which is the development of the tourism sector as detailed at the commencement of Chapter One.

This Appendix will be in five Sections. The first is the introductory Section which is allocated to give the reader an overview of the content and structure of this Appendix. Section two will identify the optimal legal basis to construct the timeshare projects and regulate the relationship between the developers and the timeshare holders in Iraq. Section three will identify the legal means of acquiring the right of occupancy in rotation. Section four will detail the proposed rights and obligations for both of developers and occupants in rotation (timeshare holders). Section five will determine when the right of occupancy in rotation come to an end.

## **1.2 The optimal legal basis for the construction of the timeshare projects in Iraq**

This Section is allocated to determine optimal legal basis for regulating the relationship between developers and timeshare holders in Iraq.

### **1.2.1 One legal approach or variety of legal approaches**

This thesis proposes that all the timeshare projects in Iraq must be regulated based on one legal approach because this will lead to several positive outcomes:

1. The simplicity and stability in timesharing transactions which in turn leads to an increase in the attractiveness and desirability of timeshare interests in the eyes of the prospective timeshare holders.
2. Providing the timeshare holders, developers and lenders in particular, and all the other parties who have a relationship with the timeshare industry in general, with an accurate and clear understanding of the concept of timesharing as well as an adequate knowledge about their rights and obligations in the timeshare project in advance. This is because using different legal approaches to regulate the timeshare projects in one country can lead to confusing the timeshare holders and the other parties regarding the legal nature of their interests in the timeshare project and then leaving them with an erroneous understanding about their rights and obligations in the timeshare project. That is to say, the use of a uniform legal approach will pave the road for informed and conscious participation in the timeshare projects, and ensure that all the timeshare holders in the Iraq will enjoy the same rights and be subject to the same obligations regardless of which project they decide to join.
3. Identifying clearly the governmental agency which is formally authorised to deal with the timeshare industry.
4. Facilitating the mission of the legal practitioners to provide all the parties who are related to the timeshare industry with appropriate legal advice.
5. Enabling the courts to base their decisions on a solid and clear legal foundation.

These positive outcomes will lead to protect the interests of both developers and timeshare holders and this will encourage them to participate in the timeshare projects which in turn will lead to a flourishing of timesharing industry in Iraq.

### 1.2.2 Legal regulation or contractual regulation

This thesis proposes to give priority to the legal regulation over the contractual regulation of the timeshare agreements in order to achieve a balance between the developers and timeshare holders. This is because a timeshare agreement is an adhesion agreement and is commonly drafted by the developer (the powerful party in timeshare agreement) in a way which best serves his interests and not the interests of the timeshare holders (the weaker party in the timeshare agreement). Therefore, we need statutory intervention to strike the right balance between the interests of the developer and timeshare holders. Consequently, a minimum level of rights and obligations has been provided to the developers and timeshare holders alike by the proposed legal arrangement and any agreement to contract out of these minimum requirements would be null and void as will be seen in detail in the next Sections.

### 1.2.3 Timeshare projects under construction

This thesis proposes to ban the sale of the occupancy rights in the timeshare projects under construction in order to ensure that only the developers of adequate financial standing can participate in the timeshare industry in Iraq. This in turn will result in providing the timesharing industry in Iraq with a good reputation and hence increase the chances of success of this industry in Iraq.

### 1.2.4 Rights *in rem* or rights *in personam*

Under the Iraqi legal system, rights are divided into common rights and private rights.<sup>1</sup> Private rights are divided into family rights (which are regulated by the Personal Status Act No. 188 of 1959) and financial rights. Financial rights are divided into three categories: rights *in personam*, rights *in rem* and intangible rights, which are the rights that relate to non-material things such as copyrights, the rights of inventors and artists. The Iraqi Civil Code No. 40 of 1951 regulates the first two categories and leaves the third category to be regulated by special pieces of legislation such as Trademarks Act No. 21 of 1957, the Copyright Protection Act No.3 of 1971 and the Publications Act No. 206 of 1968.

Pursuant to the Article 69 of the Iraqi Civil Code, a right *in personam* is a legal bond between two parties: a debtor and a creditor, under which the latter (creditor) is entitled to claim from the former (debtor) to transfer a right *in rem* or to carry out or abstain from carrying out an

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<sup>1</sup> Common rights is a term applied to rights, privileges, and immunities appertaining to and enjoyed by all citizens equally and in common such as the right to get a job, the right to travel and the right to litigate.

act. Under the Iraqi Civil Code, contracts are divided into two categories. Firstly, nominate contracts whose content and form is regulated by the Iraqi Civil Code. A nominate contract is a standardised contractual relationship which has a special name attached to it whereby the promisor and promisee have rights and obligations specially prescribed by the Iraqi Civil Code such as purchase and sale, lease, and insurance. Secondly, innominate contracts whose content and form are not regulated by the Iraqi Civil Code.

As there is currently no provision for timeshare agreements under the Iraqi Civil Code, such agreements would be classified as innominate contracts. However, it would be difficult to regulate timeshare agreements as innominate contracts under the Iraqi Civil Code because the rights and obligations of the contracting parties (i.e., developers and timeshare holders) will vary to a considerable extent from one timeshare project to another, and would harm the interests of the timeshare holders if regulated in this way due to inequality of bargaining power. This is because a timeshare agreement is an adhesion agreement<sup>2</sup> and is commonly drafted by the developer (the powerful party in the agreement) in a way which best serves his interests and not the interests of the timeshare holders (the weaker party in the timeshare agreement) as demonstrated in detail when considering the problems of the timeshare industry in Chapter Three. Rights *in personam* whether regulated as nominate or innominate contracts under the Iraqi Civil Code will not provide the timeshare holders with adequate safeguards for exercising their right of occupancy. This is because under the Iraqi Civil Code rights *in rem* provide the right holder with advantages and legal powers unrivalled in rights *in personam* as detailed hereunder.

Under rights *in rem* the right holder is given a direct power whereas with rights *in personam*, indirect legal power is given to the right holder. By extension, a tangible object is the object of rights *in rem*, whereas the object of rights *in personam* is either the performance or the non-performance of an act. Thus, with rights *in rem*, the right holder is given a direct power over the object which is the subject matter of his right with the result that he can get all the benefits of it directly, without the need for mediation. On the other hand, in the case of rights *in personam*, the right holder (the creditor) is given indirect power. Therefore, he can only

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<sup>2</sup> An adhesion contract is a legally binding agreement between two parties to do a certain thing, under which one party has all the bargaining power and uses it to write the contract primarily to his or her advantage. Consequently, the adhesion contract is a standardised contract form offered to consumers of goods and services on essentially take it or leave it basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Abdul Majid Al-Hakim, Abdel Baqi Al-Bakri and Mohamed Taha Al-Bashir, *The Theory of Obligation in the Iraqi Civil Law*, Part One (Baghdad University Press 1980) 44.

exercise this power through the mediation of the debtor himself. Furthermore, a right *in rem* is enforceable against the world at large.<sup>3</sup> In other words, it is valid against an indefinite class of persons.<sup>4</sup> For example: when (A) owns a house, people have a duty not to disturb or interfere with his possession and enjoyment. In short, this right protects the interest of the right holder against the world at large. On the other hand, a right *in personam* is enforceable only against particular people.<sup>5</sup> For instance, when (A) rents out his own house to (Z), the tenant, (A) has a right to receive rent from (Z). This right to receive rent from the tenant is a right *in personam* due to the fact that the right of the owner of the house is valid solely against the tenant and not against the world at large. In other words, this right only protects the interest of the right owner against determinate individuals. Moreover, a right *in rem* entitles the right holder to follow his owned object from any person.<sup>6</sup> Thus, if the object left the possession of the owner without his will or knowledge, then in certain circumstances he can follow his object and reacquire it even if it is in the possession of another person. This is known as the right of following, whereas, a right *in personam* does not confer the holder of such right the same authority. Instead, it confers upon the creditor the authority to oblige his debtor to perform or not to perform an action.<sup>7</sup> In addition, a right *in rem* gives the right holder priority. Therefore, the holder of a right *in rem* precedes all the unsecured creditors.<sup>8</sup> An example of such a right holder would be a mortgagee. This is called the right of priority. On the other hand, a right *in personam* does not grant this particular right holder any such priority. Consequently, if the debtor became bankrupt or went into liquidation he would only be able to claim a dividend in proportion to all of the other unsecured creditors.<sup>9</sup> Consequently, this thesis proposes that the right of the timeshare holder in occupancy should be regulated in Iraq as a new and unique type of right *in rem* as detailed in the next section.

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<sup>3</sup> Article 67 of the Iraqi Civil Code No. 40 of 1951.

<sup>4</sup> Sanjib Kumar, 'What are the differences between Rights in Rem and Rights in Personam' <<http://www.publishyourarticles.net/knowledge-hub/articles/what-are-the-differences-between-rights-in-rem-and-rights-in-personam.htm>> accessed 7 May 2013.

<sup>5</sup> Article 142 of the Iraqi Civil Code No. 40 of 1951. *In Personam* Definition <<http://www.duhaime.org/LegalDictionary/I/InPersonam.aspx>> accessed 7 May 2013.

<sup>6</sup> Articles 1306 and 1345 of the Iraqi Civil Code No. 40 of 1951.

<sup>7</sup> Abdul Aziz Amir, *Lessons about the Right of Ownership* (Al-Nahda Publishing and Printing House, without publishing date) 10; Abdul Majid Al-Hakim, Abdel Baqi Al-Bakri and Mohamed Taha Al-Bashir, *The Theory of Obligation in the Iraqi Civil Law*, Part One (Baghdad University Press 1980) 7.

<sup>8</sup> Articles 1258, 1304, 1320, 1343 and 1360 of the Iraqi Civil Code No. 40 of 1951.

<sup>9</sup> Saad Abdel-Karim Al-Mubarak, *The Explanation of the Iraqi Civil Law: the Original Rights in Rem* (Freedom House for Printing and Publishing, Baghdad 1973) 22.



### 1.2.5 A traditional right *in rem* or a new type of right *in rem*

The traditional rights *in rem*, pursuant to article 68 (1) of the Iraqi Civil Code, are the ownership right,<sup>10</sup> usufruct right,<sup>11</sup> usage right,<sup>12</sup> Musataha right (surface right)<sup>13</sup> and easements. The rights which are important from the point of view of timesharing are the ownership right, usufruct right and usage right. This is because the Iraqi equivalent of ownership right is used to regulate timeshare projects in the United States of America as we saw in Chapter Seven while the usufruct right and the usage right are used to regulate timeshare projects in Egypt as we saw in Chapter Six. However, these rights (the ownership right, usufruct right and usage right) cannot be used as a legal basis to regulate the timeshare agreements in Iraq for the following reasons:

1. The ownership, usufruct and usage rights, according to the current provisions of the Iraqi Civil Code, will not provide the timeshare projects with a dynamic life as they supply each timeshare holder with *undivided* estate in ownership/usufruct/ usage in a designated unit of accommodation together with an *undivided* ownership/usufruct/usage estate in the common areas of the timeshare project. The occupancy periods are established by means of an agreement referred to as the Agreement of Usufruct Division. The use of such an agreement is incompatible with Article 1078 of the Iraqi Civil Code, which provides that all co-ownership arrangements cannot exceed a period of five years. If made for a period of more than five years, such arrangements cannot be renewed without the consent of all the timeshare holders in the project. This will always threaten the continuity of the timeshare project because it will be subject to dissolution and final division if one of the timeshare holders does

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<sup>10</sup> The ownership right under the civil law system is equivalent to fee simple estate under the common law system. Under the Iraqi Civil Code the right of ownership is the king of the original rights *in rem* because it entitles the owner to exercise all the powers and privileges that can be granted by the law to a person over an object namely: (1) the power of usage, (2) the power of exploitation and (3) the power of disposition. Article 1048 of the Iraqi Civil Code of 1951 provides for these powers by stating 'The owner of an object shall alone and within the limits of the law have the right of using, exploiting and disposing of it'.

<sup>11</sup> The usufruct right can be defined as the right to use and derive profit from a piece of property belonging to another, provided the property itself remains undiminished and uninjured in any way.

<sup>12</sup> Usage right is a right *in rem* which entitles the user (i.e., holder of usage right) and his family to use an object owned by another person for a specific period of time on two conditions: first, not to destroy the substance of the object, and second, to return that object in good condition to his owner when the right of usage expires..

<sup>13</sup> Musataha, according to Article 1266 of the Iraqi Civil Code, is a right *in rem* which entitles its holder a right to construct buildings or other installations, other than plantations, on the land of another person pursuant to an agreement concluded by him and the owner of the land setting down the rights and obligations of the holder of the right and the landowner. This right must be registered at the Land Registry Office. The term of Musataha may not be for more than 50 years according Article 1267/1 of the Iraqi Civil Code.

not agree to renew the Agreement of Usufruct Division when the five-year period expires.

2. The current provisions governing the traditional original rights *in rem* (the ownership right, usufruct right and usage right) are devoid of the vast majority of the extracted optimal features. The amendment of these provisions in a manner compatible with the extracted optimal features will implicitly lead to the creation of a new right *in rem* as such type of radical amendments will result in changing the distinguishing features of the traditional original rights *in rem*. This is unacceptable because the majority of these distinguishing features are considered of the *public policy* in Iraq.

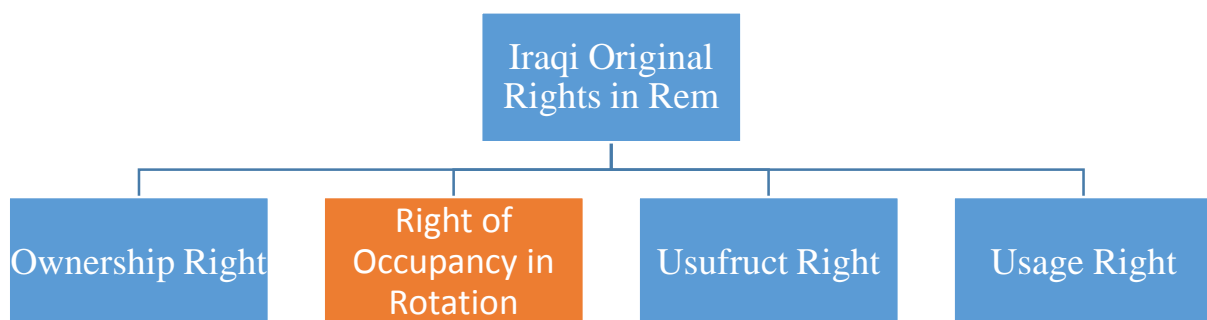
Accordingly, the current provisions of the Iraqi civil Code dealing with the traditional original rights *in rem*, are not adequate for the regulation of timesharing agreements in Iraq as they are not designed for that purpose. Therefore, this thesis proposes to regulate the right of the timeshare holder in occupancy in Iraq as a right *in rem* through the establishment of a *new* type of right *in rem* (non-ownership right) in the Iraqi Civil Code. This is due to the fact that the Iraqi Civil Code enumerates the rights *in rem* as a limitation, and not for example. The suggested name of this right is the RIGHT OF OCCUPANCY IN ROTATION. It is proposed to regulate the right of occupancy in rotation as a *divided* right *in rem* (i.e., *divided* estate in real property) as this will achieve two positive outcomes:

1. Avoiding the problem of the five-year period which will arise if one of the current original rights *in rem* is used to construct a timeshare project as explained above.
2. The documentation which will be required to construct the timeshare projects in Iraq will be relatively simple. This is on the basis that there will no need to use the Agreement of Usufruct Division to identify the time period which is allocated to each timeshare holder to exercise his right of occupancy as explained above.

It is, also proposed that the right of occupancy in rotation should be regulated as one of the original rights *in rem* which emanates from the ownership right. Moreover, it is proposed that the object of the right of occupancy in rotation should apply only to tourist overnight accommodations situated in a timeshare property (i.e. properties allocated only for timeshare occupancy) so as to exclude hotels and other holiday accommodations.

Consequently, the right of occupancy in rotation can be defined as an original right *in rem* emanating from ownership right whereby the right holder, the occupant in rotation, is entitled

to occupy and exploit a specific overnight accommodation in a timeshare property (whether movable or immovable property) owned by another person, the developer, and use the other recreational facilities of that property for a specific period of time each year and for a predetermined number of years in return for a financial consideration. This is subject to the proviso that the owner of this right does not destroy the substance of the accommodation, and returns that accommodation in good condition to the developer when the right of occupancy expires, and uses the timeshare property (accommodations and recreational facilities) for the purpose of tourist occupancy only.<sup>14</sup> Therefore, it is proposed to establish a new original right *in rem* (the right of occupancy in rotation) by way of an addition to Chapter II of Title II of Book III of Part II of the Iraqi Civil Code in order to be used as a legal basis to structure the timeshare projects and regulate the relation between the developers and timeshare holders. The position of original rights *in rem* in Iraq after the addition of the right of occupancy in rotation may be conveniently set out diagrammatically as follows:<sup>15</sup>



It is proposed that the right of occupancy in rotation as a proposed legal arrangement to structure the timeshare projects in Iraq should have the following attributes:

1. **An *in rem* right:** as mentioned earlier, the right of occupancy in rotation is proposed to be an original right *in rem* emanating from ownership right. This is to provide the occupants in rotation with high level of protection because under the Iraqi Civil Code of 1951 rights *in rem*

<sup>14</sup> This point will be explained in detail in Section 1.4.2.3 of this Appendix.

<sup>15</sup> Source of diagram: the author.

provide the right holder with advantages and legal powers unrivalled in rights *in personam* as detailed in Section 1.2.4 of this Appendix.

In accordance with proposed right, the occupant in rotation is entitled to enjoy the accommodation that is allocated to him to exercise his right of occupy and use the recreational facilities of the tourist complex for a specific period every year and for a given number of years. The occupant will be able to exploit his accommodation during his period of occupancy and finally to dispose of his right of occupancy in rotation to another person. Consequently, the arrangement of occupancy rights in rotation to the occupants deprives the developer, as the owner, of the powers of using and exploiting the tourist complex and transferring these powers (i.e., using and exploiting the tourist complex) to the occupants in rotation. However, the power of disposition remains vested in the developer because he retains the bare ownership of the tourist property and does not end up transferring it to the occupants in rotation. Therefore, when the occupancy rights in rotation expire, the powers of using and exploiting revert to the developer.<sup>16</sup>

The retention of the bare ownership of the tourist complex by the developer during the life of the project will have two main advantages:

A. Providing the occupants in rotation with the benefit of not having to shoulder any responsibility resulting from property ownership such as managing and maintaining the property; paying the taxes, mortgage payments, and insurance instalments because the performance of these tasks will be the responsibility of the developer as the owner of the property. This is closer to the will of the occupants in rotation because they want to enjoy their vacations and to have a break from the trouble of work which will not be achieved if they are involved in the management of the tourist project.

B. The developer will be able to secure loans on the tourist property, get the benefit of any increase in value of the tourist property and achieve profits through the management of the tourist project.

2. **A temporary right:** the right of occupancy in rotation is a time-limited right for two reasons. Firstly, the developer retains the bare ownership of the timeshare property and therefore it is not logical to deprive him of the use and exploitation of his property

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<sup>16</sup> The rights and obligations of the occupants in rotation and developers will be addressed in detail in Section 1.4 of this Appendix.

permanently as this would have the effect of rendering his ownership of the timeshare property as valueless. Secondly, the right of occupancy shall terminate by effluxion of time.<sup>17</sup>

3. **A recurring right:** The right of occupancy in rotation is recurring as it is repeated every year over a predetermined number of years.

Accordingly, the timeshare projects in Iraq will operate on the basis of the unit-week pattern<sup>18</sup> rather than the points' pattern<sup>19</sup> for two main reasons:

A. The right of occupancy in rotation is a right *in rem*, as mentioned above, which is inconsistent with the points' pattern as it provides the timeshare holders with purely contractual rights as highlighted in Chapter Two, Section 2.6.2.

B. To avoid the disadvantages of the points' pattern, most notably the booking system. This is because the booking system serves only the timeshare holders who planned their vacation well in advance, and disadvantages others who are not sure when and where they can enjoy their vacation because of their work or health circumstances. Consequently, a timeshare holder who participated in a timeshare project operates on the basis of a unit-week pattern will be in a better position than a timeshare holder who took part in a timeshare project which operates on the basis of points' pattern for two reasons:

- He has the opportunity to change the accommodation, resort, or time of enjoying the vacation by using the exchange system.
- He has a guaranteed accommodation to enjoy his vacation in case that the exchange system did not provide him with what he likes, or his circumstances deprived him of using the exchange system at the appropriate time.

4. **An exclusive right:** This is because it is a right *in rem*. In Iraq, rights *in rem* are characterised by providing the right holder with an exclusive authority of getting the benefit of the property. Consequently, the proposed arrangement avoids some of the disadvantages of the right *in personam* arrangements such as licence which does not provide the timeshare holders with exclusive rights of occupancy as detailed in Chapter Four, Section 4.4.

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<sup>17</sup> The termination of the right of occupancy will be addressed in detail in Section 1.5 of this Appendix.

<sup>18</sup> The unit-week pattern has been explored in detail in Chapter Two, Section 2.6.1.

<sup>19</sup> The points' pattern has been explored in detail in Chapter Two, Section 2.6.2.

5. **An alienable right:** Under the proposed arrangement, the occupant is entitled to sell, gift and rent out his right of occupancy in rotation to another person without the need for obtaining the approval of the developer or the management company as his representative so as to ensure the tradable nature of the right of occupancy in rotation and to establish active secondary market. Hence, the proposed arrangement overcomes one of the main problems of the resale, namely the inability of the timeshare holder to transfer and rent out his right without getting an approval or a prior permission from the developer as detailed in Chapter Three, Phase III.<sup>20</sup>

6. **An inheritable right:** The right of occupancy in rotation shall be capable of being transferred to the occupant's successors in case of his death provided that the death of the occupant occurs prior to the expiration of the period of the right of occupancy in rotation. This will provide the right of occupancy in rotation with a tradable character as it protects the interests of the successors and assigns of the deceased occupant.<sup>21</sup>

7. **An exchangeable right:** Under the proposed arrangement, the right of occupancy is exchangeable. This will ensure the success of the timeshare industry in Iraq, as the exchange system is the key to the success of timesharing across the world as pointed out in chapter two.<sup>22</sup>

8. **A valuable right:** This because the occupant, as a general rule, has to pay a financial consideration in return for the acquisition of the right of occupancy in rotation. The financial consideration is typically represented by an advance lump sum paid by the occupant to the developer in return for a long-term right of occupancy and an annual fee to cover the occupant's share of the common expenses, such as the costs of the maintenance and management of the tourist complex.<sup>23</sup>

9. **Recordable right:** Any legal action concerning the creation, transfer or termination of the right of occupancy in rotation will not be valid unless it is registered with the Land Registration Office as we will see in detail in Section 1.4.1.3 of this Appendix. The registration shall provide the occupants in rotation with a considerable degree of statutory protection against arbitrary forfeiture and re-entry that might be exercised by the developer,

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<sup>20</sup> For more details, please refer to Sections 1.4.1.2 and 1.4.1.3 of this Appendix.

<sup>21</sup> For more details, please refer to Section 1.3 of this Appendix.

<sup>22</sup> For more details, please refer to Section 1.4.1.3 of this Appendix.

<sup>23</sup> For more details, please refer to Section 1.4.2.1 of this Appendix.

or any person claiming on his behalf such as the liquidator in the case of the developer's insolvency.

10. **Terminable right by single will:** According to the proposed arrangement, the occupants in rotation will be entitled to withdraw from the agreement of right in occupancy during a period of fourteen working days commencing with the date of entering into the agreement without paying any compensation and without giving any justification as will see in detail in Section 1.4.1.4 of this Appendix.

In light of what has been set out above, it is suggested that the first Article of the Section which will be established by the timeshare legislation to regulate the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code should be as follows:

**Article 1: Definitions**

In this Section, the following expressions shall have the following meanings unless the context shall expressly provide otherwise:

(1) **The right of occupancy in rotation:** is an original right *in rem* which emanates from ownership right whereby the right holder, the occupant in rotation, is entitled to occupy and exploit a specific accommodation in a tourist property owned by another person, the developer, and use the other recreational facilities of that property for a specific period each year, and for a predetermined number of years in return for a financial consideration PROVIDED THAT the right holder shall not destroy the substance of the accommodation, and return that accommodation in good condition to the developer when the right of occupancy expires and shall use the tourist property (accommodations and recreational facilities) for the purpose of tourist occupancy only.

(2) **Tourist project:** A tourist property which operates only on the basis of the right of occupancy in rotation.

(3) **Tourist property:** An immovable or movable property containing more than accommodation together with any common parts, recreation facilities, and any other real estate or rights therein appurtenant to this property. A tourist property must include only accommodations that are allocated for the exercise of the right of occupancy in rotation.

(4) **Accommodation:** A unit situated in a tourist property in which the occupant exercises his right of occupancy in rotation.

(5) **Accommodation Accessories:** The personal property in an accommodation, including the furniture, electrical appliances and decorative items at the time of the acquisition of the right of occupancy in rotation in an accommodation by an occupant together with any additions from time to time.

(6) **Recreational facilities:** A place, building, amenity, or piece of equipment open to the occupants in rotation for leisure, enjoyment and amusement activities such as the swimming pools, tennis courts, golf courses, gardens, playgrounds, gyms and sport halls.

(7) **Common parts (common elements):** The areas of a tourist property which are available for the use of all occupants in rotation.

(8) **Developer:** A person who develops a tourist property to be operated on the basis of the right of occupancy in rotation.

(9) **Occupant in rotation:** A person who is entitled to enjoy a specific accommodation in a tourist property which operates on the basis of the right of occupancy in rotation as detailed in clause (1) of this article.

(10) **Exchange Networks:** The companies who facilitate the exchange of rights of occupancy in rotation among occupants in various tourist projects whether inside or outside the Republic of Iraq.

(11) **Salesperson:** A person, whether natural person or corporate person, who performs a task of a commercial nature represented by promoting and selling the rights of occupancy in rotation in a tourist project and the related services such as the exchange and resale services to the potential occupants in rotation.

(12) **Management Company:** A professional company employed by the developer to carry out the daily management operations and any other operations concerning the tourist property.

(13) **Annual fee:** A fixed amount of money which an occupant in rotation must pay to the developer or his representative to cover the occupant's share of the costs of the maintenance and management of the tourist property.



(14) **Cooling-off period:** A period of fourteen working days commencing with the date of entering into an occupancy in rotation, exchange and resale agreement during which the occupant is entitled to withdraw from the agreement without paying any compensation and without giving any justification.

(15) **Ancillary contract:** a contract under which the occupant acquires services which are related to an occupancy in rotation agreement and which are provided by the developer or a third party on the basis of an arrangement between that third party and the developer.

(16) **Durable medium:** any instrument which enables the occupant in rotation or the developer to store information addressed personally to him in a way which is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

(17) **Resale agreement:** an agreement under which a resale company/ agent, for consideration, assists an occupant to sell or buy a right of occupancy in rotation.

## 1.3 THE LEGAL MEANS OF THE ACQUISITION OF THE RIGHT OF OCCUPANCY IN ROTATION

Following the approach of the Iraqi Civil Code in regulating all original rights *in rem*, it is necessary to identify the legal means of acquiring the right of occupancy in rotation as a new original right *in rem* which is suggested should be inserted into the Iraqi Civil Code to be used as a uniform statutory framework to regulate the relationship between the developers and timeshare holders in Iraq. The contract, testament and inheritance are the proposed means to acquire the right of occupancy in rotation. A brief overview of them is given below.

### 1.3.1 Contract

The contract is the first suggested means to acquire the right of occupancy in rotation. This can be achieved in two ways as explained below.

#### 1.3.1.1 *The mode of creation*

The contract creates the right of occupancy in rotation *ab initio* as is the case when the developer transfers this right to the first occupants of the tourist property. The contract typically takes the form of sale whereby the developer grants each occupant a right of occupancy in rotation over a specific unit of accommodation in the tourist property. The contract, can take the form of barter and, on rare occasions, the form of gift.

### ***1.3.1.2 The mode of transfer***

The contract transfers the right of occupancy in rotation which has already been created, as is the case when one of the occupants conveys his right of occupancy in rotation to another person. The contract typically takes the form of sale. It can also take many other legal forms such as barter, gift and lease.

It goes without saying that contract as the main method of acquiring the right of occupancy in rotation is subject to the general principles of contract stipulated in the Articles from 73 to 185 of the Iraqi Civil Code No. 40 of 1951.

### **1.3.2 Testament**

The testament is the second suggested means of acquiring the right of occupancy in rotation. This can be achieved in two ways. First, when the developer, if he is a natural person, as the testator, transfers the right of occupancy in rotation to the occupant as the legatee by way of testament. In this case, the testament will be valid upon the death of the developer. Second, when the occupant, as the testator, transfers his right of occupancy in rotation to another person as legatee by way of testament. As in the first case, the testament will be valid upon the death of the testator, who is the occupant in this case, on condition that his death takes place before the expiration of the right of occupancy in rotation.

It goes without saying that the testament as a method of acquiring the right of occupancy in rotation is subject to the general principles of testament stipulated in Articles from 1108 to 1112 of the Iraqi Civil Code No. 40 of 1951 and the Articles from 64 to 75 of the Iraqi Personal Status Act No. 188 of 1959.

### **1.3.3 Inheritance**

The inheritance is the last suggested means of acquiring the right of occupancy in rotation. It is believed that making the right of occupancy in rotation inheritable is very important due to the fact that will increase the attractiveness of the timesharing system in Iraq as the occupant will be able to bequeath his right of occupancy in rotation to his successors upon his death on the one hand, and the successors of the occupant will not lose either the right of occupancy in rotation or the consideration for buying this right which was paid by the occupant at the time of contracting. However, it will be a requirement that the death of the occupant in rotation must occur prior to the expiration of the period of the right of occupancy in rotation so as to validate the transfer by the way of inheritance. Moreover, it is vital to provide the successors

of the occupant with right of withdrawal from the timeshare project if they do not like to take the place of the deceased occupant so as to avoid the harmful consequences of in-perpetuity contracts, long-term contracts and estate-binding contracts on the timeshare industry in Iraq. This point will be revisited in Section 1.5.5 of this Appendix.

It goes without saying that inheritance as a method of acquiring the right of occupancy in rotation is subject to the general principles of inheritance stipulated in Articles 1106 and 1107 of the Iraqi Civil Code No. 40 of 1951 as well as Articles from 85 to 91 of the Iraqi Personal Status Act No. 188 of 1959.

It is worth mentioning that the main differences between the testament and inheritance according to the Iraqi law is that under the inheritance, the entire estate of the owner will pass on his death automatically to his legal heirs according to the provisions of the Iraqi Personal Status Act i.e. without the need to the intervention of his will. In contrast, under the testament, a specific thing or a given share of the estate, which must not exceed one third of the entire estate, will pass, on the owner's death, to the legatee(s) based on his will. In other words, the inheritance transfers the whole estate of the decedent to his legal successors automatically and thus each one of them will obtain a designated share of the estate as determined by the Iraqi Personal Status Act. By way of contrast, the testament entitles any owner to transfer a specified portion of his estate, upon his death, to a designated legatee(s) be those legatees his legal successors or not, provided that the transferred portion does not exceed one third of the whole estate. The remaining two thirds will pass to the legal successors in accordance with the provisions of the Iraqi Personal Status Act, as detailed above.

Consequently, an Article should be added to the Articles of the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

**Article 2:** The means of the acquisition of the right of occupancy in rotation

The right of occupancy in rotation shall be acquired by contract, by testament and by inheritance.

#### **1.4 THE EFFECTS OF THE RIGHT OF OCCUPANCY IN ROTATION**

The effects of the right of occupancy in rotation refer to the rights and obligations of developers and occupants which will come into existence by virtue of the acquisition of the

right of occupancy in rotation by one of the aforementioned means. This Section will detail the proposed rights and obligations for both of developers and occupants in rotation as set out below.

#### **1.4.1 The rights of the occupants in rotation**

Four basic rights are proposed to be given to the occupants of any tourist property in Iraq operating on the basis of the right of occupancy in rotation: (1) the right of using the accommodation which is the object of the right of occupancy and the recreational facilities of the tourist property, (2) the right of exploiting the accommodation, (3) the right of disposing of the right of occupancy in rotation, (4) the right to withdraw from the preliminary occupancy in rotation, resale and exchange agreements by the occupant's individual will during the cooling-off period. It is proposed to entitle the occupants in rotation to exercise these rights without the need for obtaining prior approval from the developer or the management company as his representative in order to guarantee the tradable nature of the right of occupancy in rotation and thus establish an active second-hand market. It is also proposed that the aforementioned rights must be included in Chapter II of Title II of Book III of Part II of the Iraqi Civil Code by the timeshare legislation to regulate the right of occupancy in rotation. This is for three reasons.

Firstly, to provide the occupants in rotation with the ability of exercising the proposed rights without the need for stipulating them in the agreement of the right of occupancy in rotation because they will be legal rights. Secondly, to achieve a balance between the interests of the developer on the one hand and the interests of the occupants in rotation on the other hand. Thirdly, to guarantee that the developer, the powerful party in the agreement of occupancy in rotation, will not be able to include in the agreement of the right of occupancy any condition which would deprive the occupant of one of the aforementioned rights. Consequently, it is proposed to prohibit the deprivation of the occupants of one of the aforementioned rights. However, it is permissible to give the occupants more rights by the agreement of occupancy in rotation owing to the fact that the above-mentioned rights are proposed to be the minimum level of the rights of the occupants in rotation under the Iraqi Civil Code and thus anything more than this level is acceptable provided that it does not result in depriving the developer of his suggested statutory rights or the exemption of the occupants from their suggested statutory obligations.

Accordingly, an Article should be added to the Section of the right of occupancy in rotation under the Iraqi Civil Code as follows:

**Article 3:** The Rights of the Occupants in Rotation

(1) In the rights of an occupant in rotation, the instrument by which the right of occupancy in rotation is established, and the provisions prescribed in this Section shall be observed.

(2) An occupant in rotation is entitled to exercise the rights prescribed in this Section without the need for obtaining an advanced approval from the developer or the management company as his representative.

(3) It is forbidden to deprive an occupant in rotation of one of his rights prescribed in this Section. However, it is permissible to provide him with more rights by the instrument which establishes the right of occupancy provided that this does not have the effect of depriving the developer of his rights laid down in this Section or releasing the occupant in rotation from any of his obligations stipulated in this Section.

*1.4.1.1 The right of using the accommodation which is the object of the right of occupancy and the recreational facilities of the tourist property*

It is proposed to give each occupant and his family the right of using the accommodation which is the object of the right of occupancy as prescribed by the proposed Article hereunder. Hence, an Article should be added to the Articles of the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

**Article 4**

During the period of occupancy, an occupant in rotation and his family are entitled to occupy and exclusively possess the accommodation which is allocated to them to exercise the right of occupancy in rotation, to use the accommodation's accessories, to use the common parts of the tourist property, to enjoy the recreational facilities of the tourist property and to use the easements which are created for the interest of the tourist property.

#### *1.4.1.2 The right of exploiting the accommodation which is the object of the right of occupancy*

Under the right of occupancy in rotation, it is proposed to give the occupant the power of exploiting his accommodation in order to obtain its civil fruits<sup>24</sup> as determined by the proposed Article hereunder. This Article should be added to the Articles of the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code.

#### **Article 5**

An occupant in rotation, during the period of occupancy, has the right to rent out the accommodation which is allocated to him to exercise the right of occupancy in rotation provided that the period of tenancy not exceeding the period of the occupancy right.

#### *1.4.1.3 The right of disposing his right of occupancy*

Each occupant in any tourist property operating on the basis of the right of occupancy in rotation shall have the right to dispose of his periodic right of occupancy to another occupant in the tourist property or to a third party during the lifetime of the tourist project irrespective of whether the legal effect of the exercise of the power of disposition takes place during the life of the occupant as in the case of the sale and gift or after his death as in the case of the testament. Consequently, the occupant is entitled to alienate his right of occupancy in rotation either in return for a financial consideration as in the case of sale and barter or not in return for a financial consideration as in the case of gifts.

Furthermore, it is proposed to give the occupant the right to mortgage his right of occupancy in rotation provided that the duration of the mortgage should not exceed the duration of the right of occupancy itself because the mortgage will terminate at the end of the duration of the right of occupying.

It is believed that giving the occupant the right of disposing and mortgaging his right of occupancy during the lifetime of the tourist project is of great importance because this will help the occupant to obtain many advantages such as benefiting from any increase in the value of the right of occupancy during the lifetime of the project, paying off his debts by transferring the right of occupancy to his creditor in order to let the creditor get his full debt,

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<sup>24</sup> Under the Iraqi civil law, civil fruits can be defined as steady income that is produced by a thing as a result of its exploitation, such as the monthly amount of rent that is obtained by the landlord from the tenant, interests on money that is deposited in banks and dividends.

financing the purchase of the right of occupancy itself as well as empowering the occupant of using the right of occupancy as a guarantee to be provided to any lender in return for getting a loan to finance a commercial enterprise or to achieve other purposes.

Moreover, it is proposed to give the occupant in rotation the right to exchange his right of occupancy with another occupant be that in the same tourist property or at a wide range of resorts across the world by using one of the vacation exchange networks. It is believed that providing the holders of the right of occupancy in Iraq with the power of exchange is very important for three main reasons: (1) the right of exchange is one of the key factors of the success of the timeshare industry across the world as highlighted in Chapter Two, (2) the right of exchange offers flexibility to the occupant in rotation by enabling him to exchange his right of occupancy with other occupants at a wide range of resorts across the world and (3) provide the occupants in rotation in Iraq with the same rights granted to any timeshare holder around the world which in turn leads to encouraging the prospective foreign timeshare holders to take part in the timeshare projects in Iraq which in turn can only reflect positively on this industry in Iraq.

Consequently, an Article should be added to the Section of the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 6**

An occupant in rotation is entitled to:

- (1) Dispose of his right of occupancy in return for or without financial consideration.
- (2) Mortgage his right of occupancy in rotation provided that the duration of the mortgage should not exceed the duration of the right of occupancy.
- (3) Exchange his right of occupancy with another occupant whether in the same tourist complex or at a wide range of resorts across the world by using one of the vacation exchange networks.

It is worth mentioning that according to the general principles of the Iraqi civil law, all the legal transactions in respect of rights *in rem* attached to a piece of real estate must be registered with the Land Registration Office in order to be valid. This rule is established by the Article 1126(2) of the Iraqi Civil Code which provides for ‘Any contract transfers the ownership of a property or any real right related to a piece of property shall not be valid

unless it takes into account the way prescribed by the law', and according to the Article 3 of the Iraqi Land Registration Act No. 43 of 1971 'Any legal action which creates, transfers or terminates the ownership of a property or any real right related to a piece of property is not valid unless it is registered in the Land Registration Office'. Thus, any legal action which creates, transfers or terminates the right of occupancy in rotation related to a piece of real property will not be valid unless it is registered with the Land Registration Office due to the fact that it is proposed that the right of occupancy in rotation be regulated in Iraq as a right *in rem*. It is proposed to amend the Iraqi Land Registration Act in order to make the procedures of the registration of the right of occupancy in rotation fast, simple and in return for inexpensive fees so as to increase the attractiveness and desirability of the right of occupancy, reduce its cost and then make it affordable for a wide spectrum of people. Therefore, an Article should be added to legislation that will be enacted to regulate the right of occupancy in rotation as follows:

#### **Article 37**

- (1) A registration department must be established in the location of each tourist project in order to facilitate and accelerate the procedures of registration.
- (2) The registration departments mentioned in clause (1) of this Article must be affiliated administratively and financially to the main Land Registration Office.
- (3) The provisions of Section VI of Chapter II of Title II of Iraqi Land Registration Act No. 43 of 1971 must be amended in accordance with the provisions of this Article.

#### ***1.4.1.4 The right of obtaining a cooling-off period and the right to withdraw of the preliminary agreement of occupancy by the occupant's individual will during the cooling-off period***

Each occupant in rotation shall have the right to withdraw from the preliminary occupancy in rotation agreement, exchange agreement and resale agreement of his own volition during an appropriate period of time starting from the date of the conclusion of any of the aforementioned agreements with the developer, without the need for justification and without bearing any legal or financial responsibility such as the payment of compensation. This is vital to supply the occupants in rotation with the ability to face the aggressive methods of marketing that may be used by some salespersons or developers, which would prevent the



occupant from giving careful consideration or seeking the opinion of a specialist before entering to the aforesaid agreements.

In order to enable each occupant in rotation to exercise his right of withdrawal , it is proposed to bind all salespersons and developers to include in the standard pre-contractual information form alongside the above-mentioned agreements ( agreement of occupancy in rotation, exchange agreement and resale agreement) an explicit clause written in a clear and distinctive way, such as red bold font, providing for the right of occupant to withdraw from the agreement without giving a reason and without incurring any costs. It is also suggested that this clause must be situated in any of these agreements before the designated signature space in order to highlight the importance and existence of this right. Moreover, it is suggested to supply each timeshare holder with a withdrawal form at the time of contracting so as to facilitate the exercise of the right of withdrawal. Furthermore, it is suggested that the withdrawal period should not exceed fourteen working days beginning with the date of entering into any of the previously mentioned agreements due to the fact that giving the occupants a long period to exercise the right of withdrawal will lead to potentially harming the interests of developers, because the longer withdrawal period given to the occupants, the more chances of contracting with other parties will be lost by the developer, especially in the high demand seasons for spending holidays. Nevertheless, if an exchange agreement is offered to the occupants in rotation at the same time as the occupancy in rotation agreement, only a single withdrawal period shall apply to both agreements. The withdrawal period for both agreements shall be calculated in the same manner mentioned above.

In the case that the occupant exercises his right of withdrawal, it is proposed that all ancillary agreements, such as credit agreements, must be terminated automatically so as to ease the exercise of this right. Thus, an Article should be added to the Section of the right of occupancy in rotation, which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code, as follows:

#### **Article 7**

(1) An occupant in rotation has the right to withdraw from the preliminary occupancy agreement, exchange agreement and resale agreement by his own individual will during 14 working days starting from the date of the conclusion of any of these agreements with the developer without the need for justification and without bearing any legal or financial

responsibility. However, if an exchange agreement is offered to the occupant in rotation at the same time as the agreement of occupancy in rotation, only a single withdrawal period shall apply to both agreements.

(2) Where the occupant in rotation intends to exercise the right of withdrawal the occupant in rotation shall, before the expiry of the withdrawal period, notify the developer on paper or on another durable medium of the decision to withdraw. The occupant in rotation may use the standard withdrawal form set out in Appendix II and provided by the developer in accordance with Article 23(C). The deadline is met if the notification is sent before the withdrawal period has expired.

(3) The exercise of the right of withdrawal by the occupant in rotation terminates the obligation of the parties to perform the agreement.

(4) Where the occupant in rotation exercises the right of withdrawal, the occupant in rotation shall neither bear any cost nor be liable for any value corresponding to the service which may have been performed before withdrawal.

(5) When the occupant exercises the right to withdraw from the agreement of occupancy in rotation, any exchange contract ancillary to it or any other ancillary contract is automatically terminated, at no cost to the occupant.

(6) Where the price is fully or partly covered by a credit granted to the occupant by the developer, or by a third party on the basis of an arrangement between the third party and the developer, the credit agreement shall be terminated, at no cost to the occupant, where the occupant exercises the right to withdraw from the preliminary occupancy in rotation agreement, exchange agreement and resale agreement.

Ultimately, it must be pointed out that the right of withdrawal is supported by the commitment of the developer, his agent or any third party of not getting any financial consideration from the occupants before the end of the above-suggested period of withdrawal, which is 14 working days.<sup>25</sup>

#### **1.4.2 The obligations of occupants in rotation**

It is proposed to subject the occupants in rotation to six basic obligations. Those obligations are: (1) the obligation to pay the financial consideration, (2) the obligation to pay the

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<sup>25</sup> For more details, please refer to Section 1.4.4.6 of this Appendix.

registration fee of the right of occupancy with the Land Registration Office, (3) the obligation to use the tourist property for the purpose of tourist occupancy only, (4) the obligation of safekeeping the tourist property, (5) the obligation of not causing a nuisance to the other occupants in rotation, and (6) the obligation to vacate the accommodation at the end of the period of occupancy.

Furthermore, it is proposed that the aforementioned obligations must be included in the Section of the right of occupancy which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code. This is for two reasons. Firstly, to guarantee that the occupants will fulfil the above-mentioned obligations without the need for stipulating them in the occupancy agreement by the developer because they will be legal obligations. Secondly, to achieve a balance between the interests of the developer on the one hand and the interests of the occupants in rotation on the other hand. Therefore, any condition included in the agreement of the right of occupancy in rotation to exempt the occupant from one of the above-mentioned obligations will be null and void. However, it is proposed to prevent the developer from adding other obligations on the shoulders of the occupant to guarantee that the developer, the powerful party in the agreement of occupancy in rotation, will not be able to use his power to force the occupant, the weaker party in the agreement, to accept any additional onerous obligations.

Accordingly, an Article should be added to the Section of the right of occupancy in rotation as follows:

**Article 8:** The obligations of the occupants in rotation.

(1) With regard to the obligations of an occupant in rotation, the provisions prescribed in this Section shall be observed.

(2) The developer is not entitled to impose obligations on occupants in rotation other than those stipulated in this Section.

(3) Any condition included in the instrument on the basis of which the right of occupancy in rotation is established to exempt an occupant in rotation from one of the obligations laid down in this Section will be null and void.

#### *1.4.2.1 The obligation of the payment of the financial consideration*

Each occupant in rotation has to pay a financial consideration in return for the acquisition of the right of occupancy in rotation unless he obtained the right of occupancy by donation. The financial consideration is typically represented by: (1) an advance lump sum paid by the occupant to the developer in return for a long-term right of occupancy in rotation. Thus, the agreement of the right of occupancy in rotation shall be valid only when the occupant pays the price of the occupancy right in full as prescribed in Article 9 below. (2) An annual fee to cover the occupant's share of the common expenses such as, the costs of the maintenance and management of the tourist property. The agreement of the right of occupancy in rotation must determine clearly the fee that should be paid annually by each occupant in rotation so as to prevent the developer from overestimating the share of each occupant in the common expenses.<sup>26</sup> However, if general exceptional incidents occur under which the annual fees as determined in the occupancy agreements become not commensurate with what has already been spend by the developer, Article 146(2) of the Iraqi Civil Code must be applied. This Article states that 'If general exceptional unpredictable events occur, as a result, the performance of the contractual obligation has become burdensome to the debtor to the extent that threatens him with exorbitant loss, the court, after balancing the interests of the contracting parties, may reduce the burdensome obligation to a reasonable limit if that would be equitable. Any agreement otherwise shall be null and void'.

It is proposed to grant the developer a landlord's lien over the rights of occupancy in rotation which have been sold on account of any unpaid annual fees and damage to property. That is, the developer as the landlord of the tourist project shall be given the status of a preferred creditor with regard to the occupant's right of occupancy in rotation in relation to both the occupant's share of the common expenses and the property damages incurred. Thus, an Article should be added to the Section which will be established to regulate the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 9**

(1) Each occupant in rotation has to pay an advance lump sum to the developer or his representative in return for the acquisition of the right of occupancy in rotation unless he

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<sup>26</sup> This point is regulated by Article 20 (A) (10) of the proposed legislation. Please refer to Section 1.4.4.1 of this Appendix.

obtained the right of occupancy by donation. This sum should be paid in full at the end of the cooling-off period otherwise the agreement of the right of occupancy in rotation shall not be valid.

(2)

(A) Each occupant in rotation has to pay to the developer or his representative his share of the annual fee as prescribed in Article 20 (A) (10).

(B) The cost of any annual fees associated with unsold occupancy rights must be met by the developer.

(C) A written summary of the incurred charges must be provided to the occupants by the developer. The summary must be certified by a qualified accountant as a fair summary and sufficiently supported by accounts, receipts and other relevant documents produced to the accountant. Each occupant in the project is entitled to (1) access and inspect the accounts, receipts and any other documents relevant to the annual fee information in the summary, and to be provided with the appropriate facilities for the purpose of making copies of such documents, and (2) to challenge the annual fees before the appropriate court if they believe that their share of the fees is greater than what it should be in accordance with the related terms of the occupancy in rotation agreement.

(D) The developer has a landlord lien on the sold rights of occupancy in rotation.

In the case of the failure of the occupant to pay his share of the annual fee without a valid or legitimate reason, he will be subject to the sanctions stipulated in the proposed Article set out below. Consequently, another Article should be added to the Section of the right of occupancy in rotation under the Iraqi Civil Code as follows:

#### **Article 10**

In the case of the failure of the occupant to pay the financial charges mentioned in Article 9

(2) (A) without a valid or legitimate reason, the following sanctions will be imposed after sending an official notice of overdue payments to the defaulting occupant in rotation.

(1) In the first year of failing to pay the due amount, the developer, or the management company as his representative, is entitled to deprive the defaulting occupant in rotation from using the accommodation and the recreational facilities of the tourist project.<sup>27</sup>

(2) In the second year of failing to pay the due amount, the developer, or the management company as his representative, is entitled to rent out the accommodation on behalf the defaulting occupant in rotation during his period of occupancy and collect the unpaid amount from the rent. The balance of the rent, if any, should be paid back to the defaulting occupant in rotation. The developer must do his best to rent out the accommodation at the best rent, taking into account the circumstances of the case, but without any fine being taken. The developer shall, within three days after making the lease, deliver to the occupant in rotation a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.

(3) In the event that the developer failed to rent out the accommodation as prescribed in clause (2), or the rent was less than the due amount, and there were no rights for third parties related to the right of occupancy in rotation, the developer is entitled to ask the competent court to sell the right of occupancy in rotation of the defaulting occupant. The sale should be at a public auction according to the procedures stipulated in Articles 71-75 of the Act of executing the judgments and other executive documents No. 45 of 1980. The price should be given to the occupant in rotation after the deduction of the due debts related to the right of occupancy in rotation as well as the administrative and judicial expenses of the sale.

(4) In the event that there is a right for a third party related to the right of occupancy in rotation of the defaulting occupant as in case that the occupant has mortgaged his right of occupancy in rotation, the developer has the right to continue renting out the accommodation of the defaulting occupant as prescribed in cause 2 until the collection of the due amount or the expiration of the mortgage whichever is earlier.

(5) If the developer managed to collect the due amount in full from the rent before the expiration of the mortgage, the occupant shall regain his right of exercising the right of occupancy in rotation. However, if the mortgage expired before the developer managed to

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<sup>27</sup> This sanction is proposed according to the rule of 'Exceptio Non Adimpleti Contractus' or 'defence of non-performance of the contract' which is set forth in the Articles 280 and 282 of the Iraqi Civil Code. Exceptio Non Adimpleti Contractus is a demur or defence available in the Iraqi Civil Code under which a party who is bound by a reciprocal contract is entitled to refuse to perform his part of the contract until the other party has performed his part on condition that the former party is not bound to perform his part of the contract first.

collect the due amount, the developer is entitled to ask the competent court to sell the right of occupancy in rotation of the defaulting occupant in accordance with the procedures prescribed in clause 3.

#### *1.4.2.2 The obligation of paying the registration fee*

In the case that the right of occupancy is related to immovable property, it is proposed that the registration fee of the right of occupancy in the Land Registration Office should be paid by the occupant in rotation as he is the right holder. Accordingly, an Article should be added to the Section which will be established to regulate the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 11**

An occupant in rotation has to pay the fee of the registration of the right of occupancy in the Land Registration Office when the right of occupancy is related to immovable property.

#### *1.4.2.3 The obligation of using the accommodation and its accessories in accordance with what it is allocated for*

It is proposed to impose an obligation on all the occupants in rotation to use the accommodations and facilities of the tourist property in accordance with what they are allocated for. Since these accommodations are allocated for the tourist occupancy, the occupants in rotation cannot use them for other purposes such as a clinic or a commercial office; nor can he use them for illegal purposes such as prostitution. If this obligation is breached, the procedures stated in the proposed Article hereunder must be followed. Hence, an Article should be added to the Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 12**

(1) Each occupant in rotation must use the accommodation and its accessories for the purposes of tourist occupancy only.

(2) If this obligation is breached, the developer may bring a legal action before the competent court to stop the illegal use of the accommodation and its accessories. If the developer is successful in proving his claim, the court has to give a judgment in his favour. If the defaulting occupant in rotation fails to abide by the court's decision to stop the illegal use, the

court may deprive the defaulting occupant of his right to exercise the right of occupancy in that year by removing the accommodation from his possession and handing it over to the developer.

(3) In the event of the breach of this obligation for the second time, the court, at the request of the developer, must terminate the right of occupancy in rotation provided that this will not result in harming the rights of the third parties as in case that the occupant has mortgaged his right to occupancy in rotation. In such a case, the court has to remove the accommodation from the defaulting occupant in rotation and deliver it to the developer in order to rent it out on behalf of the defaulting occupant in rotation until the expiration of the mortgage. The developer must do his best to rent out the accommodation at the best rent, taking into account the circumstances of the case, but without any fine being taken. The developer, shall, within three days after making the lease, deliver to the occupant in rotation a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with. The developer should pay the rent to the defaulting occupant after the deduction of his share of the annual fee as well as the expenses of managing the accommodation for his benefit. At the end of the term of mortgage, the court should pass its rule to end the right of occupancy in rotation.

(4) The aforementioned provisions do not affect the statutory rights of the developer to be compensated by the defaulting occupant in rotation for all damages incurred to the accommodation because of misuse or illegal use.

#### *1.4.2.4 The obligation of safekeeping the accommodation and its accessories*

It is proposed to put each occupant in rotation under the obligation of safekeeping and protecting the accommodation and its contents of furniture and other equipment as well as the common and recreational facilities of the tourist property and keep them free from damage during his period of occupancy. The acts of safekeeping are either negative or positive. The negative acts are represented by refraining from doing any action that leads to any damage of the accommodation and its contents as well as the common and recreational facilities of the tourist property.

With regards to the positive actions, it is represented by respecting the rules and regulations laid down by the management company regarding the use of the accommodations and the common facilities of the tourist property. It is proposed to oblige each occupant to exert the diligence of the ordinary person (ordinary care) in the implementation of this obligation in



order to make the provisions of the right of occupancy in rotation consistent with the provisions of the Iraqi Civil Code which regulate the other original rights *in rem*. Thus, if any damage or loss is sustained in respect of any accommodation and its contents, the developer must prove that this damage or loss has occurred due to the fault of the occupant who was exercising his right occupancy during that time. That is to say, the developer must prove that the damage or loss occurred because the occupant did not exert the due diligence (i.e., the care of the ordinary person) in protecting and safekeeping the accommodation. In such circumstances, the occupant will be responsible as prescribed by clauses (3) and (4) of the proposed Article hereunder. This Article must be added to the Section which will be established to regulate the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code.

### **Article 13**

(1) An occupant in rotation is under the obligation of safekeeping and protecting the accommodation and its accessories, the common parts, and the recreational facilities of the tourist property. Moreover, he has to keep them free of damages during his period of occupancy.

(2) An occupant in rotation has to exert the diligence of the ordinary person (ordinary care) in the implementation of this obligation.

(3) If the occupant fail to fulfil this obligation for the first time, he will be responsible for compensating the developer for all the damages or losses incurred upon the accommodation and its accessories.

(4) In the event that the occupant fails to fulfil this obligation for the second time, the competent court, at the request of the developer, must terminate the right of occupancy in rotation. In such a case, the procedures stipulated in Article (12/3) must be followed. This will not affect the statutory rights of the developer to be compensated by the defaulting occupant in rotation for all damages incurred to the accommodation and its accessories as provided for in clause (3).

#### ***1.4.2.5 The obligation of not creating a nuisance***

It is proposed to oblige each occupant in rotation during his period of occupancy to refrain from doing anything which results in inconvenience to the other occupants in rotation. The proposed Article below illustrates how this obligation will be regulated according to the

Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code.

#### **Article 14**

(1) An occupant in rotation, during his period of occupancy, must refrain from undertaking any action that leads to a nuisance, or that prevents the other occupants in rotation from deriving benefit from their accommodation and the recreational facilities of the tourist property during their periods of occupancy.

(2) If this obligation is breached, the injured occupant in rotation is entitled to ask the developer or the management company as his representative to stop the occupant who is in breach of this obligation in accordance with Article 26(3). If the developer or the management company as his representative fails to do that, the injured occupant in rotation is entitled to ask for the application of Article 26(4). This will not affect the statutory rights of the injured occupant to be compensated by the defaulting occupant in accordance with Articles 204 and 207(1) of the Iraqi Civil Code No. 40 of 1951.<sup>28</sup>

#### ***1.4.2.6 The obligation of vacating the unit of accommodation***

Due to the to the fact that the right of occupancy in rotation is characterised by being a time-limited right, it seems axiomatic to suggest that the last occupant of each accommodation has to hand it over to the developer or his representative at the end of the life of the project. It is also proposed to compel each occupant in rotation to vacate the accommodation annually on the day and time stipulated in the legal instrument that establishing the right of occupancy in order to ensure that the process of rotation in the use of each accommodation is operating in a smooth way and without delay or hindrance. This is due to the fact that each accommodation in the tourist complex is used by several occupants throughout the year. In the case of the failure of the occupant in rotation to vacate the accommodation on the agreed time, the sanctions provided in the proposed Article hereunder must be imposed as the breach of this obligation will negatively affect the functioning of the tourist project. Consequently, an Article should be added to the Section of the right of occupancy which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

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<sup>28</sup> Article 204 of the Iraqi Civil Code provides that ‘Each illicit act which causes damages or injuries....entails payment of compensation’. Article 207/1 of the Iraqi Civil Code states that ‘In all cases, the court will estimate the damages commensurately with the losses sustained by the victim and the gains he missed provided that they were a natural result of the illicit act’.

## **Article 15**

(1) Each occupant in rotation has to vacate the accommodation annually on the day and time stipulated in the legal instrument on the basis of which the right of occupancy in rotation is established.

(2) In the case of the failure of the occupant in rotation to fulfil this obligation for the first time, the following sanctions will be imposed.

(A) The payment of 250000 Iraqi Dinar for every day that the occupant in rotation delays delivering the accommodation to the developer or the management company as his representative.

(B) Renting an equivalent accommodation, whether in the same or in another tourist property, by the developer or his representative for the next occupant who is deprived of exercising his right of occupancy in rotation at the expense of the defaulting occupant.

(3) In the case of the failure of the occupant in rotation to fulfil this obligation for the second time, the competent court, at the request of the developer, must terminate the right of occupancy in rotation. In such a case, the procedures stipulated in Article 12(3) must be applied. This will not affect the statutory rights of the occupant who has deprived of exercising his occupancy right to be compensated by the defaulting occupant as prescribed in clause 2(B).

(4) Imposing the aforementioned sanctions would not deprive the affected occupant of his statutory right to claim compensation for the incurred losses and lost profits which he has suffered because of him not being given the accommodation at his time of occupancy.

(5) The last occupant of each accommodation has to hand it over to the developer or the management company as his representative at the end of the life of the project.

### **1.4.3 The rights of the developer**

As mentioned earlier in this Chapter, under the proposed right of occupancy in rotation the developer retains the bare ownership of the tourist property during the life of the timeshare project. Therefore, it is proposed to provide the developer with the right of disposing of his bare ownership of the tourist property to another person during the life of the tourist project. Consequently, the developer is entitled to alienate the bare ownership of the tourist complex

whether in return for a financial consideration as in the case of sale and barter or not in return for a financial consideration as in the case of gift.

Moreover, it is proposed to entitle the developer the right to establish easements over the tourist property for the benefit of another person during the life of the project as long as this does not result in damaging the interests of the occupants in rotation. This matter is subject to the discretion of the court. Furthermore, it is proposed to give the developer the right to mortgage the bare ownership of the tourist property during the life of the timeshare project.

It is believed that by giving the developer the right of disposing and mortgaging the bare ownership of the tourist property is of great importance because this will help the developer to gain many advantages. These may include getting the benefit of any increase in the tourist property's value during the life of the project, paying off his debts by transferring the bare ownership of the tourist property to his creditors in order to let the creditors secure payment in full, expanding his business through concluding an agreement with other developers to set up a timeshare holding company so that the share of each one of them in the capital of this company is his owned tourist property, financing the purchase or the establishment of the tourist project itself and empowering the developer to use the tourist property as a guarantee provided to any lender in return for getting a loan to finance a commercial enterprise or indeed to achieve other purposes.

It is of great importance to bear in mind that when the bare ownership of the tourist complex is transferred to another person whether based on the free-will of the developer as in the case of sale, or against his will as in the case of the judicial sale, the occupancy rights will not be affected and cannot be overreached by the new owner owing to the fact that under the proposed legal arrangement, the occupancy rights in rotation will be established as estates in land and thus these rights will be valid against any person who replace the old owner of the tourist property as well as against the world at large until the expiry of the tourist project. It goes without saying that when the occupancy rights come to an end, the new owner regains the full ownership of the tourist property and thus will be able to exercise all the powers that are granted by the Iraqi Civil Code to the owner, namely: the power of usage, the power of exploitation and the power of disposition.

It is worth mentioning that according to the general principles of the Iraqi Civil Code, all the legal transactions in respect of rights *in rem* attached to a piece of real estate must be registered with the Land Registration Office so as to be valid . This rule is established by the

Article 1126(2) of the Iraqi Civil Code which provides for ‘Any contract transfers the ownership of a property or any real right related to a piece of property shall not be valid unless it takes into account the way prescribed by the law’, and according to the Article 3 of the Iraqi Land Registration Act No. 43 of 1971 ‘Any legal action creates, transfers or terminates the ownership of a property or any real right related to a piece of property is not valid unless it is registered in the Land Registration Office’. Thus, any legal action leads to transferring the bare ownership of the tourist property, if it is immovable property, will not be valid unless it is registered with the Land Registration Office.

On this basis, two Articles must be added to the Section which will be established to regulate the right of occupancy in rotation under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 16**

(1) In the rights of a developer, the instrument on the basis of which the right of occupancy in rotation is established, and the provisions provided for in this Section shall be observed.

(2) It is forbidden to deprive any developer of his rights prescribed in this Section. However, it is permissible to provide him with more rights by the instrument on the basis of which the right of occupancy in rotation is established provided that this does not result in exempting him from his obligations provided for in this Section or depriving the occupants in rotation of their rights stipulated in this Section.

#### **Article 17**

During the life of the timeshare project, each developer is entitled to exercise the following powers.

(1) To alienate the bare ownership of the tourist property.

(2) To mortgage the bare ownership of the tourist property.

(3) To establish easements on the tourist property for the benefit of another person provided that not leads to damage the interests of the occupants in rotation.

#### **1.4.4 The obligations of the developer**

It is proposed to subject the developer to seven obligations. Those obligations are: (1) the obligation of providing complete and accurate information in both of pre-contractual and

contractual stages, (2) the obligation of formulating a statement about the condition of the accommodation, (3) the obligation of preparing an inventory of the movables of accommodations, (4) the obligation of enabling the occupants in rotation of benefiting from the tourist property without impediment, (5) the obligation of the management and maintenance of the tourist property, (6) the obligation of not getting any financial consideration during the cooling-off period, and finally, (7) the obligation of paying the financial charges due on the tourist property.

Moreover, it is proposed that aforementioned obligations must be included in the Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code. This is to achieve a balance between the interests of the developer on the one hand and the interests of the occupants in rotation on the other hand. Therefore, any condition included in an agreement of the right of occupancy in rotation to exempt a developer from one of the above-mentioned obligations will be null and void.

Accordingly, an Article should be added to the Section of the right of occupancy in rotation as follows:

**Article 18:** The Obligations of the Developers

(1) In the obligations of a developer, the instrument on the basis of which the right of occupancy in rotation is established, and the provisions prescribed in this Section shall be observed.

(2) Any condition included in the contract of the right of occupancy in rotation or any other instrument used to establish the right of occupancy in rotation to exempt the developer from one of his obligations set forth in this Section is null and void.

(3) It is permissible to commit the developer with more obligations by the instrument on the basis of which the right of occupancy in rotation is established provided that this does not result in depriving the developer of his rights prescribed in this Section or the exemption of the occupant in rotation from his obligations set forth in this Section.

***1.4.4.1 The obligation of providing complete and accurate information at each of pre-contractual and contractual stages***

In countries in which the business of the timesharing is prevalent, such as the United States of America and European countries, experience has shown that the period prior to entry into a

timeshare, exchange and resale agreement is characterised by the use of perceived unfriendly means of marketing by some developers and salespersons so as to force the prospective timeshare holders to conclude the agreement. This may constitute actions such as inserting inaccurate information by means of advertisement that they use to promote the timesharing interests and the related services in order to lure the prospective timeshare holders and push them to conclude any of the aforesaid agreements.

Since the developer is the powerful party in the timeshare, exchange and resale agreements as he has full knowledge of all the details of the agreement, and since the knowledge of the prospective timeshare holder about the important aspects that is related to the timeshare, exchange and resale agreements is mostly limited, it is the responsibility of the developer and salespersons to inform and enlighten the prospective timeshare holder about the core information which relates to the timeshare, exchange and resale agreements in order to ensure that the element of consent of the prospective timeshare holder is sound and free of defects. Accordingly, it is proposed that the obligation of enlightenment must be included in the Section of occupancy right in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as detailed in the following proposed Articles.

#### **Article 19**

In good time before the occupant in rotation is bound by any agreement or offer, developers and salespersons must provide the occupant in rotation with accurate and sufficient information by means of the standard pre-contractual information form, as follows:

#### **Article 20**

(A) In the case of an agreement of occupancy in rotation, the following information must be included by developers and/or salespersons in the standard pre-contractual information form.

- (1) The name of the developer and his page number in the commercial register.
- (2) The name of the company which is responsible for the management of tourist project and its page number in the commercial register.
- (3) The name and address of the tourist project, as well as the date and license number of the establishment of the project.

- (4) Any legal burden that has been arranged over the tourist property such as encumbrances, mortgages and servitudes.
- (5) The exact legal nature and content of the right of occupancy that each occupant in rotation will obtain if he decides to participate in the tourist project.
- (6) The lifetime of the tourist project.
- (7) Detailed information about all the accommodation of the tourist property. This information should include the size, number of rooms, the quality of furniture and equipment, and the services available in each category of accommodations.
- (8) Detailed information about the recreational facilities available in the tourist project which are dedicated to serve the occupants in rotation.
- (9) The amount that each prospective occupant has to pay in return for getting the right occupancy in rotation and payment method.
- (10) The annual fee that each prospective occupant has to pay in exchange for carrying out the works of maintenance and management which are related to the tourist property by the management company. It is also vital to clearly state the mechanism which will be used by the developer to calculate the annual fees and provide details on how the fees will be allocated to the occupants, as well as how and when such fees may be increased .
- (11) Any other expenses and fees which must be paid by the occupant in rotation to the developer on an annual basis.
- (12) The final and total price that must be paid by the occupant in exchange for getting the right of occupancy in rotation, with an explicit and clear clause that the developer has no right to obtain fees or expenses not provided for in the instrument on the basis of which the right of occupancy in rotation is established and this legislation.
- (13) In the case of the subscription of the developer with an exchanging company, all the information related to that company as well as an adequate clarification of the rights and obligations arising from this subscription must be provided to the prospective occupants.
- (14) The right of each occupant in rotation to withdraw from the preliminary occupancy agreement by his own individual will during 14 working day starting from the date of the



conclusion of the preliminary agreement of occupancy in rotation with the developer without the need for justification and without bearing any legal or financial responsibility.

(15) The prohibition of getting any financial consideration whether by the developer, his agent or any third party from the occupants in rotation before the end of the withdrawal period.

(16) Has the trader signed a code/ codes of conduct and, if yes, where can it/ they be found?

(B) In the case of a resale agreement, the following information must be included by resale company or agent in the standard pre-contractual information form.

(1) Identity, place of residence and legal status of the persons who will be party to the resale agreement.

(2) Sufficient description of the resale services.

(3) Exact nature and content of the rights arising from the resale agreement.

(4) Duration of the agreement.

(5) Price to be paid by the occupant in rotation for acquiring the resale services.

(6) Outline of additional obligatory costs imposed under the agreement; type of costs and indication of amounts (e.g. local taxes, notary fees, cost of advertising).

(7) The occupant in rotation has the right to withdraw from the resale agreement without giving any reason within a period of fourteen days from the conclusion of the agreement or any binding preliminary agreement.

(8) Any advance payment by the occupant in rotation is prohibited until the actual sale has taken place or the resale agreement otherwise is terminated. This prohibition concerns any consideration, including payment, provision of guarantees, reservation of money on accounts, explicit acknowledgment of debt etc. It includes not only payment to the resale company/ agent, but also to third parties.

(9) Has the trader signed a code/ codes of conduct, and if yes, where can it/ they be found?

(C) In the case of an exchange agreement, the following information must be included by exchange company and/or salespersons in the standard pre-contractual information form.

- (1) Identity, place of residence and legal status of the persons who will be party to the agreement.
- (2) Brief description of the exchange service.
- (3) Exact nature and content of the rights arising from the exchange agreement.
- (4) Exact period during which the right which is subject of the agreement may be exercised and its duration.
- (5) Date on which the occupant in rotation can exercise the contractual right.
- (6) Price to be paid by the occupant in rotation for exchange membership fees.
- (7) Price to be paid by the occupant in rotation for every exchange transaction, including any additional charges.
- (8) Outline of additional obligatory costs imposed under the agreement; type of costs and indication of amounts (e.g. renewal fees, other recurrent fees, special levies, local taxes).
- (9) The occupant in rotation shall not bear any costs or obligations other than those specified in the agreement.
- (10) The occupant in rotation has the right to withdraw from the exchange agreement without giving any reason within a period of fourteen days from the conclusion of the agreement or any binding preliminary agreement. In the event that the exchange agreement is offered together with and at the same time as the occupancy in rotation agreement, only a single withdrawal period shall apply to both agreements.
- (11) During the withdrawal period, any advance payment by the occupant in rotation is prohibited. This prohibition concerns any consideration, including payment, provision of guarantees, reservation of money on accounts, explicit acknowledgment of debt etc. It includes not only payment to the developer, but also to third parties.
- (12) Has the developer signed a code/ codes of conduct, and if yes, where can it/ they be found?

## **Article 21**

(A) All the information referred to in Article 20 must be provided, free of charge, by the developer on paper or on another durable medium which is easily accessible to the occupant in rotation, and must be drawn up in the language of the country in which the occupant in rotation is a national.

(B) Where an occupancy in rotation, resale or exchange agreement is to be offered to an occupant in rotation in person at a promotion or sales event, the developer must clearly indicate in the invitation the commercial purpose and the nature of the event. The information referred to in Article 20 must be available to the occupant in rotation at any time during the event. The right of occupancy in rotation must not be marketed or sold as an investment.

(C) All the information stated in the standard pre-contractual information form concerning the rights of occupancy in rotation, exchange and resale services shall be considered an integral part of the occupancy in rotation, exchange and resale agreements.<sup>29</sup> The information shall not be altered unless the parties expressly agree otherwise.

## **Article 22**

(A) The developer must ensure that the legal instrument which creates the right of occupancy in rotation includes, as a minimum, the information stipulated in Article 20(A) in addition to the information set forth below:

(1) The date and place of the creation of the instrument on the basis of which the right of occupancy in rotation is established.

(2) The name of the developer and his address, his work phone numbers, his page number in the commercial register, his stamp and signature on the instrument and all enclosures.

(3) The name and address of the occupant, phone numbers and identity.

(4) Detailed description of the accommodation allocated to the occupant to exercise his right of occupancy in rotation. This description should include the size, number and location of the accommodation which is provided to the occupant to exercise the right of occupancy in rotation, the quality of the furniture and equipment, and the services provided. Therefore, a

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<sup>29</sup> This Article has been added to ensure compliance by developers to provide correct and accurate information to the prospective occupants in rotation.

scheme must be enclosed to illustrate the number and location of the said accommodation in the tourist property with the legal instrument which creates the right of occupancy in rotation.

(5) The season during which the right of occupancy can be exercised.

(6) The duration of the right of occupancy.

(7) The date on which the occupant can start to exercise the right of occupancy.

(8) The number of persons who are allowed to occupy the accommodation.

(9) A clause stating explicitly and clearly that the right of occupancy entitles the occupant to the use recreational facilities attached to the tourist property without financial consideration together with occupying a specific accommodation in the tourist property.

(10) Detailed description about the recreational facilities available in the tourist property which are dedicated to serve the occupants in rotation.

(11) The conditions or regulations of using the accommodations and recreational facilities of the tourist project, if any, for example, the inadmissibility of bringing pets.

(12) The restrictions on the exercise of the occupancy right.

(13) The standards of mending and re-furnishing the accommodation and the recreational facilities of the tourist property in general.

(14) The rights and obligations of the developer with the statement of the consequences of the failure of the developer to implement his legal and contractual obligations.

(15) The rights and obligations of the occupant with the statement of the consequences of the failure of the occupant to implement his legal and contractual obligations. This must include the statement in a clear and obvious way on the following:

- The right of the occupant to exploit and dispose of his right of occupancy in rotation to another person during the life of the tourist project.
- The right of each occupant in rotation to withdraw from the preliminary occupancy agreement by his own individual will within 14 working days starting from the date of the conclusion of the preliminary agreement of occupancy in rotation with the developer without the need for justification and without bearing any legal or financial responsibility.

- The prohibition of getting any financial consideration from the occupant before the end of the withdrawal period, whether by the developer, his agent or any third party.

(16) The mechanism of the management and maintenance of the tourist property; including whether and how occupants in rotation may influence and takes part in the decisions regarding these issues.

(17) The language(s) that can be used for communication between the developer and the occupant in rotation in relation to the occupancy in rotation agreement, for example in relation to the handling of queries and complaints.

(18) In accordance with international private law, the agreement may be governed by a law other than the law of the country in which the occupant is resident or is habitually domiciled and possible disputes can be brought before courts other than those of the country in which the occupant is resident or is habitually domiciled.

(19) Where applicable, the possibility for out-of-court dispute resolution.

(B) The resale company/agent must ensure that the resale agreement includes, as a minimum, the information stipulated in Article 20 (B) in addition to the information set forth below:

(1) The rights and obligations of the resale company/agent with the statement of the consequences of the failure of the company/ agent to implement his legal and contractual obligations.

(2) The rights and obligations of the occupant in rotation with the statement of the consequences of the failure of the occupant inn rotation to implement his legal and contractual obligations.

(3) The occupant in rotation shall not bear any costs or obligations other than those specified in the resale agreement.

(4) Conditions for terminating the resale agreement, the consequences of termination, and information on any liability of the occupant for any costs which might result from such termination.

(5) Indication of the language(s) that can be used for communication between the resale company/ agent and the occupant in rotation in relation to the resale agreement, for example in relation to the handling of queries and complaints.

(6) In accordance with international private law, the resale agreement may be governed by a law other than the law of the country in which the occupant is resident or is habitually domiciled and possible disputes can be brought before courts other than those of the country in which the occupant is resident or is habitually domiciled.

(7) Where applicable, the possibility for out-of-court dispute resolution.

(8) The identity, place of residence and signature of each of the parties; and the date and place of the conclusion of the agreement.

(C) The exchange company must ensure that the exchange agreement includes, as a minimum, the information stipulated in Article 20 (C) together with the additional information set forth below:

(1) A complete and accurate description of the terms and conditions of the occupant's contractual relationship with the exchange company and the procedures by which changes thereto may be made.

(2) A complete and accurate description of the procedures to qualify for and effectuate exchanges.

(3) An explanation of how the exchange program works; the possibilities and modalities for exchange, an indication of the value allotted to the occupancy right of the occupant in the exchange program and set of concrete examples of exchange possibilities.

(4) A complete and accurate description of all limitations, restrictions, or priorities employed in the operation of the exchange program, including, but not limited to, limitations on exchange based on seasonality, unit size, or levels of occupancy, expressed in boldfaced type, and, in the event that such limitations, restrictions, or priorities are not uniformly applied by the exchange company, a clear description of the manner in which they are applied.

(5) Whether and under what circumstances an occupant in rotation, in dealing with the exchange company, may lose the use of his occupancy right, in any properly applied for exchange without his being provided with substitute accommodations by the exchange company.

(6) An indication of the number of tourist properties participating in the exchange program and the number of members in the exchange program, including any limitations on the

availability of particular accommodation selected by the occupant, for example, as the result of peak periods of demand, the potential need to book a long time in advance, and indications of any restriction on the choice resulting from the occupancy rights deposited into the exchange system by the occupant.

(7) An appropriate description of the tourist properties participating in the exchange program and their location; where the agreement concerns accommodation other than immovable property, an appropriate description of the accommodation and the facilities; description of where the occupant can obtain further information.

(8) Where appropriate, information on the arrangements for termination of ancillary agreements and the consequences of such termination.

(9) Conditions for terminating the exchange agreement, the consequences of termination, and information on any liability of the occupant for any costs which might result from such termination.

(10) Indication of the languages that can be used for communication between the exchange company and the occupant in rotation in relation to the exchange agreement, for example in relation to the handling of queries and complaints.

(11) In accordance with international private law, the agreement may be governed by a law other than the law of the country in which the occupant is resident or is habitually domiciled and possible disputes can be brought before courts other than those of the country in which the occupant is resident or is habitually domiciled.

(12) Where applicable, the possibility for out-of-court dispute resolution.

(13) The identity, place of residence and signature of each of the parties; and the date and place of the conclusion of the agreement.

### **Article 23**

(A) An occupancy in rotation, resale and exchange agreement must be in writing, on paper or on another durable medium which is easily accessible to the occupant in rotation, and drawn up in the language of the country in which the occupant in rotation is a national.

(B) In the case of the failure of the salespersons or developers to include the standard pre-contractual information form or the occupancy in rotation, resale or exchange agreement

some of or all the required information set forth in Articles 20 and 22, the occupant is entitled to ask the competent court to pass a judgment to terminate the occupancy in rotation, resale or exchange agreement as well as asking for compensation if appropriate.

(C) The occupancy in rotation, resale and exchange agreements shall include a separate standard withdrawal form, as set out in Annex I, intended to facilitate the exercise of the right of withdrawal in accordance with Article 7.

(D) The occupant in rotation must be provided with a copy or copies of the occupancy in rotation, resale or exchange agreement at the time of its conclusion.

It is worth mentioning that the sanctions described in Article 23 (B) shall be applied outside of the cooling-off period upon proof by the occupant in rotation that he has not been given any of the information stipulated in Articles 20 and 22 or the information given to him not match the state of things as they are.

#### *1.4.4.2 The obligation of formulating a statement about the condition of the accommodation*

It is proposed to oblige the developer or the management company, as his representative, to formulate (draft) a statement about the condition of each accommodation in the tourist property. The statement is an instrument in writing drafted by the developer or the management company for the purpose of giving a comprehensive and appropriate description of accommodations and recording their physical condition before the commencement of each occupant to exercise his right to occupancy in rotation. There are two main purposes behind this proposal.

Firstly, to enable the developer to check if there are damages or losses to the accommodation as a result of either the intentional or negligent conduct of the occupant, his sub-tenant, members of his family, guests or invitees at the time of exercising the right of occupancy through the comparison between the condition of the accommodation at the expiration of the right of occupancy and its condition before the beginning of exercising the right of occupancy as it is recorded in the statement. Secondly, to enable the occupant to prove he has fulfilled his obligation of returning the accommodation to the developer in its condition as handed over to him at the start of the right of occupancy in rotation i.e. without losses or damages. Consequently, an Article should be added to the Section of the right occupancy in rotation



which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 24**

(1) A developer or the management company, as his representative, has to formulate a statement describing the condition of each accommodation in the tourist property.

(2) Each occupant must sign the statement before starting to exercise his right of occupancy in rotation. However, he must be enabled from comparing between the information which is stated in this statement with the factual condition of the accommodation before signing the statement in order to be sure that they match one another.

(3) In the case of the failure of the occupant in rotation to sign the statement without a legitimate and valid reason, the developer or the management company, as his representative, has the right to refrain from handing the accommodation to the occupant in rotation until signing the statement.<sup>30</sup>

(4) In the case of the failure of the developer or his representative to fulfil this obligation, the occupant who is deprived of exercising his right of occupancy in rotation is entitled to rent an equivalent accommodation in another tourist property at the expense of the developer. This will not affect the statutory rights of the occupant to be compensated by the developer because of depriving him of exercising his right of occupancy in rotation.

#### ***1.4.4.3 The obligation of preparing an inventory of the accessories of accommodations***

It is proposed to oblige the developer or the management company, as his representative, to prepare an inventory including an accurate description of the accessories of each accommodation in the tourist property. The inventory must show the quantities, physical condition and the detailed value of the accommodation accessories. There are two main purposes behind this proposal; first, to enable the developer to check if there are damages or losses that have come upon the accommodation accessories as a result of either the intentional or negligent conduct of the occupant, his sub-tenant, members of his family, guests or invitees at the time of exercising the right of occupancy through the comparison

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<sup>30</sup> This sanction is proposed according to the rule of 'Exceptio Non Adimpleti Contractus' or 'defence of non-performance of the contract' which is set forth in the Articles 280 and 2282 of the Iraqi Civil Code. Exceptio Non Adimpleti Contractus is a demur or defence available in the Iraqi Civil Code under which a party who is bound by a reciprocal contract is entitled to refuse to perform his part of the contract until the other party has performed his part on condition that the former party is not bound to perform his part of the contract first.

between the condition of the accessories at the end of the right of occupancy and their condition before the beginning of exercising the right of occupancy as it is recorded in the inventory; second, to enable the occupant to demonstrate he has fulfilled his obligation of returning the accommodation accessories to the developer in their condition as handed over to him at the start of the right of occupancy i.e. without losses or damages.

Accordingly, an Article should be added to the Section of the right occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

### **Article 25**

(1) A developer or the management company, as his representative, must prepare an inventory including an accurate description of the accessories of the accommodations of the tourist property. The inventory must show the quantities, physical condition and the detailed value of the accessories of the accommodation.

(2) Each occupant must sign the inventory before starting to exercise his right of occupancy in rotation. However, the occupant must be enabled from comparing between the information which is stated in this inventory with the factual condition of the accommodation accessories before signing the inventory in order to be sure that they match one another.

(3) In the case of the failure of the occupant in rotation to sign the inventory without a legitimate and valid reason, the developer or the management company, as his representative, has the right to refrain from handing accommodation to the occupant in rotation until signing the inventory.<sup>31</sup>

(4) In the case of the failure of the developer or his representative to fulfil this obligation, the occupant who is deprived of exercising his right of occupancy in rotation is entitled to rent an equivalent accommodation in another tourist property at the expense of the developer. This will not affect the statutory rights of the occupant to be compensated by the developer because of depriving him of exercising his right of occupancy in rotation.

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<sup>31</sup> This sanction is proposed according to the rule of 'Exceptio Non Adimpleti Contractus' or 'defence of non-performance of the contract' which is set forth in Articles 280/2282 of the Iraqi Civil Code. Exceptio Non Adimpleti Contractus is a demur or defence available in the Iraqi Civil Code under which a party who is bound by a reciprocal contract is entitled to refuse to perform his part of the contract until the other party has performed his part on condition that the former party is not bound to perform his part of the contract first.

#### *1.4.4.4 The obligation of enabling the occupants in rotation of benefiting from the tourist complex peacefully*

It is proposed to oblige the developer to deliver the accommodations to the occupants during their period of occupancy and enable them to make use of the accommodations together with the recreational facilities of the tourist property peacefully and without any disturbance. The proposed Article below illustrates how this obligation will be regulated according to the Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code.

#### **Article 26**

(1) A developer or the management company, as his representative, has to deliver the accommodation and its accessories to the occupant in rotation or his replacement free from hindrances on the agreed time every year in a suitable condition for the tourist occupancy, and in accordance with the specifications stipulated in the instrument on the basis of which the right of occupancy in rotation is established, and in accordance with the criteria of the classification of hotels and tourist properties adopted by the Ministry of Tourism and Antiquities in Iraq.

(2) A developer, his representative and his subordinates must refrain from undertaking any legal or physical action that leads to a delay, or which disturbs or prevents the occupant in rotation from deriving benefit from the accommodation and the recreational facilities of the tourist property during his period of occupancy. However, the developer or his representative has the right to enter the accommodations so as to conduct the necessary operations of cleaning and repairing. He also has the right to enter the accommodations in the company of the person(s) who want(s) to view the tourist property for the purpose of purchasing or mortgaging provided that there is no harassment of the holders of the rights of occupancy.

(3) A developer or his representative has to confront, repel and rebut any legal or physical action emanating from any other occupant, or any person that leads to delay, disturbing or preventing the occupant in rotation from making use of the accommodation and the recreational facilities of the tourist property during his period of occupancy.

(4) If the developer fails to fulfil the aforementioned obligations and this resulted in depriving the occupant in rotation of the benefit he should enjoy by virtue of the right of occupancy, he is entitled to request the competent court to pass a judgment to terminate the right of

occupancy, or to compensate him or both if appropriate. If the occupant chooses to request the termination of the right of occupancy in rotation, and he has mortgaged it, the court will not respond positively to his request unless he provides the mortgagee with another security.

#### *1.4.4.5 The obligation of the management and maintenance of the tourist property*

It is proposed to make the developer responsible for managing and maintaining the tourist property. This is because of two main reasons. First, the developer retains the bare ownership of the tourist property. Second, the occupants in rotation, as a rule, are not concerned with participating in the project's management. Rather, they are just concerned with acquiring the right of occupancy in one of the project's accommodations and in participating in using the project's recreational facilities because they want to enjoy their vacations and to have a rest from the trouble of work which will not be achieved if they are involved in the management of the timeshare project. The developer shall execute this obligation either by himself if he has the required experience or by employing a professional company specialised in performing such business if he does not have the required experience. Whatever the case, the developer himself shall be responsible towards the occupants in rotation in the case of the occurrence of a fault in managing and maintaining the tourist property or in the event of any decline in the level of the provided tourist services. It is also proposed to divide the year into fifty-two weeks, forty-eight weeks is devoted to the exercise of the right of occupancy and the rest to carry out the regular maintenance and repair work. The purpose of this proposal is to enable the developer to implement his obligation of the maintenance of the tourist property in a way that does not lead to preventing the occupants in rotation from utilising the tourist project during their period of occupancy. Thus, an Article should be added to the Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows.

#### **Article 27**

(1) The developer is under an obligation to manage, maintain and repair the tourist property either by himself if he has the required experience or by employing a professional company specialised in performing such business if he does not have the aforementioned experience.

(2) In performing this obligation, the developer or the management company as his representative has to divide the year into fifty-two week, forty-eight week to be sold on the

basis of the right of occupancy in rotation. The remaining four weeks, must be allocated to carry out the regular maintenance and repair work.

(3) The developer must implement this obligation in accordance with the terms and conditions stipulated in the instrument on the basis of which the right of occupancy in rotation is established, and in accordance with the criteria of the management of hotels and tourist properties adopted by the Ministry of Tourism and Antiquities in Iraq.

(4) If the developer fails to fulfil this obligation, and this proved through a report issued by the Department of Inspection in the Ministry of Tourism and Antiquities, an occupant in rotation is entitled to demand that developer to perform his obligation in accordance with clause (3). If the developer fails, within a reasonable period, to respond positively to the demand of the occupant in the rotation, he has the right to request the competent court to pass a judgment to terminate the right of occupancy, or to compensate him or both if appropriate. If the occupant chooses to request the termination of the right of occupancy in rotation, and he has mortgaged it, the court shall not comply with his request unless he provides the mortgagee with another security.

#### *1.4.4.6 The obligation of not getting any financial consideration during the cooling-off period*

In relation to the occupancy in rotation and exchange agreements, it is proposed to place each developer, his agent or any third party under the obligation of not obtaining any financial consideration from the occupants in rotation before the end of the period of withdrawal, which is suggested to be 14 working days, starting from the date of the conclusion of the agreement.<sup>32</sup> It is also proposed, in relation to the resale agreement, to oblige the resale company/ agent to not obtaining any financial consideration from the occupants in rotation before the actual sale takes place or the resale agreement is otherwise terminated.

There are three purposes behind this proposal. Firstly, to protect the occupants in rotation from being vulnerable to the actions of procrastination that may be exercised by some developers in order to prevent the occupants from recovering their money that they have paid to developers. Secondly, to protect the paid money of the occupants in rotation from being lost in the event that the developer filed for bankruptcy during the period of withdrawal.

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<sup>32</sup> For more detail, please refer to Section 1.4.1.4 of this Appendix.

Finally, to encourage the foreign timeshare holders to take part in the Iraqi timeshare projects as they will get the same level of protection that they can get in their countries which in turn will lead to offer high probability to the success of the timeshare industry in Iraq. Thus, the following Article should be added to the Section which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil to regulate the right of occupancy in rotation.

#### **Article 28**

(A) In relation to occupancy in rotation and exchange agreements, any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the developer, his representative or any third party by the occupant in rotation before the end of the withdrawal period according to Article 7, is prohibited.

(B) In relation to resale agreements any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the developer, his representative or any third party by the occupant in rotation before the actual sale takes place or the resale agreement is otherwise terminated, is prohibited.

#### ***1.4.4.7 The obligation of paying the financial charges due on the tourist complex***

It is proposed that the taxes, insurance premiums and any other charges due on the tourist property should be paid by the developer as he holds the bare ownership of the tourist property. Hence, the hereunder Article should be added to the Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article (29)**

The taxes, insurance premiums and any other charges due on the tourist property must be paid by the developer or his representative.

## 1.5 The CASES OF THE TERMINATION OF THE RIGHT OF OCCUPANCY IN ROTATION

Tracing the approach of the Iraqi Civil Code in the regulation of the original rights *in rem* emanating from ownership right, it is suggested to make the right of occupancy in rotation come to an end when one of the causes listed below occurs.

### 1.5.1 Effluxion of time (Term expiration)

Since one of the characteristics of the right of occupancy in rotation is to be a time-limited right, it seems axiomatic to propose the termination of this right when its period comes to an end. Thus, an Article must be added to Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 30**

The right of occupancy in rotation shall terminate with the expiry of its defined term as stipulated in the instrument on the basis of which the right of occupancy in rotation is established.

### 1.5.2 The destruction of the object of the right of occupancy in rotation

In the case of the destruction of the object of the right of occupancy in rotation (the accommodation which is allocated to the occupant to exercise his right of occupancy in rotation or the entire tourist property) because of the force majeure, extraneous reason, act of God or the fault of the third party, the provisions which are detailed in the below proposed Article will be applied. Thus, an Article must be added to Section of the right of occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 31**

(1) The right of occupancy in rotation shall terminate with the destruction of its object (the accommodation which is allocated to the occupant to exercise his right of occupancy in rotation or the entire tourist property) because of the force majeure, extraneous reason, act of God or the fault of the third party. However, if the developer has been compensated for the destruction, he has to use the amount of compensation to restore the object to its original condition. This will not affect the statutory rights of the harmed occupants to be compensated

because of depriving them of exercising their right of occupancy in rotation during the period of restoration if the destruction occurs because of the fault of the third party.

(2) If the destruction of the object of the right of occupancy in rotation occurs because of the fault of the developer himself or one of his subordinates, he has to restore the object to its original condition and compensate the harmed occupants who were deprived of the exercise of their right of occupancy during the period of restoration.

(3) If the destruction of the object of the right of occupancy in rotation occurs because of the fault of the occupant himself or a member of his family, he has to restore the object to its original condition and compensate the developer and the harmed occupants who were deprived of the exercise of their right of occupancy during the period of restoration.

### **1.5.3 Prescription (Limitation)**

It is proposed to make the right of occupancy in rotation come to an end when not being enjoyed by the occupant in rotation for a continuous five-year period without a legitimate excuse. This is for two main reasons. Firstly, all the original rights *in rem* emanating from ownership right under the Iraqi Civil Code are subject to the provisions of extinctive prescription. Secondly, the five-year period is sufficient evidence that the occupant is not serious in exercising his right of occupancy. Nonetheless, the right of occupancy in rotation will not come to an end when the creditors of the occupant in rotation have an interest in retaining it such as when the right of occupancy has been mortgaged by the occupant.

It goes without saying that the termination of the right of occupancy in rotation because of limitation shall be subject to the provisions of suspension and interruption of time limitation stipulated in the Articles from 435 to 443 of the Iraqi Civil Code. Accordingly, an Article must be added to Section of the right in occupancy in rotation which will be established under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code as follows:

#### **Article 32**

The right of occupancy in rotation shall terminate when not being enjoyed by the occupant in rotation for a continuous five-year period without a legitimate excuse. However, the right of occupancy in rotation shall not be deemed as having ended if the creditors of the occupant in rotation have an interest in retaining it such as when the right of occupancy in rotation has been mortgaged.



#### 1.5.4 Merger of titles

It is proposed to end the right of occupancy in rotation when the ownership right and the occupancy right of one of the accommodations or the entire tourist property are combined concurrently in the developer or an occupant in rotation. This may occur, for example, when the developer buys the right of occupancy in rotation, or when the occupant in rotation buys the bare ownership of the tourist property. However, the right of occupancy in rotation will not terminate if one of the cases prescribed by the proposed Article hereunder occurred. This Article must be added to the Section of the right of occupancy under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code.

#### **Article 33**

The right of occupancy in rotation shall come to an end if the occupant in rotation is at the same time the developer (the owner). However, the right of occupancy in rotation shall not be deemed as having ended if the developer, his creditors or the creditors of the occupant in rotation have an interest in retaining it such as when the title of the tourist property or the right of occupancy has been mortgaged.

#### 1.5.5 The waiver of the right of occupancy in rotation

It is proposed to make the right of occupancy in rotation come to an end by means of relinquishment. That is to say, it is proposed to entitle the occupant the power of relinquishing his right of occupancy in rotation for the benefit of the developer by his own will and without the need for the acceptance of the developer and thus the developer will regain the full ownership of the accommodation during the period of occupancy which was allocated to the relinquished occupant.

There are two aims behind this proposition. Firstly, to enable the occupants in rotation or their heirs to get out of the tourist project in an unobtrusive way when they can no longer use their occupancy rights or keep it because of the change in their circumstances and at the same time they cannot sell their right of occupancy in the second-hand market. Secondly, to give the developer the ability to get rid of the occupants who may procrastinating or refraining from paying the annual fees because they lost their desire to remain in the tourist project, and to give the developer the legal authority to resell the right of occupancy to another person who has the real desire of joining the tourist project and bear the financial burdens. However, the right of occupancy in rotation will not come to an end if one of the cases prescribed by

the proposed Article hereunder occurred. This Article must be added to the Section of the right of occupancy under Chapter II of Title II of Book III of Part II of the Iraqi Civil Code.

#### **Article 34**

(1) The right of occupancy in rotation shall terminate if the occupant relinquished his right of occupancy in rotation for the benefit of the developer during the life of the tourist project. However, the right of occupancy in rotation shall not be deemed as having terminated if the developer, his creditors or the creditors of the occupant in rotation have an interest in retaining it such as when the title of the tourist property or the right of occupancy has been mortgaged.

(2) The relinquishment will be valid without the need for the acceptance of the developer.

#### **1.5.6 Other cases**

It goes without saying that the right of occupancy in rotation shall terminate: (1) In the case of the failure of the occupant in rotation to pay the annual fee as detailed in Section 1.4.2.1 of this Appendix. (2) If the occupant in rotation used the accommodation and its accessories in illegal way as detailed in Section 1.4.2.3 of this Appendix. (3) In the event of the failure of the occupant in rotation to safekeeping the accommodation and its accessories as detailed in Section 1.4.2.4 of this Appendix. (4) If the occupant in rotation did not vacate the accommodation as prescribed in Section 1.4.2.6 of this Appendix. (5) When the salespersons or developers failed to include the standard pre-contractual information form or the agreement of the right of occupancy in rotation some of or all the required information set forth in Articles 21 and 23 as detailed in Section 1.4.4.1 of this Appendix. (6) In the case of failure of the developer to formulate a statement regarding the condition of the accommodation as detailed in Section 1.4.4.2 of this Appendix. (7) If the developer failed to prepare an inventory of the accessories of accommodations as detailed in Section 1.4.4.3 of this Appendix. (8) In the case of the failure of the developer to fulfil his obligation of enabling the occupants in rotation of benefiting from the tourist property peacefully as detailed in Section 1.4.4.4 of this Appendix. (9) If the developer failed to fulfil his obligation of the management and maintenance of the tourist property as detailed in Section 1.4.4.5 of this Appendix.

## **1.6 FINAL PROVISIONS**

### **Article 35**

It is prohibited to sell of the rights of occupancy in rotation in the tourist projects under construction.

This Article is of great importance to ensure that only the developers of adequate financial standing can participate in the timeshare industry in Iraq. This in turn will result in providing the timesharing industry in Iraq with a good reputation.

### **Article 36**

The Articles (1-35) of this legislation will form Branch IV of Chapter II of Title II of Book III of Part II of the Iraqi Civil Code No 40 of 1951.

### **Article 38**

This legislation must be published in the Official Gazette and it must be implemented in three months of its publication.<sup>33</sup>

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<sup>33</sup> Please note that Article (37) has been dealt with in Section 1.4.1.3 of this Appendix.

**APPENDIX II**  
**SEPARATE STANDARD WITHDRAWAL FORM TO**  
**FACILITATE THE RIGHT OF WITHDRAWAL**

- To (name and address of the developer) (\*).
- I/ We (\*\*) hereby notify/ notifies that I/ We (\*\*) withdraw from the agreement.
- Date of conclusion of agreement(\*).
- Name(s) of occupant(s) (\*\*\*)
- Address(es) of occupant(s) (\*\*\*)
- Signature(s) of occupant(s) (only if this form is notified on paper) (\*\*\*)
- Date(\*\*\*)

(\* )To be filled in by the developer before giving the form to the occupant.

(\*\* ) Delete as appropriate.

(\*\*\*) To be filled in by the occupant(s) where this form is used to withdraw from the agreement.

Signature of the occupant