

Consumer Protection: Directive 2008/122/EC

A Directive on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, repealing Directive 94/47/EC, has been published today (OJ, L, n° 33). The new Directive aims to update Directive 94/47/EC, covering new holiday products similar to timeshare that did not exist in 1994, and also some transactions related to timeshare that were not regulated by the old Directive.

The new text differs significantly from the old one. Directive 94/47/EC contained (art. 11) a minimum harmonisation clause, that is, Member States could adopt stricter rules in order to improve consumer protection. The outcome of doing so was a fragmented regulatory framework across the Community that caused significant compliance cost when entering into cross border transactions. The new Directive provides for full harmonisation, though only for certain aspects (sale and resale of timeshares and long-term holiday products, as well as the exchange of rights deriving from timeshare contracts), in which Member States are not allowed to maintain or introduce national legislation diverging from the Directive. Where no harmonised provisions exist, Member States remain free; due to this fact, conflict of laws rules are still needed. In this sense, Whereas 17 specifies that

The law applicable to a contract should be determined in accordance with the Community rules on private international law, in particular Regulation (EC) n° 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

In spite of this caution, it is still disputable whether consistency with Regulation (EC) n° 593/2008, Rome I, has really been respected. Actually, due to the differences regarding their respective juridical consequence, a careful job of delimitation is to be made between art. 6 of the Regulation (remember para. 1 and 2 shall not apply to a contract relating to a right in rem in immovable property or a tenancy of immovable property *other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC*), and Art. 12 of Directive 2008/122/EC, establishing that “2. Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum if:

- any of the immovable properties concerned is situated within the territory of a Member State or,
- in the case of a contract not directly related to immovable property, the trader pursues commercial or professional activities in a Member State or, by any means, directs such activities to a Member State and the contract falls within the scope of such activities.” Whilst art. 6 Rome I points to the protection provided by the law of the country of the consumer habitual residence, the Directive leans on the law of the forum.

Art. 3.4 of the Regulation, providing for the application of provisions of Community law that cannot be derogated from by agreement, when the parties have chosen as applicable law other than that of a Member State and *all other elements relevant to the situation* are located in one or more Member States, may also be a source of confusion.

The new instrument will enter into force on the 20th day following its publication; Member States shall adopt and publish, by 23 February 2011, the laws, regulations and administrative provisions necessary to comply with the Directive; they will apply from the same date.