RDO COMMENTARY ON THE SPANISH REGULATIONS

The Spanish Government has passed the necessary regulations to implement the new Timeshare Directive. RDO has now had sufficient time to study the regulations and to produce the following commentary notes for members that operate in Spain.

Commentary on the Spanish Regulations

Please note the following is not meant to be legal advice and is no substitute for legal advice from lawyers experienced in Timeshare and familiar with your business. Whether and how the Regulations apply will depend on where a business is located, to whom you sell, where you sell and even where you market and promote your products.

This note assumes the Spanish Regulations do apply to your business.

RDO Ltd
Hamilton House, Mabledon Place, London, WC1H 9BB, United Kingdom
Tel: +44 (0) 207 554 8634 Fax: +44 (0) 207 554 8501
info@rdo.org www.rdo.org www.gotimeshare.org www.gofractional.org

Registered Address: IFG House, 15 Union Street, St. Helier, Jersey, JE1 1FG Registered in Jersey No: 109519

After a year's delay, the new Spanish Act regulating *aprovechamiento por turno* (Rotational Use i.e. "timeshare") has been approved by Royal Decree. It encompasses the traditional formulas, i.e. timeshare weeks, fractionals, etc, all names which can be used for commercial purposes (e.g. vacation club) – with the exception of those containing the word "ownership"- provided that the consumer has been clearly informed of the characteristics of what they intend to purchase.

The above could have also been said about the (now repealed) Timeshare Act of 1998 but the new Act deals in more depth with the obligation to provide the prospective purchaser with the information required for them freely to decide whether or not to purchase such products based on their own needs and preferences and without the pressure of modern selling techniques which may effect their freedom to make an "informed" decision. The reason we say "such products" is that the new Act, as demanded by Directive 2008/122/EC, also regulates the so-called "long-term holiday products, resale and exchange" in addition to timeshare.

TIMESHARE AND ROTATIONAL USE

In translating the original working document used for drawing up the Directive from English into Spanish, the translators chose not to do a literal translation of the word 'timeshare' as *tiempo compartido* and thought it more appropriate to use the non-literal, albeit already used in the 1998 Act, *aprovechamiento por turno*.

In keeping with the above, the first thing the new piece of legislation does (Section 2) is transcribing the definition of *tiempo compartido* or *aprovechamiento por turno* (commonly known by its initials DAT) contained in the Directive.

This is a general definition that comprises any system of use, for overnight stay, of property (immovable or otherwise) by occupation periods during more than one year. More specifically, Title II of the Royal Decree contains the same definition of *aprovechamiento por turno de bienes inmuebles* (rotational use of immovable property) as the 1998 Act.

LEGAL SYSTEMS FOR COMMERCIALISATION

It could be inferred, therefore, that the DAT system pertaining to immovable property may only be structured and set up in accordance

with the provisions of the aforesaid Title under the previous Spanish system of rights in rem or leasehold rights, but article 23.8 of the new law provides an extremely important exception by, rather than allowing, recognising systems based on personal rights created under non-Spanish Law (EU or otherwise) by express choice and submission to it under the EU Regulation called Rome I, which has the status of a national Law of Spain (as with other EU States) and a higher rank than ordinary national law.

For the avoidance of doubt in applying this rule, the Legislative Committee of RDO-Spain has in its pleadings stressed the scope of such submission to non-Spanish law in the case of personal contracts or obligations, as certain literal interpretations of the phrase "contracts subject to non-Spanish Law" may limit its scope merely to the contract of transfer of timeshare or rotational use rights despite the fact that associations, partnerships, clubs, etc are nothing but "multilateral contracts". Fortunately, RDO's voice has been listened to and taken into account insomuch as the validity of "any other contractual formats whereby rights of a personal or associative nature are created…" has been 'recognised' (again, I would stress this word as recognising means accepting the state of affairs since the bringing into force of the Rome I Regulation in 2009).

As a final conclusion with regard to such an important point we could say:

1.- *Aprovechamiento por turno* (rotational use), under whichever system used to constitute it either in accordance with Spanish Law or by being under a non-Spanish law, is equivalent to 'timeshare'.

2.- Timeshare or rotational use rights may be created:

(i) Under Spanish Law, exclusively as a right in rem or leasehold right of rotational use, any other "in rem" or "personal" rights being excluded.

(ii) Under non-Spanish law, as a contractual or merely binding right.

MANDATORY APPLICATION OF SPANISH REGULATIONS

The legal system subject to Spanish Law may under no circumstance operate to "dodge" mandatory consumer protection rules, which are applicable to all sales, currently in force in Spain among them:

(i) The consumers may not waive or be made to waive the rights recognised under the Royal Decree and any such waiver of the rights thereby vested in them shall be null and void, as shall be any acts performed by abuse of law.

(ii) In the case of contracts subject to the law of a non-EU member state, the consumer may invoke the juridical protection conferred by this Royal Decree in any of the following cases: a) any of the immovable properties in question is located in the territory of a State member of the European Economic Space; and b) in the case of a contract which is not directly related to an immovable property, the entrepreneur carries out their activities in a member State or such activities are in any way aimed at a member State and the contract falls within the scope of such activities.

4).- The promotion and transfer of the DATs shall in any case be done according to the provisions of Title I of the Royal Decree, i.e. with full and unavoidable application of the rules concerning publicity and pre-contractual information, form and content of the contract for transfer of the DATs, right of withdrawal, total prohibition of advanced payments, cases of non-validity of ancillary contracts, etc.

It is also important to point out that systems subject to Spanish Law may be “given public status” at the Land Registry, which we deem highly advisable as this will provide security to the consumer and, to no lesser extent, to the trader, who will thus have evidence of the existence and scope of the system used for commercialisation in Spain. This will be a very efficient tool in dismissing the possible accusations of lack of clarity and lack of publicity for spurious purposes.

SYSTEMS CONSTITUTED UNDER SPANISH LAW

Title II of the Royal Decree, on the other hand, refers to the special rules for constitution of systems subject to Spanish Law and, specifically, the right in rem or personal leasehold right system of rotational use. Most of the provisions of this system are a transcription of the repealed 1998 Act.

Notwithstanding the above, many of the lobbying points have been taken into account, not all of which were made by RDO-Spain, such as:

i) Possibility that the constitution of systems of 1 to a maximum of 50 years could refer to constitutive years or alternate years (e.g. biennial).

ii) An occupation period may not be shorter than seven successive days but the duration of all the occupation periods (as happened with the previous Act) does not have to be the same.

iii) The obligation to include certain documents in the constitution deed has been eliminated.

iv) The limits of the "commercialisation" insurance have been defined. This insurance was not properly delimited under the previous Act, which in most cases resulted in serious problems for the insurance companies to be willing to enter into a contract for an insurance which did not 'exist' in their catalogue.

This has now been clearly delimited as they can be taken out for annual periods and renewed during the continuance of the system. The insured sum may not be lower than the proportional part of the value assigned to the resort, corresponding to the non-commercialised part at the commencement of the contracting period.

v) The informative document is no longer required as it has now been replaced with the "pre-contractual information".

vi) Court action for recovery of unpaid maintenance fees can now be taken by the same proceeding envisaged to claim payment of service charges owed to communities of homeowners under the *Ley de Propiedad Horizontal* (Condominium Act).

LONG-TERM HOLIDAY PRODUCTS, RESALE AND EXCHANGE

Obviously, the Royal Decree also incorporates into the Spanish juridical system the so-called long-term holiday products and the resale and exchange contracts.

Such incorporation is done through an almost literal transcription of the relevant chapters of Directive 2008/122/EC, which will not be commented on in this emergency summary as they are well know to all of us.

TAXATION RULES

They are similar to those contained in the 1998 Act, particularly as regards the *Impuesto del Patrimonio* – Wealth Tax (virtually unenforceable owing to certain international treaties such as the one entered into with the UK and to the minimum taxable sum for the purposes of this Tax) – and the *Impuesto de Transmisiones Patrimoniales* – Transfer Tax – at the rate of 4% for transfers between private individuals.

As for the IVA and the IGIC (VAT and General Indirect Tax of the Canary Islands), the section on taxation rules does not include a specific provision, although the 3rd Final Provision does contain one in respect of the IVA only whereby Section 9.1 of the VAT Act (LIVA) is amended by including the DAT as one of the instances of application of the reduced IVA rate (8%). A more detailed study of these precepts will be required in any case as such rate refers to "real property" DATs in resorts or buildings with at least 10 units.

TRANSITIONAL RULES

The Bill which the Council of Ministers approved at the time for incorporation of Directive 2008/122/EC envisaged a similar mandatory "adaptation" of pre-existing systems to the new Act as that contained in the 1998 Act.

RDO-Spain lodged with the Ministry of Justice strong objections in this respect as such an adaptation was deemed unnecessary for those systems which had been previously adapted in accordance with the 1998 Act. This objection was of utmost importance owing to the extremely high costs it would entail for the resorts both in respect of notary's and Land Registry charges and of the *Impuesto de Actos Jurídicos Documentados* – Stamp Duty – , which costs it would be impossible to assume and could result in the closure of some resorts while offering no advantages to the consumers. This requirement has finally been left out of the final text of the new Act.

In summary, the new regulations concerning the transitional scheme are as follows:

(i) This Royal Decree is not applicable to contracts entered into before its coming into force unless the contracting parties shall agree to adapt such contracts to any of the modalities

recognised in this rule. This notwithstanding, in my opinion, such contracts have to observe the regulations in force at the time of its conclusion.

(ii) The pre-existing systems to the Royal Decree shall have a maximum duration of 50 years from the coming into force of the 1998 Act (4th January 1998) unless they had a shorter duration or the deed of adaptation to the said Act contained a specific statement of indefinite validity or specific duration.

(iii) Voluntarily, systems constituted under the Rome I Regulation before the coming into force of the new Act may be "published" in the Land Registry.

It is important to point out that, in this case (as in that envisaged by the said Section 23.8), for the same kind of systems constituted after the coming into force of this Royal Decree, mention in made to publishing and making public at the Land Registry as opposed to "adapting" (even if publicly), so this could be exempt from the Stamp Duty, albeit anybody wishing to do so should consult with their legal advisors in this regard as other interpretations are possible.

COMING INTO FORCE

This Royal Decree came into force on the 17th March 2012 and, therefore, Act 42/1998 of the 15th December was repealed on the same date.

However, the Royal Decree is a rule which has been approved by the Council of Ministers but, without prejudice to its coming into force, it now has to be confirmed by the Parliament and it may be processed as an ordinary Act and therefore could be subject to amendments.

Francisco J. Lizarza
Chairman of RDO-Spanish Chapter