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Timesharing and Land Register in Spanish Law¹

Introduction. Concept of timesharing

Tourist product known as timesharing or multi-property is a well-known option for location and accommodation. The rise of lodging offers under those denominations introduced an important change in the sector of immovable property, joining the characters of versatile adaptability and economic profitability for investors, sellers and buyers.

Timesharing supposes the acquisition of lodgement rights linked – but not – to immovable property. According to this right, the acquirer can use and occupy the estate during a specific number of days and a variable number of years. In this definition we can find two characters named previously – adaptability and profitability – because the same concept of turn exploitation is applicable in different sectors of business activities like informatics leasing or touristic lodgement.

Economic profitability is a character because in tourism, timesharing permits to buyers the adaptation of lodgement rights acquisition to vacation period available in each case. This option is a real alternative to second home acquisition, economically more expensive. On the other hand, sellers obtain a greater benefit with the same investment, because over every estate can be established many timesharing lodgement rights. These positive characters are completed with a third one, born later and concreted by the exchange option. According to it, lodgement place or accommodation period could be exchanged. This possibility introduces an important factor in timesharing operations: trans-nationality.

Those three characters explain the success obtained by timesharing in the tourist sector, concreted in an irresistible apparition and presence in those States where tourism is predominant in their economies.

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First apparition of timesharing in a lodgement system is, according to some authors, in Europe, in the late fifties of twentieth century². Hotel chain EUROTEL established a system to confer an accommodation right by its selling. The buyer received the right to use one room during an established period of the year and during a number of years; also acquired some privilege as a guest of other complex of the chain (for example, a cut in accommodation prices). This initiative includes not only basic concepts of timesharing, but the seed of exchanges systems, by concession of various benefits in the hypothesis of accommodation in another complex of the chain, diverse from that one where the room of periodical right of use is.

However, the petrol crisis of the 1970s is the key to understand the expansion of that concept in the tourist world, under the structure of different statutes³. Its variability and faculty of adaptation in the juridical nature area has an interesting reflex on the inexistence of a unitary concept of timesharing. That idea explains the existence of many theories about the real and true origin of timesharing but the concept has travelled all around the world and adopted in each land the juridical status more adjusted to economical and social situation of the country⁴.

² A. Armour, *Ad valorem taxation of time-share properties: should time-share estates be separately assessed and taxed?*, "University of Florida Law Review, Volume 37, 1985, p. 421–442. E. Pollack: *Time-Sharing or Time is Money But Will It Sell?*, "Real estate Law Journal", Volume 10, 1982, pp. 281-301. M. K. Zervigon: *TimeShare: The New Vacation Home*, "Loyola Law Review", Vol. 29, 1983, pp. 403–437.

³ A study of the history of timesharing could be read in L.J. Capote Pérez, *El tiempo compartido en España. Un análisis de la formula club-trustee desde la perspectiva del Derecho español*, Tirant lo Blanch, Área de Turismo y Planificación del Cabildo Insular de Tenerife, Valencia, 2009.

⁴ Other studies about origins of timesharing: from Spanish doctrine: P.A. Munar Bernat, *Regímenes Jurídicos de Multipropiedad en Derecho Comparado*, Ministerio de Justicia. Secretaría General Técnica. Departamento de Publicaciones, Madrid, 1994. p. 19. For other contributions of this author about timesharing, vid. P. A. Munar Bernat, *El derecho real de aprovechamiento por turno, la nueva opción legislativa en materia de multipropiedad*, "Revista Crítica de Derecho Inmobiliario", Año LXXIV, Julio – Agosto, núm. 647, p. 1210. P. A. Munar Bernat, *La Regulación Española de la "Multipropiedad"*. *La Ley de Derechos de Aprovechamiento por Turnos de Bienes Inmuebles de Uso Turístico y Normas Tributarias*. (Ley 42/1998, de 15 de Diciembre), Aranzadi Editorial, 1999, pp. 21–23. T. Azaustre-Torrecilla, *Multipropiedad. Propiedad por Turnos*, "Boletín de Información del Ilustre Colegio Notarial de Granada", núm. 3, marzo 1981, pp. 597 and following. J. A. Leyva de Leyva, *La propiedad cuadrimensional: Un estudio sobre la multipropiedad*, "Revista Crítica de Derecho Inmobiliario", 566–567, 1985, pp. 29 and following. J. Pelegrí Girón and F. J. Pelegrí Girón, *La naturaleza jurídica de la multipropiedad y sus aspectos fiscales*, "Cuadernos de Derecho y Comercio", nº 2, septiembre, 1987, p. 109. E. Martínez Piñeiro-Caramés, *Soluciones notariales al fenómeno de la multipropiedad o propiedad a tiempo compartido*, "Revista de Derecho Notarial", año XXXIV, nº135, enero-marzo 1987, p. 19. J.L. Mezquita del Cacho, *La propiedad por períodos*, "Boletín de Información del Ilustre Colegio Notarial de Granada", 73, enero de 1987, pp. 141 and following. X. O'Callaghan Muñoz, *Promoción y adquisición de viviendas en régimen de Multipropiedad ("time – sharing")*. *Regulación legal y Derecho Comparado*, Ministerio de Obras Públicas y Urba-

In any case, the election of this or that structure to configure always tries to cover the need of an institution that permits the articulation of the faculty of temporal and periodical use of an accommodation adapted as holidays home⁵. In the Spanish case, the decision taken is the consequence of circumstances that provided the imposition – failed – of the legal nature of a limited in rem or real right: the *derecho de aprovechamiento por turno de bienes inmuebles de uso turístico*.

nismo, Madrid, 1988, p. 29. P. De Pablo-Contreras, *La configuración jurídica de la llamada „multipropiedad” a la luz del anteproyecto de ley de conjuntos inmobiliarios*. Ponencia publicada dentro del libro *Conjuntos Inmobiliarios y Multipropiedad*, Barcelona, 1993, p. 121. B. Sanz Bernal, *Los problemas con los que deben enfrentarse los consumidores: técnicas de venta, condiciones de los contratos, garantías postventa, intercambios, mantenimiento y conservación de los complejos*, conferencia impartida durante el II Congreso Internacional sobre Multipropiedad y Defensa de los Consumidores, Madrid, 1994, p. 3. R.M. Roca Sastre and L. Roca-Sastre Muncunill, *Derecho Hipotecario*, tomo V, octava edición, revisada, ampliada y puesta al día, Bosch Casa Editorial, S.A., Barcelona, 1997, p. 158. A. M. Torrens Sánchez, *Extracto sobre la multipropiedad y su anteproyecto*, “Revista Crítica de Derecho Inmobiliario”, Año LXXIII, noviembre-diciembre, núm. 643, pp. 2101–2138, p. 2102. L. Hernanz Cano, *Las Comunidades de Propiedad Urbana*. Editorial COLEX, Madrid, 1998, p. 180. E. Chuliá Vicent and T. Beltrán Alandete, *Aspectos Jurídicos de los Contratos Atípicos III. 1. Leasing; 2. Multipropiedad; 3. Hostelería; 4. Merchandising*. José María Bosch Editor; Barcelona; 1998, p. 270. A. L. Sánchez-Cía, *Multipropiedad, Timesharing y Aprovechamiento por Turno. La Ley 42/1.998 Comentarios Jurídicos*, Editorial EDIJUS, 1999, p. 11. J. Arroyo López-Soro, *Urbanizaciones Privadas, Conjuntos y Complejos Inmobiliarios, Aprovechamiento por Turno de Bienes Inmuebles de Uso Turístico. Ley 42/1.998 de 15 de Diciembre. Estudio jurídico – práctico de sus principales problemas: Criterios jurisprudenciales actuales incluido año 1.998*, Dykinson, Madrid, 1999, p. 285. M. A. Del Arco Torres and M. Pons González, *Diccionario de Derecho Civil*, Editorial Comares, Granada, 1999, Voz “Multipropiedad”, p. 878. L. Costas Rodal, *Los derechos de aprovechamiento por turno*, Ed. Comares, Granada, 2000, pp. 24–25.

From Italian doctrine: M. Confortini, *La Multiproprietà*, Publicación dell’Istituto di Diritto Privato dell’Università di Roma “La Sapienza”, XVII, Padova, CEDAM, 1983, p. 2. U. Vincenti, *Multiproprietà Immobiliare. La multiproprietà come tipo de comunione*. CEDAM, Casa Editrice Dott. Antonio Milani, Padova, 1992, p. 3. F. Di Ciommo, *Multiproprietà: L’attuazione italiana della direttiva a tutela dell’acquirente*, “Il Foro Italiano”, Anno CXXIV, n° 2, Febbraio 1999, pp. 39–46, p. 40

From Common Law: P. M. Gunnar, *Regulation of Resort Time-Sharing*, “57 Oregon Law Review”, 1977, pp. 31 and following, p. 32. D. R. Dubord, *Timeshare Condominiums Property’s Fourth Dimension*, “Maine Law Review”, vol. 32, 1980, pp. 181 and following. K. K. Duke, *Timesharing: A Unique Property Concept Creates the Need for Comprehensive Legislation*, “Saint Louis University Law Journal”, volume 25, 1981, pp. 629–656, p. 629. W. B. Ingersoll, *The Legal Aspects of Real Estate Timesharing*, Practising Law Institute, 1982. J. Edmonds, *International Timesharing*, third edition, Longman, London, 1991, p. 1. C. G. Van Der Merwe and D. W. Butler, *Sectional Titles, Share Blocks and Time-Sharing*. Butterworks. Durban, 1985, p. 460. M. D. Brodie, *Regulation of Time Sharing in South Carolina*, “South Carolina Law Review” volume 37, 1986, pp. 527–556, p. 521, note 1.

⁵ As says the antecedents of 1988 Spanish Timesharing Act: con el término impropio de «multipropiedad» se vienen denominando todas aquellas fórmulas por las que se transmite el derecho a disfrutar de un alojamiento durante un periodo determinado cada año.

Timesharing spanish acts

Spanish timesharing regulation is firstly contained in the *Ley 42/1998, de 15 de diciembre, sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias* (henceforth 1988 Spanish Act).

The *derecho de aprovechamiento por turno de bienes inmuebles de uso turístico* is conceived as one part of another concept, named “*conjunto inmobiliario*” o real estate ensemble. Spanish legislator wanted to join timesharing regulation to others like condominiums law (*propiedad horizontal* and *urbanizaciones privadas*). However there are many differences between these institutions:

1. The legal nature of the right in the *aprovechamiento por turno*, because it is ruled as a limited real right, due to de impossibility of a configuration as a real property right.
2. The intervention in the constitution of the timesharing ensemble of Notary and Land Register.

Basically, the organization of the timesharing ensemble is designed with concepts transported from the rules of condominium, using as a subsidiary rule the Spanish Act applied to this (*Ley de Propiedad Horizontal – LPH*)⁶. The process of creation includes one public deed for the constitution as it is established for condominiums. The participation of Notaries and Land Registers is justified in Spanish rules appealing to consumers’ protection in a market where frauds had been abundant. In the process of constitution of timesharing ensemble there would be no constitution without the public deed controlled by Notary and the second control by Land Register. Nevertheless, during the process of approval of the 1998 timesharing Act the original project underwent many changes and they spoiled the system initially conceived.

The *derecho de aprovechamiento por turno de bienes inmuebles* is designed principally according to the legal nature of limited real rights. An explanation of that decision is contained in the precedents of the Act and justifies the election as an intermediate position between the multiplicity of systems and the imposition of one and only⁷. There is also another possibility of timesharing as leasing⁸. The

⁶ As says 1988 Spanish Act: Art. 15.5º que las normas de la Ley de Propiedad Horizontal reguladoras del funcionamiento de las comunidades de propietarios se aplicarán supletoria y subsidiariamente a las presentes.

⁷ As says the Statement of motives: la cuestión clave de política legislativa consistía en determinar si debían regularse varias fórmulas institucionales o si se debía limitar su regulación a una sola, dejando fuera de la ley a las demás. Se ha optado por una vía intermedia, consistente en la detallada regulación de un nuevo derecho real de aprovechamiento por turno, permitiendo sin embargo la configuración del derecho como una variante del arrendamiento de temporada, al que resultarán aplicables el conjunto de disposiciones de la Ley en cuanto no contradigan su naturaleza jurídica.

⁸ As says the Statement of motives: se incluyen a todos los efectos en el ámbito de la Ley los arrendamientos de temporada que tengan por objeto más de tres de ellas y en los que se anticipen las rentas correspondientes a algunas o a todas las temporadas contratadas.

election of a limited real right justifies also the strange denomination selected by the Spanish legislator trying to separate the new model from other modalities ruled under the concept of personal right and identified as principal cause of frauds⁹.

1998 Act maintains the idea of integration of timesharing in the real estate ensembles area, although it is contained in a different Act of the one dedicated to condominiums. Its principal points are the following:

1. Introduction of requirements to constitute timesharing ensembles under the Spanish law. These demands suppose a separation from the more flexible system contained in condominium rules and are set on:
 - A. The existence of a building architecturally differenced or separated.
 - B. The existence of a minimum number of ten accommodations in the ensemble.
2. Introduction of an organizational model based on the idea of timesharing as an accommodation product distant from traditional touristic market and more similar to others real estate ensembles¹⁰.
3. Prohibition, almost theoretical, of the term “*multipropiedad*” and of the legal nature according to property right¹¹. That forbiddance is coherent with the intention of introducing a legal nature suitable with the plurality of persons that acquire accommodation rights in timesharing ensembles, so it is impossible to articulate them as property rights. Considering that in Spanish legislator mind timesharing personal rights constitute the origin of frauds the election of limited real right, as legal nature is logical.

All Spanish operators and the consequent organization of timesharing in 1998 Act ignored systematically the international dimensions of timesharing and con-

⁹ All those decisions are justified historically by the analysis of the long list of failed timesharing act projects, where is clear the impossibility of a regulation of that touristic product as a property right. L.J. Capote Pérez, op. cit., pp. 181 y ss.

¹⁰ As says 1988 Spanish Act, Art. 1.2: se permite, no obstante, que un mismo conjunto inmobiliario esté sujeto, al tiempo, a un régimen de derechos de aprovechamiento por turno y a otro tipo de explotación turística, siempre que los derechos de aprovechamiento por turno recaigan sobre alojamientos concretos y para periodos determinados.

¹¹ As says 1988 Spanish Act, Art. 1.4: el derecho real de aprovechamiento por turno no podrá en ningún caso vincularse a una cuota indivisa de la propiedad, ni denominarse multipropiedad, ni de cualquier otra manera que contenga la palabra pro piedad. Furthermore, a los efectos de publicidad, comercialización y transmisión del derecho de aprovechamiento por turno de bienes inmuebles, podrá utilizarse cualquier otra denominación, siempre que no induzca a confusión a los consumidores finales y del mismo se desprenda con claridad la naturaleza, características y condiciones jurídicas y económicas de la facultad de disfrute. [...] el término «multipropiedad» tenía la gran ventaja de haber calado en la opinión pública, hasta el punto de ser, con mucho, la forma más habitual de denominar entre nosotros a la institución, con independencia de que se hubiera constituido como una forma de propiedad o como una forma de derecho personal. Pero es precisamente ese carácter globalizador con el que normalmente se utiliza, por un lado, y el hecho de hacer referencia a una forma concreta de propiedad, por otro, lo que lo hacen un término inadecuado por equívoco.

ceived the rules thinking only of Spanish consumers, Spanish real estate ensembles and Spanish law to create one mechanic useless and far from the reality that needed regulation. Timesharing evolved into other products distant from the original idea of “*multipropiedad*” and fully linked with legal nature of personal rights as point clubs. Those changes determined a new Directive and in 2012 a new Spanish Timesharing Act.

New Spanish Act is the *Ley 4/2012, de 6 de julio, de contratos de aprovechamiento por turno de bienes de uso turístico, de adquisición de productos vacacionales de larga duración, de reventa y de intercambio y normas tributarias* (henceforth 2012 Spanish Act). This Act introduces the changes established by Directive 2008 / 122 / EC of the European Parliament and of the Council of 14 January 2009, on the protection of consumers with respect to certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

2012 Spanish Act supposes, according to legislator words contained in Act’s preamble, adaptation of 1998 set of rules to new Directive’s rules. Double system with Notary and Land Register participation is maintained.

Land register and timesharing in spanish law

Land Register is, according to numerous authors of Spanish doctrine¹², the public organism responsible of publicity of property and other real rights over immovable goods, through their evidence in its books of acts of constitution, modification, transmission and extinction of those rights. In Spanish Law, Land Register is organised according to a real-estate page (*folio real*) system. Each estate opens a new and different page with its first inscription (*inmatriculación*). In that page are inscribed all acts about constitution, transmission, modification or extinction of all real rights established over the estate. Only acts inscribed could be opposed against third persons non participants in them.

Inscriptions in Land Register can hold three dimensions well differenced. All of them obey principal objective of publicizing rights over estates, but adding in each case another effects¹³. Normally, inscribable acts exist independently of being

¹² P. De Pablo Contreras en AA. VV., *Curso de Derecho Civil (III). Derechos Reales*, Ed. Colex, Madrid, 2004, pp. 89 and following. J.L. Lacruz Berdejo et al, *Elementos de Derecho Civil III bis. Derecho Inmobiliario Registral*, segunda edición revisada y puesta al día por J. Delgado Echeverría y J. Rams Albesa, Dykinson, Madrid, 2003, pp. 5 and following. L. Díez-Picazo and A. Gullón, *Sistema de Derecho Civil, volumen III, Derecho de Cosas y Derecho Inmobiliario Registral*, séptima edición, Ed. Tecnos, Madrid, 2001, pp. 225 and following. C. Lasarte, *Principios de Derecho civil V, Derechos reales y Derecho hipotecario*, Marcial Pons, Madrid, Barcelona, Buenos Aires, 2010, pp. 254 and following. M. Albaladejo, *Derecho Civil III. Derecho de bienes*, décima edición, Edisofer, S.L., Madrid, 2004, pp. 859 and following.

¹³ J.L. Lacruz Berdejo et al, op. cit., pp. 96 and following.

inscribed or not. However, Spanish Law recognises also some cases where the existence of real rights depends on inscription in Land Register or inscription is needed and unavoidable. In one case, inscription is an indispensable requisite for transmission or constitution of a real right; in the other, the lack of inscription supposes a penalty, but the act not inscribed is still valid. In first case, there is a constitutive inscription; in second one, there is an obligatory inscription. This distinction is specially important to understand the true nature of Land Register participation in regulation of timesharing.

The Spanish Act approved in 1998 ignored the reality of timesharing establishing a legal nature according to dominant positions in legal doctrine between the late 1980s and the early 1980s, when the idea of timesharing as property right was perceived as the solution to every problem in the timeshare market¹⁴. Confirmed the impossibility of a property regulation, the second option was a system of co-entitlement of limited real rights, clearly influenced by the condominium system and improved with an active participation of Notaries and Land Register. In this way, whereas in the rules for real estate ensembles the action of these legal operators was dispositive under the timesharing act it was going to be imperative.

Old Spanish Act introduced a double system where the grant of protection of timesharing consumers is trusted to Notary and Land Register. But, as stated above, the approval of the Act established also some changes that affected deeply the original idea of the Spanish legislator. Initially the system was conceived in a way that without the positive control of Notaries and Land Register operators the timesharing ensemble could not exist. But the second requisite – inscription in Land Register – was converted from constitutive to only obligatory and then the ensemble was constituted after the actuation of the Notary. An obligation without a penalty linked to its transgression proved to be essentially useless.

New Spanish Act maintains the system of 1998 one: constitution by a public deed and possibility of inscription in the Land Register¹⁵. But the new rules include

¹⁴ Examples of that position in Spanish doctrine can be found in M. González Laguna, *La Multipropiedad: Aspectos jurídico – prácticos*, conferencia pronunciada en la Escuela de la Hacienda Pública el 25 de enero de 1988, publication s. d. J. M. Hernández Antolín, *La multipropiedad en la práctica notarial. Estudio de Derecho vigente, de la proyectada legislación y de la normativa comunitaria*, “Actualidad Civil” n° 21, 22 al 28 de mayo de 1995. I. Lora-Tamayo Rodríguez, *La multipropiedad*, “Noticias CEE”, n°15, abril 1986. X. O’Callaghan Muñoz, *La Multipropiedad*, “Actualidad Civil” 1987-2, pg. 1663 and following. Again, *Promoción y adquisición de viviendas en régimen de Multipropiedad (“time – sharing”)*. *Regulación legal y Derecho Comparado*, Ministerio de Obras Públicas y Urbanismo, Madrid, 1988. A. Pau Pedrón, *Configuración jurídica de la multipropiedad en España*. “*Revista Crítica de Derecho Inmobiliario*” (Febrero 1989), pp. 9–29. J. Roca Guillamón, *Consideraciones sobre la llamada „Multipropiedad”*, “*Revista de Derecho Notarial*”, 117–118, Julio–Diciembre 1982, pp. 291–343. M. H. Tranchini, *Nuevas formas de contratación. El tiempo compartido*, “*Revista Notarial (Órgano del Colegio de Escribanos de Buenos Aires)*”, núm. 781, Julio-Agosto 1985, pp. 671–691

¹⁵ As says arts. 25 to 29.

also the recognition and validity of contracts of timesharing organised under other rules and according to other legal natures (as for example personal rights). Implicitly the Spanish legislator has recognised what was wrong in the old Act but has maintained as a strange fossil the way to constitute timeshare ensembles under the like-a-condominium system according to legal nature of limited real rights.

Conclusions

Spanish legislator, to establish a set of rules where double control by Notary and Register should guarantee consumer's protection, invoked Land Register. Ignoring trans-national nature of timesharing and prevalence in timesharing rights of lodgement services –“time” – over a connection with an estate. Rise of point clubs is a good example of an evolution where estates have almost disappeared from business' equation. Timesharing rights were always very different from classic concept of condominiums, but now are really far away from it.

Independently from the useless condition of Spanish system, there is also an additional inconvenient, concretised in conversion of Land Register role from constitutive inscription (timesharing system cannot exist without inscription) to obligatory inscription (timesharing system exists with notarial public deed and the lack of its inscription supposes no penalty).

In 1998 and 2012, Spanish regulation of timesharing to establish a real right where Notary and Land Register controls over constitution and transmission of timesharing rights proved to be failed. Their presence doesn't guarantee a higher level of protection for consumers. The “Spanish way” to rule timesharing is probably as useless as in 1998 Act.

Summary

“Tiempo compartido” or timesharing is one of locative models present in Spanish tourist market. Its regulation in legal perspective has reflected the constant controversy between legal operators and timesharing enterprises. Spanish acts have introduced the participation of Land Register in consumers' protection, but are those decisions actually practical?

Key words: Time-sharing, Land Register, Spanish Law.

Timesharing oraz rejestr nieruchomości gruntowych w prawie hiszpańskim

Streszczenie

Timesharing (hiszp. "tiempo compartido") jest jednym ze sposobów dysponowania prawem własności nieruchomości, funkcjonującym na hiszpańskim rynku turystycznym. Regulacja prawna tej instytucji stanowi odzwierciedlenie nieustających sporów między operatorami turystycznymi a przedsiębiorstwami timesharingowymi. Ustawodawstwo hiszpańskie wprowadziło mechanizmy ochrony konsumenta za pomocą przepisów regulujących rejestr gruntowy. Nasuwa się jednak pytanie, w jakim stopniu przyjęte rozwiązanie wypełnia tę funkcję w praktyce.

Słowa kluczowe: timesharing, rejestr gruntowy, prawo hiszpańskie.