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TIMESHARE, AS THE ACE OF THE INTERNATIONAL PRIVATE-LEGAL RELATIONSHIP*

I. OPENING REMARKS

Issues of timesharing in international trade have not very rich Polish-speaking literature[1]. However it is material issue as a matter of expediency, because agreements of timesharing are usually agreements, that create attitudes connected with more than one legal area. It is quite complicated, various character of timesharing, discussing it in the context of the international trade

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[1] One should however exchange here basic, for this issue, publications: B. F u c h s, *Timesharing w prawie prywatnym międzynarodowym*, [in:] *Księga pamiątkowa dla uczczenia pracy naukowej Profesora Kazimierza Kruczalaka*, „Gdańskie Studia Prawnicze" 1999, t. V, p. 89 and next; E a d e m, *Timesharing w prawie polskim (uwagi na tle ustawy z dnia 13 lipca 2000 roku)*, „Rejent" 2001, No. 4, p. 40 and next; E a d e m, *Timesharing w obrocie międzynarodowym (aspekty kolizyjnoprawne)*, „Rejent" 2001, No. 7-8, p. 49 and next; J. G o ł a c z y ń s k i, *Timesharing – zagadnienia kolizyjnoprwane*, „Rejent" 2001, No. 7-8, p. 60 and next; P. M o s t o w i k, *Kolizyjnoprawne problemy dostosowania prawa polskiego do dyrektyw Unii Europejskiej* (cz. II), „Rejent" 2002, No. 9, p. 59 and next; J. L o r a n c, *Timesharing w polskim prawie cywilnym*, „Rejent" 2002, No. 11, p. 68 and next; K. S z n a j d e r, *Jurysdykcja dla roszczeń z umów timesharingu*, [in:] *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego ofiarowane Panu Rejentowi Romualdowi Sztykowi*, under the ed. E. Drozd, A. Oleszko, M. Pazdan, Kluczbork 2007, p. 533 and next.

seems to be very useful. It is significant particularly for current and potential buyers of such law.

Timesharing in the international aspect requires the great attention, that in the few last years revolutionary amendments in regulations of the international private law took place. We should discuss new principles of establishing entitlement typically of individual agreements and of timesharing relationships as well as of jurisdiction for claims resulted from them[2]. You should take these treatments considering norms contained in records into account the EU and in international Conventions and in the internal law. In particular there should be norms of the Roman Convention on entitlement typical of obligations stipulated in the contract from 1980[3] and norms of the Regulation amending the Convention of No. 593/2008 regarding entitlement typical of obligations stipulated in the contract (Rome I)[4]; in the Convention from Lugano about jurisdiction and carrying court decisions out in civil and commercial cases from 1988[5] and in the Regulation amending the Convention of No. 44/2001 about jurisdiction and carrying statements of courts out in

[2] On account of limited possible sizes of this text in the study only issues associated with entitlement typical of international attitudes were brought up timesharingowych. Discussing issues associated with jurisdiction wasn't taken.

[3] Convention on entitlement typical of obligations stipulated in the contract opened to the signature in Rome of 19 June 1980. According to the Government Statement of the government of the Republic of Poland from 05.12.2007 on the legal validity of the Convention being in effect on the accession of the Czech Republic, the Estonian Republic, the Cypriot Republic, the Latvian Republic, the Lithuanian Republic, the Hungarian Republic, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention about entitlement typical of obligations stipulated in the contract, opened to the signature in Rome on 19 June 1980, and to the first and second Protocol of the interpretation on her by the Tribunal of the Justice of European Bonds, drafted in Luxembourg of 14.04.2005 yr. This convention was ratified by the President the Republic of Poland of 28.03.2007, and came into effect towards the Republic of Poland of 01.07.2007. The text of the Convention along with attachments, protocols, declarations and statements was published into the Journal of Laws of the Republic of Poland from 2008 yr, No. 10, pos. 57. This convention is called hereinafter of this study with Roman Convention.

[4] The regulation of the European Parliament and Advice (EC) No. 593/2008, from 17.06. 2008, on entitlement typical of obligations stipulated in the contract (Rome I), (Official Journal EC, series L 177, from the 4.7.2008 day yr, p. 6). This regulation will be hereinafter referred to in this study: with Regulation Rome 1. Regulation Rome I, according to the sound his Art. 29 tiret 2, applies (except for Art. 26) from 17.12.2009. Pursuant to Art. 24, the Regulation replaces, in relationships between membership states EC, Roman Convention.

[5] Convention on jurisdiction and carrying court decisions out in civil cases and commercial, drafted in Lugano of 16 September 1988 (Journal of Laws the Republic of Poland from 2000 yr, No. 10, pos. 132). This convention will be hereinafter referred to in the study: with

civil and commercial cases[6]. On the attention one should have provisions from the scope of international civil proceedings entered into the Code of Civil Proceedings and also[7] norms of the Act from 12.11.1965 International private law[8].

II. NORMALIZING THE INSTITUTION OF TIMESHARING IN THE POLISH LAW

Timesharing, this way as well as in the whole world and in Poland, involves the market of tourist services mainly. Beginnings of timesharing in our country date back to the nineties of the last century[9]. For the first years of the presence at the Polish market timesharing was a new, also exotic phenomenon both for the society and for the institution of the state taking in consideration its luxury character. It caused the unconcern for the legislator with providing with legal normalizing. However such a need existed having weighed, that to Poland timesharing came in its the most "aggressive" and unfriendly form for a consumer[10]. They have often imposed regulations disadvantages to purchasers stipulated in the contract upon the seller, so like for

Convention from Lugano. A convention was ratified by the President the Republic of Poland of 26.08.1999. The convention came into force in Poland from 01.02.2000.

[6] Regulation of Advice (EC), No. 44(2001), from 22 December 2000 about jurisdiction and carrying statements of courts out in civil cases and commercial (O. J. EC, series L 12, from the 16.1.2001 day yr, p. 1, with more late changes). The regulation is in effect in Poland for a day of the accession of the Polish republic to the European Union, it is from 01.05.2004, replacing to that day Convention from Lugano.

[7] The fourth part, acts from 17.11.1964 Code of Civil Proceedings (Journal of Laws from 1964 yr, No. 43, pos. 296, and more late changes). The act hereinafter referred to as the Code of Civil Procedure.

[8] Act from 12.11.1965: international private law (Journal of Laws the Republic of Poland from 1965 yr, No. 46, pos. 290, with changes). Act hereinafter referred to as A.i.p.l. This act will be replaced with the new act international private law. At present parliamentary works on her project last. It isn't ruled out, that in the moment of the publication of this article, these works will come to an end. The text of a bill is published among others in: M. P a z d a n, *Prawo prywatne międzynarodowe*, Warsaw 2007, p. 349 and next. This project is called studies hereinafter with a bill or the A.i.p.l. project.

[9] Compare J. G o s p o d a r e k, *Prawo turystyczne*, Warsaw 2001, p. 267.

[10] Compare for example E. Ł ę t o w s k a, *Prawo umów konsumenckich*, Warsaw 2004, p. 524; M. N e s t e r o w i c z, *Prawo turystyczne*, Warsaw 1999, p. 143-144.

example the need for the payment of the very high compensation fee, or also costs determined in the imprecise way associated with this service. They applied also dishonest marketing practice (telephone offers, in which they talked about alleged won trips, temporal property, need for taking an immediate decision, offering time-sharing's on trips-where the customer doesn't expect offers of this type, creating the disorientating atmosphere, the refusal to read the offer, agreements drafted in foreign languages, surrendering the agreement to alien legal systems and the unfamiliar territory of jurisdiction, and so on, and so forth)[11]. It was a reason for many conflicts which came into existence between sellers and buyers of time-sharing's services. Courts, meeting with the new legal institution, revealed considerable discrepancies in the evaluation of legal time-sharing's. In extreme cases courts approved agreements vague often being unfair to customers, taking for the base of applying to them freedoms of contracting being a principle overcome, which principle generally is expressed in Art. of 353^1 Civil Code. On the other hand courts have often acknowledged agreements of timesharing as unimportant, regarding them inadmissible in the Polish law[12].

The situation changed in relation to the approaching date of accessing our country to the European Union. Implementation was necessary to Polish system of the law of EU directives, in it also Directives of No. 94/47 from 26.10.1994, on the bodyguard of buyers with reference to some aspects arrange the meeting for the EC of the European Parliament and Advice of rights concerning purchasing to use the real estate in the fixed time[13]. Poland regulated the phenomenon of time-sharing's issues the act from 13 July 2000 about the protection of buyers of the right to use the building or living quarters in the fixed time every year and about the amendment to act the civil code, the code of petty offences and acts on land and mortgage registers and the mortgage[14]. The purpose, of both directives and acts there is protecting

[11] Compare for example Ł ę t o w s k a, *Prawo umów konsumenckich*, p. 524-525; G o s p o d a r e k, *Prawo turystyczne*, p. 267.

[12] Ł ę t o w s k a, *Prawo umów konsumenckich*, p. 524-530.

[13] O. J. WE, L 280, from 29.10.1994 r., p. 83-87. Big differences appear in justifying of texts acts with the EC. M. Trzebiatowski gives the correct Polish title of the Directive in: M. T r z e b i a t o w s k i, *Zwrot kosztów w razie odstąpienia przez nabywcę umowy timesharingu (analiza na tle wyroku SN z 23.3.2005 r., I CK 586/04 i dyrektywy 94/47)*, „Monitor Prawniczy" 2006, No. 23, p. 1288. According to this author a title is correct: Dyrektywa w sprawie ochrony nabywców w odniesieniu do niektórych aspektów umów dotyczących nabywania praw do korzystania w oznaczonym czasie z nieruchomości.

[14] Journal of Laws of the Republic of Poland, from 2000 yr, No. 74, pos. 855.

mainly consumers. The scope of the protection is extended in addition and in addition regarding different aspects of the turnover of time-shares[15]. In these records, rights and duties were determined enough precisely: issues of the so-called protection before amendments[16], issues of the form, the procedure of containing and giving the minimal contents of the agreement time-share.

The Polish legislator didn't limit himself only to legal-consumer issues, but defined very agreement time-share, and described acceptable characters of this law. Act, in Art. 1 of mouth 1 determines, that timesharing agreement is a contract concluded, for at least three years, in which buyer-natural person concluding a contract outside the scope of the business activity if necessary conducted − "a right to use the building or living quarters in the fixed time in every year gets from the entrepreneur as well as commits himself amount due for entrepreneur of the flat-rate remuneration". Specifying acceptable characters of this law the legislator determined, that timesharing can be created, as the variety of the use or also, as the debenture relationship[17]. To make it possible time-sharing's, as varieties of the restricted property right, Art. 270^1 which modifies the institution of the use was entered into the civil code.

On 14 January 2009 The European Parliament and the Board of the Union accepted the Directive No. 2008/122/WE, on the protection with reference to some aspects arranged the meeting for consumers timeshare, arrange the meeting against long-term holiday products, arrange the meeting of the resale and the exchange[18]. This directive replaces the Directive of the No. with 94/47[19], to a considerable degree a scope and a way of regulation change of time-sharing on the Community level[20]. Implementing provisions to the internal laws of states of Bond should access the new directive into force with 23 February 2011[21].

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[15] Compare Art. 1 sec. of 1 Act.

[16] L. S t e c k i, *Timesharing*, Toruń 2002, s. 127; K. Z a r a d k i e w i c z, *Timesharing – szczególny stosunek prawa rzeczowego*, [in:] *System Prawa Prywatnego*, t. IV: *Prawo rzeczowe*, under the ed. E. Gniewek, Warsaw 2007, p. 422.

[17] How he gives the Art. to 1 sec. 3 acts: "the law for the buyer can have a character of the personal law, including debts or laws material, in particular uses".

[18] Official journal the EU series L 33/10 from 3.2.2009 yr Directive hereinafter referred to as the new directive or the Directive from 14 January 2009 or with directive of the No. 2008/122/EC.

[19] Art. 18 Directives No. 2008/122/WE.

[20] Discussing the new directive gives: B. F u c h s, *Timesharing w prawie wspólnotowym – wnioski dla polskiego ustawodawcy*, „Rejent" 2009, No. 2, p. 11 and next.

[21] According to the record of article 16, sec. 1, tiret 2, Directives number 2008/122/EC.

III. CONFLICTING-LEGAL ISSUES – WHOLE REMARKS

With agreements time-share a problem of the collision of laws can be connected. International character agreement time-share is accepted in the situation, when the registered office of the entrepreneur or a place of residence for the buyer are in state different from you on the area, of which a subject of this agreement is located. A situation often appears, when the real estate is located in the foreign country to the buyer.

In this place we should consider, that for many years exists in doctrine an unresolved dispute about the agreement, that has international character[22]. A relation of civil law with the element for foreigners can be understood in two ways. Firstly, as the relationship which isn't limited to the area of one state, but when a connection with the foreign legal system exists or, as the attitude connected through norms of the international private law only with the own legal space[23]. Here is about, when we deal with international relations conclude on the basis of the specific case adopting certain determined criteria of settling. An indicator subjective or in question, or both criteria are most often an adopted criterion including. Making preliminary analysis one should establish, what legal documents regulate the scope of the specific agreement in international trade[24].

For concluding a contract, as defined in the act and directives, he/she reaches if the seller concludes such contract in the enterprise owned by somebody special. A natural person, concluding that contract is disconnected with the business activity if necessary conducted is always his contracting party or professional. We have here, the typical consumer agreement. Right to "divided during using" it is a new institution giving rise to a lot of questions and legal problems especially in the situation, when consumer timesharing agreement gains international character. Such an agreement can be connected with many threats to the buyer[25]. The buyer, in special cases, makes a deci-

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[22] Compare for example J. S k ą p s k i, *Międzynarodowy charakter umowy sprzedaży*, „Studia Iuridica Silesiana" 1979, t. V, p. 218 and next; F u c h s, *Timesharing w obrocie międzynarodowym*, p. 49.

[23] Compare G o ł a c z y ń s k i, *Timesharing*, p. 69 and quoted there literature; P. S o ł t y s i ń s k i, *Recenzja do I wydania: M. Pazdan, Prawo prywatne międzynarodowe*, „Państwo i Prawo" 1988, No. 11, p. 111.

[24] F u c h s, *Timesharing w obrocie międzynarodowym*, p. 49.

[25] Compare K. Z a r a d k i e w i c z, *Umowa time-sharing'u a regulacje Unii Europejskiej*, „Monitor Prawniczy" 1997, No. 5, p. 185.

sion for her to conclude as a result of aggressive commercial practice not having a possibility of thinking about the offer. There is often situation when a customer in such way exposed to such practice, decides to purchase, much burdening him financially, right to use the real estate located in the exotic state, surrendering this legal relationship at the same time to the law and jurisdiction of this state[26]. A number of the matter of the conflicting-legal nature turns up at such the complex actual state of affairs[27]. A question about legal character of the agreement and the law character acquired arises[28]. An admissibility of choice about law typically of the concluded agreement is another issue. Also an issue of the possibility of applying norms to protect of the consumer appears[29].

IV. CLASSIFICATION OF TIME-SHARE RELATIONSHIPS

In order to establish the governing law for the specific attitude time-share it should be previously determined, whether we deal with the law of debenture character, or with the matter-of-fact law, that effects its classification. Without this treatment it is not possible responsibly to talk about the admissibility of choice about law typical of the specific timeshare agreement[30].

In the international private law are proposed four methods of classification[31].

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[26] Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 49.

[27] Compare F u c h s, *Timesharing w prawie prywatnym międzynarodowym*, p. 89 and next.

[28] Frequent lack of statutory determining legal character timesharingu as a rule disadvantageously buyers, exposed to dishonest practice of entrepreneurs are impressed on the situation. Compare J. P r e u s s n e r - Z a m o r s k a, E. T r a p l e, *Timesharing – nowa instytucja prawa polskiego*, „Kwartalnik Prawa Prywatnego" 1998, No. 3, p. 541; G o ł a c z y ń s k i, *Timesharing*, p. 68.

[29] F u c h s, *Timesharing w obrocie międzynarodowym*, p. 50; E a d e m, *Timesharing w prawie prywatnym międzynarodowym*, p. 89 and next.

[30] F u c h s, *Timesharing w obrocie międzynarodowym*, p. 50; M o s t o w i k, *Kolizyjnoprawne problemy dostosowania prawa*, p. 67.

[31] P a z d a n, *Prawo prywatne międzynarodowe*, p. 56 and next; W. L u d w i c z a k, *Międzynarodowe prawo prywatne*, Poznań 1996, p. 101 and next.

They are:

1) Method of the classification according to the technical law, applying in the place to seats of the court (classification according to technical *legis fori*). In accordance with it assumptions, establishing contents of notions appeared in conflict norms of the own international private law the court should be guided by instructions taken from its own technical law. The court should comprehend these notions in the way they are understood in its own technical law.

2) Method of the classification according to the technical law shown (classification according to *legis causae*). In accordance with guidelines of this concept one should understand the classification in such way, in which they are understood in the technical law given legal relationship.

3) It is possible to determine the next method of the classification, as the autonomous classification. This classification is conducted in this way, that through comparing related institutions appeared in different legal systems, they aspire for making independent conflict norms in the international private law of any technical law.

4) Method of the functional classification (of classification according to conflicting *legis fori*). According to this concept, the interpretation of expressions appeared in norms of the international private law should be made autonomously - independently of it, how they are understood in individual legal systems[32].

In doctrine it seems to reweigh the position, according to which in the case of timesharing a classification is the best method of the interpretation according to *legis causae*[33]. It consists in drawing the relevant law through the hyphenation marked in the conflict norm which is in such situation. A logical mistake is accused this method question-begging, since "it recommends with using the relevant law in order to establish, whether it is appropriate"[34]. For justified applying this principle he/she gets up, that an indissoluble connection of the thing, area and the law, on which she is located. Whereas for her ruthless warning is aimed at ensuring the safety of the turnover, taking the ruthless effectiveness into account (*erga omnes*) of matter-of-fact laws[35]. According to the principle *legis rei sitae*[36], on the basis of the law you

[32] L o r a n c, *Timesharing*, p. 81-82.

[33] Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 51; E a d e m, *Timesharing w prawie prywatnym międzynarodowym*, p. 99 and next.

[34] P a z d a n, *Prawo prywatne międzynarodowe*, p. 57.

[35] Ibidem, p. 183 and next.

[36] That is with the principle according to which the law of the place in which these things are is entitlement typical of legal relationships associated with things.

should describe the state on which the subject of the given agrement is legal character of the specific legal time-share relationship. Next one should apply right conflict rules of the debenture law or the matter-of-fact law[37].

Method of the classification according to *legis causae* disappoints, when we deal with the time-share agreement, which agreement is missing of specifically determined immobility being a subject of this agreement. In practice situations often appear, when the contract contains the clause enabling annual choice by the buyer of real estate's being in the instruction for the entrepreneur, which real estate is located in a few different countries[38]. These are legislative agreements about the changeable object stipulated in the contract[39]. Time-share relationship, created with such an agreement, from the assumption accept the form typically debenture. It is hard to assume that for such an obligation, a "governing law" changes every year. A classification is the best method for such agreements of the classification according to technical *legis fori*.

V. ADMISSIBILITY OF CHOICE ABOUT LAW FOR TIME-SHARE ATTITUDES

In case of forming the timesharing relationship in the form of the debenture law a principle accepted in the majority of freedom countries agreements emphasizing the autonomy of the will of sides[40]. In its consequence sides can quite freely determine contents of the agreement in which it also joins them to subject one's obligation to the law chosen by oneself. They must however take into account that cannot cross border freedoms of the contracting appointed in the specific legal system[41]. Towards agreements of temporary using the real estate, on land of the Polish law which appoints: the Art. of 353^1 Civil Code, as well as records of the act and timesharing directives. Pages of the agreement can always, freely to arrange the legal relationship,

[37] F u c h s, *Timesharing w obrocie międzynarodowym*, p. 51; E a d e m, *Timesharing w prawie prywatnym międzynarodowym*, p. 99.

[38] Compare J. S a d o m s k i, K. Z a r a d k i e w i c z, *Wybrane zagadnienia prawa konsumenckiego*, „Kwartalnik Prawa Prywatnego" 1999, No. 1, p. 168.

[39] Compare S t e c k i, *Timesharing*, p. 386-387.

[40] Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 52.

[41] Compare ibidem, p. 51.

provided its contents or the purpose didn't oppose to the property of this relationship, acts or also rules of social intercourse[42].

In international trade a desire dominates in order to allow for unrestricted choice about appropriate law. The principle of the supremacy of the autonomy of the will was acknowledged min. in the Resolution from Bazel from 1991[43], as well as in the Roman Convention from 19.06.1980 about entitlement typical of obligations stipulated in the contract. According to regulations of this Convention in the lack of choice through sides of the relevant law ballot box comes under this law, with which the obligation shows the close relationship. Simultaneously this Convention implements the number of conjectures facilitating the process of establishing this connection[44]. Among others a conjecture that the agreement concerning the real estate shows the close relationship with the law of this country, in which the real estate is put, was adopted. However this conjecture is removable[45]. Identical solutions are in a Regulation Rome I, which this Regulation replaced the Roman Convention.

As for the principle independent determining by sides the agreement of the relevant law is also acceptable in the internal Polish law. One should however underline, that entry into force towards Poland of the Roman Convention, and then entry into force of the Regulation Rome I it caused, that conflict had occurred between these records and between the Polish I.p.l. Act. This Act is in part contrary to these records.

According to Art. 25 § l of the I.p.l. Act, sides can subject their relationships to the law in obligations stipulated in the contract set between oneself, if it stays in relation to the obligation[46]. This connection must have objective character[47]. Included norm in § 2 from Art. 25 A.i.p.l. makes free choice about law impossible, if the obligation concerns real estate determining, that a right of the state to put is an entitlement typical of such obliging

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[42] Compare M. S a f i a n, *Zasada swobody umów (Uwagi na tle wykładni art. 353[1] k.c.)*, „Państwo i Prawo" 1993, No. 4, p. 12 and next.

[43] Compare M. P a z d a n, *Rezolucja bazylejska z 1991 roku w sprawie autonomii woli w zakresie umów zawieranych w międzynarodowym obrocie handlowym*, „Przegląd Prawa Handlowego" 1993, t. 17, p. 124 and next.

[44] Compare P a z d a n, *Prawo prywatne międzynarodowe*, p. 123.

[45] Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 53.

[46] Compare G o ł a c z y ń s k i, *Timesharing*, p. 75-76; P a z d a n, *Prawo prywatne międzynarodowe*, p. 136-137.

[47] Ibidem, p. 126 and next, 146 and next.

real estates[48]. However it allows for Art. 3, read out in the light of Art. 4, sec. from 3, Conventions Roman; and Art 3 read out in the context of Art. 4, sec. 1, c let., of the Regulation Rome I.

In case of the thing, the Polish legislator stopped on the item of the uniform object liaison officer of conflicting norms for all situations connected with the scope arising from Art. 24, § l and 2 A.i.p.l. Also the disposing agreement is always subjected to the law of the country where thing is found. Polish normalizing of this matter is a stiff answer, from which there are no departures[49]. In the I.p.l. Act they also gave the concept up of exploiting the personal liaison officer for matter-of-fact laws having moving things as the object − *mobilia personam sequuntur*[50]. As justifying accepting the elevated walkway in question, i.e. the link of the place of putting the thing, they assume that in case of the real estate a close relationship exists between the law of the state, on which the located real estate is and this real estate. Approval of this connection is aimed at ensuring the safety of the turnover[51].

Turning up at this context issue of purchasing the real estate by foreigners. These issues constitute the so-called law of foreigners and it is regulated in Poland by the act from 24 March 1920 about purchasing the real estate by foreigners[52].

From above expressed norms of the I.p.l Act and from the Regulation (Rome 1) it results that a possibility of selecting the law doesn't exist, for timesharingowej of disposing agreement (parts of the disposing agreement about the double effect). However such a possibility exists, when we deal with the pure figure of timesharing debenture. If whereas sides didn't select the law for the agreement concluded between themselves, then first one should take into consideration the conflicting norm determined in article 4, section 1 clause c of the Regulation (Rome 1). It results from this article, that if sides didn't select the law, the obligation comes under the law of the state, in which the real estate is located. If the obligation doesn't regard the real estate's located in one country (timesharing about the changeable object)

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[48] G o ł a c z y ń s k i, *Timesharing*, p. 74-75.

[49] F u c h s, *Timesharing w obrocie międzynarodowym*, p. 53.

[50] G o ł a c z y ń s k i, *Timesharing*, p. 71.

[51] Compare E. D r o z d, *Nabycie i utrata w świetle prawa prywatnego międzynarodowego*, „Państwo i Prawo" 1976, No. 6, p. 5 and next.

[52] Journal of Laws of the R.P. 1920, No. 54, poz. 245 with changes. Compare G o ł a c z y ń s k i, *Timesharing*, p. 71; P a z d a n, *Prawo prywatne międzynarodowe*, p. 168 and quoted there literature.

then one should apply section 2 of article 4 Regulations Rome I. According to norm included in it, in the lack of choice about law the obligating relationship is subjected to the law of the state, which the side obliged to the characteristic benefit has a place of the ordinary stay in. In such case a law being in effect in the place in which the entrepreneur has a registered office is an appropriate right.

VI. SCOPE OF APPLYING APPROPRIATE LAW

A scope of applying appropriate law is another issue. When timesharing agreement about debenture character, then it will mould the right to temporary using contractual articles of association will decide about issues associated with concluding a contract, its interpretation, workmanship as well as about repairing the damage in case of the non-performance or the undue workmanship obligations. Analyzing the scope of applying appropriate law it is necessary to take into account, that obliging the law for the timesharing buyer is, as for the principle with financial obligation, one should so count oneself with applying the principle of the law of currency – *legis valutae*[53]. It concerns principles of the expression here: currency of the payment, course in its exchange, in part also of the place and the way of performing the obligation. A correctness of performing obliging, for the admissibility of the transfer, means also principles of the evaluation deductions as well as for matters connected with guaranteeing.

Timesharing can accept the character of the law matter-of-fact, being a subjective law on ruthless character. As for the principle closed catalogues of matter-of-fact laws exist in continental, European systems of legal states, so that it is possible to recognize the specific legal relationship as legal-material, recognizing it is necessary so through the act too[54]. Usually principle *numerus clausus* doesn't apply to only very matter-of-fact laws, but all subjective laws on ruthless character. It this way is also in the Polish system of the law, although our legislator didn't make this *expressis verbis*.

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[53] Compare P a z d a n, *Prawo prywatne międzynarodowe*, p. 160-163.

[54] Compare for example E. D r o z d, *Numerus clausus praw rzeczowych*, [in:] *Problemy kodyfikacji prawa cywilnego* (*studia i rozprawy*). *Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego*, under the ed. S. Sołtysiński, Poznań 1990, p. 257 and next.

The act on the protection buyers of the law of using the building or living quarters in the fixed time in the sequence of the year didn't implement changes of the catalogue of restricted property rights into Art. 244 Civil Code. In the process they disregarded the right acquired as part of the agreement directly timesharing for the matter-of-fact law. One can see certain hesitation here for the legislator, which after all adding the Art. of 270^1 Civil Code wanted to enable to create timesharing law of use being a variety.

When timesharing agreement forms the property law, then, according to article 24, § l. A.i.p.l., it comes under the law of the state in which their object is. A provision contains the analogous conflicting rule § 2 of this article which decides, that "the purchase and loss of the property, as well as the purchase and loss and the change of contents and supremacies of other material laws, they come under the law of couples, in which the subject of these laws was in the moment, when an event resulting behind oneself in exchanged legal effects took place". The legislator applied as elevated walkway in question a place of putting the thing is which (*res rei sitae*)[55]. So if in Poland a contract about timesharing will is reached for concluding being a variety of the matter-of-fact law on the put real estate abroad, of Art. 24 then pursuant to decisions quoted, § 1, or 2, I.p.l. Acts for the evaluation of the purchase and loss and the change a right to this country will be typical of contents of the property law, in which real estate timesharing is put[56]. So in the event that we deal with the time-share attitude about legal-business-like character, determining the scope of applying legal matter-of-fact articles of association becomes necessary. A scope of action of matter-of-fact articles of association is an evaluation of coming into existence, change, transfer or expirations of matter-of-fact laws. For matter-of-fact articles of association activities triggering legal-material effects are subject to it. It is necessary however to take into account, that very title of acquiring the businesslike right, in this case time-share agreement alone isn't already subject to matter-of-fact articles of association, but separate articles of association of this activity[57]. However matter-of-fact articles of association decide in this case on it, whether such an agreement establishing the matter-of-fact law time-share it is a causal or abstract agreement, whether is a consensual agreement,

[55] G o ł a c z y ń s k i, *Timesharing*, p. 71 and quoted there literature.

[56] F u c h s, *Timesharing w prawie prywatnym międzynarodowym*, p. 97; E a d e m, *Timesharing w obrocie międzynarodowym*, p. 55.

[57] Compare P a z d a n, *Prawo prywatne międzynarodowe*, p. 181 and next.

whether is also a real agreement. It decides also on meaning of the entry in the determined register of the soil-grown specific state[58].

Doubts turn up at the situation, when on account of appearing discrepancies in individual legal systems these two articles of association, i.e. debenture and matter-of-fact articles of association; predict inconsistent consequences of the activity obliging to rule. The Polish law is in favour of a principle of the double effect. However there are states of this principle not-respecting. The part of doctrine thinks in order in such a situation to give precedence to matter-of-fact articles of association[59]. This matter is particularly substantial after the entry into force: at first of the Roman Convention but next Ruling Rome I. These acts regulate principles of determining the relevant law for all obliging agreements, also for agreements obliging to move (of establishing) of matter-of-fact laws[60].

VII. PROVISIONS EXTORTING THEIR PROPERTY IN TIME-SHARE RELATIONSHIPS[61]

Provisions extorting their property are sometimes called regulations of direct applying. The fact that they are applicable independently but sometimes even against provisions of the relevant law is their common feature[62].

Among others regulations protecting the weaker side, i.e. the consumer have character of provisions extorting their property. They serve restoring

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[58] F u c h s, *Timesharing w obrocie międzynarodowym*, p. 55; G o ł a c z y ń s k i, *Timesharing*, p. 73-74.

[59] P a z d a n, *Prawo prywatne międzynarodowe*, p. 182. Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 56.

[60] M. P a z d a n, *Zobowiązania umowne dotyczące nieruchomości po wejściu w życie w Polsce konwencji rzymskiej z 1980 r. o prawie właściwym dla zobowiązań umownych*, [in:] *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego*, p. 263 and next.

[61] Called also: with "regulations of the necessary application" or with “provisions extorting their application”. Compare M. M a t a c z y ń s k i, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Cracow 2005, p. 15 and next, p. 28 and next.

[62] Compare B. F u c h s, *Przepisy wymuszające swoją właściwość w przyszłej kodyfikacji prawa prywatnego międzynarodowego*, „Kwartalnik Prawa Prywatnego” 2000, No. 3, p. 653 and next.

the shaken equality between sides[63]. The practice and implementation of timeshare contracts shows that most such agreements are concluded between professionals and consumers, eclipses which acquire the rights for recreational purposes only. The buyer is here on a weaker position, so we should guarantee him suitable position.

Timeshare directive granted character of provisions extorting their property regulations protecting the buyer of the law. Art. 9 obliges Directives membership states would take essential centre's in order to guarantee for buyers of protection due to them independently of the entitlement typical of the specific timesharing attitude. In case of directives the protection granted consumers is dependent from, whether the real estate which the agreement regarding, is located in the area of some of membership states.

Regulations of the Polish act of the protection of buyers of the right to use the building or living quarters according to recommending the directive have character of provisions extorting their property. It happens this way, when appears one from as an alternative determined in Art. 10 acts of premises. So if the agreement or the legal timesharing relationship subject to foreign law, and this law doesn't protect the buyer of the level predicted with Polish act, provisions of this act are applied then, when:

1) the building or living quarters are located in the Republic of Poland or,

2) the buyer has a place of residence in the Republic of Poland or,

3) concluding a contract happened as a result of giving the brochure or submitting an offer by the entrepreneur in the Republic of Poland or,

4) concluding a contract happened as a result of an offer for the buyer submitted for the entrepreneur in the Republic of Poland.

Applying Polish regulations will be justified, when the governing law doesn't provide the appropriate protection for the buyer and a connection exists between the timesharing agreement and Republic of Poland. If the regulations protecting the buyer aren't a part of the relevant law, pages of the agreement should count with extorted applying Polish provisions. However, when the transaction does not show connection with the area of Republic, and a right to some of states of the European Union which ensures the protection due to the buyer will be a relevant law, the Polish act won't find application[64].

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[63] Compare F u c h s, *Timesharing w prawie prywatnym międzynarodowym*, p. 102 and next.

[64] Compare P a z d a n, *Prawo prywatne międzynarodowe*, p. 142; F u c h s, *Timesharing w obrocie międzynarodowym*, p. 57.

Discussing the issue of provisions extorting their application one should take into account changes which took place in relation to the entry into force of the Regulation Rome I. This act, in art. 6, sec. 1 and 2, in relation to art. 6, sec. 4, c lit., determines, that for consumer agreements, in it for obliging timesharing agreements, in case of the lack of choice about law, a law of the place of the ordinary stay of the consumer is a relevant law. However, if sides of the agreement selected the law and the law is different from the entitlement indicated by the elevated walkway of the whereabouts of the consumer, such choice cannot lead it for depriving this consumer of the protection, he grants him provisions ruthlessly applying to the relevant law in the situation of the lack of choice about law. Other termination provides for art. 12 Directives of the No. 2008/122/WE. Section 1 constitutes this article that in the situation, when with the entitlement typical of the timesharing agreement there is a right to one of membership states, the consumer will not be able to relinquish from entitlements it being entitled to him on the legal validity of this directive. However, sec. 2 art. 12, determines, that in the situation, when with the entitlement typical of the timesharing agreement there is a law of the state not being a member of the European Union, then forcing into applying protective provisions of the directive will take place only in the situation, when conflict is settled by the court of the member state as well as simultaneously the real estate being a subject of the agreement is put in the EU or, when the obligation doesn't regard the real estate, the entrepreneur directs his activity (resulting in concluding this contract) to one of membership states. In the situation of conflict between norms of the Directive of the No. 2008/122/WE and Regulations Rome I, taking into account the lack of the horizontal effect of directives – which are binding on citizens derive through the act that implements them in national legal systems (usually the Law) – precedence should be given directly for binding Regulation. Art. 12 of new timesharing directive should not be implement in the current form. Opposite action will lead legislators to the situation of conflict of implementing acts with the Regulation Rome I, which this Regulation is an act of the higher class than the internal legal document.

VIII. STATUTE OF ASSOCIATION OF THE FORM OF THE TIMESHARING AGREEMENT

Form of the timesharing agreement won't be the subject to an evaluation of contractual statute, but separate statute of the form[65]. Under the notion "form" hide: way of recording the verbal declaration of intent, requirements concerning keeping the written form, participation of witnesses at performing an act, participation of the state agency at effecting legal acts, authenticating the signature or dates. In the concept of form do not fit the statutory requirement to issue of the entry of the relevant register. Because it concerns financial-legal premises of effecting legal acts here. Also such issues aren't included in a scope of the form as expressing by the competent body or other third person, consents to effect specific legal acts[66].

Conflicting norm referring to the form of the timesharing agreement is expressed in article 11, section 4 and 5 Regulations Rome I[67]. In section 4 we read, that to the form arrange the meeting consumer "a law of the state, in which the consumer has a place of the ordinary stay is applicable". However section 5 determines the exception to the mentioned above principle, constituting, that in the situation, when the matter-of-fact law is a subject of the agreement on real estates or right to use the real estate, these agreements come under concerning requirements of the form provided by the law of the state, in which the real estate is located. *Lex rei sitae* on the form applies only if the standards of the mandatory application of the law "regardless of where the contracts and the law governing the contract", and when they are mandatory norms − *ius cogens*.

IX. REMAINING CONFLICTING PRACTICABLE NORMS IN THE CASE OF TIMESHARING

There are norms concerning the ability of sides among other conflicting norms. Article 1, section 2, letter ah, Regulations (Rome I) determines that

[65] Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 58.

[66] Ibidem; P a z d a n, *Prawo prywatne międzynarodowe*, p. 107 and next.

[67] Applied article 12 should not be Acts international private law since is contrary to the above mentioned article of the Regulation.

as for the principle issues are excluded from the scope of using it of the legal capacity and the ability for legal acts [68]. So in this respect, one should apply the Polish act of international private law.

According to article 9 § l of the I.p.l. Act, the legal capacity and the ability for legal acts of persons are subject to an evaluation of the native entitlement. In case of legal persons according to art. 9 § 2 I.p.l. Acts, their ability comes under the law of this state, in which this person has its registered office. The exceptional situation follows, when the person or the legal person is acting in the field of their enterprise. In such a situation according to article 9, § 3 I.p.l. Acts, for the evaluation of the ability of this person a law of the state in which the residence of this entrepreneur is located is applicable. At transactions, regulated by the act of time-share one should stress, that the seller will always operate as part of his enterprise[69].

In case of time-share relationships significant was article 10 I.p.l. Acts which constituted, that "if incapable foreigner" for legal acts "according to his native law he effected legal acts being supposed to produce the effect in Poland, the ability of the foreigner is subject to Polish law in this respect, provided protection of persons acting in good faith requires it". At present one should grant the norm the power being in effect included in with art. 13 Regulations Rome I which describes, that "in case of the concluded agreement of persons which are in the same state, the person which would have a legal capacity and an ability for legal acts on the basis of the law of this state, can quote the lack of the legal capacity or the abilities for legal acts resulting from the right of other state only then, when in the moment of concluding a contract the other side of the agreement knew about this lack or didn't know about it because of the slackness". This regulation protects contracting parties of the foreigner who according to his native law is incapable of legal acts[70].

[68] With reserving of the norm included in article 13 this Regulation.

[69] Compare F u c h s, *Timesharing w obrocie międzynarodowym*, p. 59.

[70] Compare P a z d a n, *Prawo prywatne międzynarodowe*, p. 95-96; F u c h s, *Timesharing w obrocie międzynarodowym*, p. 58.

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TIMESHARING
JAKO MIĘDZYNARODOWY STOSUNEK CYWILNOPRAWNY

S t r e s z c z e n i e

W niniejszym artykule rozważa się temat, jakie prawo jest właściwe dla umów time-share zawierających „element obcy". Podstawą analizy są przepisy wspólnotowe oraz krajowe prawa prywatnego międzynarodowego. Omówiono takie zagadnienia, jak regulacja instytucji timesharingu w prawie polskim, kwestie kolizyjno-prawne: kwalifikację stosunków timesharingu, dopuszczalność wyboru prawa i zakres zastosowania prawa właściwego dla relacji timesharingowych; poruszono kwestie statutu kontraktowego, statutu personalnego oraz statutu właściwego dla formy umów timesharingowych; a także przepisów wymuszających swoją właściwość, mających zastosowanie do stosunków timesharingu.

Słowa kluczowe: umowy time-share, prawo prywatne międzynarodowe, rozporządzenie Rzym I.

Key words: Timesharing, Private International Law, Regulation Rome I.