

THE ISSUE OF THE ACQUISITION OF REAL ESTATE PREMISES FOR THE PURPOSE OF HOUSING INVESTMENT IN THE CONDO AND APART SYSTEMS (SECONDHOME) IN THE LIGHT OF REGULATIONS IN POLISH CIVIL LAW

PROBLEMATIKA NADOBÚDANIA NEHNUTEĽNOSTÍ ZA ÚČELOM INVESTÍCIE DO NEHNUTEĽNOSTÍ V CONDO A APART SYSTEME (DRUHÝ DOMOV) VO SVELTE REGULÁCIE POĽSKÝM CIVILNÝM PRÁVOM

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ABSTRACT

The article is an analysis of contracts and systems condo apart, as an alternative investment worldwide. The object of such agreements is to purchases of second home (so-called holiday properties). The concept of second home (or vacation properties), is used both for the purchase of real estate premises in the system as well as condo in the system apart, but between these systems, there are significant differences. This state of affairs stems from the fact that there are no legal regulations concerning contracts in selected systems, which means that these concepts are confused and mixed. It is also unclear to potential buyers principles on which it comes to the purchase of an apartment or hotel room, causing uncertainty of potential investors as to the shape of the concluded agreement and its legal effects. Purpose of the publication is to characterize the differences between contracts concluded in these systems as well as differences in the content of the agreements.

ABSTRAKT

Článok predstavuje analýzu zmlúv a systému condo apart ako celosvetovej alternatívnej investície. Predmetom takýchto zmlúv je kúpa druhého domu (tiež nazývané ako rekreačné nehnuteľnosti). Podstatou druhého domu (alebo rekreačnej nehnuteľnosti) je jednak kúpa nehnuteľností v systéme, ako aj bývanie v systéme apart; no medzi týmito systémami existujú rozdiely. Tento stav vychádza z toho, že neexistuje právna regulácia týkajúca sa zmlúv v danom systéme, čo znamená, že tieto systémy sú zamieňané a zmiešavané. Pre potenciálnych kupujúcich tiež nie sú zrejmé princípy, na základe ktorých nastáva kúpa apartmánu alebo hotelovej izby; to spôsobuje neistotu potenciálnych investorov ohľadom charakteru uzatvárania zmluvy a jej právnych účinkov. Účelom tohto článku je charakterizovať rozdiely medzi zmluvami uzatváranými v týchto systémoch, ako aj rozdiely v obsahu týchto zmlúv.

I. INTRODUCTION

Contracts concluded in condo and apartment systems have been known as an investment alternative on the international market for many years. What triggered that investment trend and increased development of that market were issues resulting from a high competition on the market, crises and development of markets demanding adjustment of products to niches. The idea of buying hotel apartments and renting them during the absence of the owners who

gain benefits from it emerged in the 50s in the USA. It was also during that period that first condo hotels were created in Florida, in the Miami Beach resort (Shelborne, Casablanca, Alexander). Later on, next condo hotels started to operate in New York, Washington, Chicago and Las Vegas. The concept of the condo and apartment systems was then introduced in Europe. At first, it was implemented in the countries located on the basin of the Mediterranean Sea and then, in other areas of the continent. In Poland, buying homes in the *second home* system has also become popular.

The term “*second home*” (or summer real estate) can be applied to both condo and apartment systems of purchasing real estate, but there are significant differences between them. This state of affairs results from the fact that there are no legal regulations concerning contracts concluded in the aforementioned systems and, as a consequence, they are being confused and mistaken for one another¹. What is also unclear for potential buyers are the rules of buying an apartment or a hotel room, causing uncertainty of potential investors in relation to the shape and legal effects of the purchasing agreement concluded. Condo hotels and apartment hotels are frequently and incorrectly deemed to be the same as timesharing. The lack of legal regulations clearly stating the conditions of concluding agreements in the condo and apartment systems is one of the factors blocking the development of this kind of investments in Poland as the development of the real estate sector depends to some extent on the legal factor². Due to the aforementioned confusion of the terms and conditions of condo and apartment contracts, the aim of the paper was to describe the differences between contracts concluded in those systems as well as the differences in the content of those contracts.

II. THE DIFFERENCES BETWEEN THE CONDO AND APART

As it has been indicated, the first issue shaping unclear rules on the acquisition of real estate in selected systems is the lack of social and legal awareness as to the differences in acquisition of property in condominium and apart systems. The condo property is based on purchasing a room in lodging facility (emerging or already functioning) by an investor, which transmits the acquired property for rental to the hotel operator (often a developer who had built the hotel). In the respect of a signed lease agreement, the property owner derives revenues (depending on the guaranteed rental agreements or other). The developer, in contrast to conventional hotelier does not become the owner of the entire property. He sells individual rooms, which then rents from owners and on their basis, using his own infrastructure in the facility, runs the hotel (i.e. condo-hotel). The apart system is a purchase of studio apartment, consisting mostly of a room with a kitchen or two rooms with a kitchen. With the apart system real estate both in hotel facilities with catering facilities and SPA services, as well as in a typical apartment buildings with reception, but without a restaurant or recreation part are acquired. In practice in both cases, however, a collective concept apart-hotel is used.

The indicated systems (condo and apart) are based on designs to conclude two agreements: the purchase of residential property and the lease of the property. The acquisition of residential property occurs here in accordance with the regulations of the Law on ownership of prem-

¹ For example CHRABAŚCZ K., distinguishes between so-called condo-investments in so-called Second home investments which include the purchase of apartments (acquisition of premises in the apart system), or houses. He distinguishes between the acquisition of rooms at condo-hotels as well as apartments in condo hotels, rooms in apart-hotel and acquisition of Second home in the rest of the work CHRABAŚCZ, K., Condo-investments as an alternative form of capital allocation, Scientific Papers of the Malopolska School of Economics in Tarnow, works in the field of Management, Tarnów - 2014, N° 1.- S.49-50 i 56. M. Martyniak describes condo-investment by both the acquisition of rooms and apartments to rent. MARTYNIAK M., An alternative form of investing in real estate - a condo-hotel [in:] Polish doctors and doctoral students in the development of world scientific thought (ed.) M. Woźniak, Ł. Pilarz, M. Drewniak,- Słupsk – 2015. - S.101.

² CYRAN, R. Factors affecting the development of real estate market, Real estate 2006, N°11. - S. 23; Załączna, M. The functioning of real estate markets in some countries [in:] Western real estate markets (ed.) E. Kucharska- Stasiak., Warszawa 2004.- S.27.

ises³, according to which the buyer becomes the owner of the apartment premises and co-owner of the common property owners of the premises. That law also regulates the rights and duties of landlords, including their obligation to cooperate in the management of common property owners of the premises. In the first place there is, therefore, a need to establish the separate ownership of premises and transfer the separated ownership of the premises to the purchaser. At the moment a first establishment of separate ownership of premises located in the building is thus formed, a structure based on the link between the existence of three types of property: residential property the separated, real estate that is not separated and is composed of premises that are to be extracted and common property of landlords. The lack of awareness of the rules on the acquisition of a condo hotel and apart means that the doctrine can find opinions that, in the case of acquisition of hotel rooms the buyer acquires the room without taking part in the common property, which is component the land⁴. Again, however, the case of the purchase of the room, in any case there is a purchase of a share in the common property. In accordance with Art. 2 paragraph. 1 of the Act on ownership of premises, the concept of the premises, which can be extracted and constitute a separate property should be understood by any independent residential dwelling and premises for other purposes. The only prerequisite for the establishment of a separate ownership of premises, is its independence⁵. It is understood, however, to be acceptable to recognise such premises as stand-alone, the exploitation of which would involve the use of equipment located within the common property, whether they are used for common use (i.e. not entitled to only one of the landlords), and if only these devices were not in another premises that could constitute a separate stand-alone property⁶. The independence of premises therefore comes down to the existence of a unit of chambers (the chambers) and the auxiliary rooms, which are separated by permanent walls within the building, and the unit of chambers alone is established to achieve the certain goal, without having to use premises located in other commercial spaces. At the same time the Act does not impose any restrictions or requirements relating to your own premises surface. Considering the above, the subject of separate ownership can be both local covering the entire floor of the building (eg. Penthouse) as well as a single room. It is only essential for the room to constitute the chamber or a unit of the chambers (a room with a bathroom) separated by permanent walls within the building, which use (for accommodation) does not require the use of premises located in other commercial spaces.

Subsequently, a premises lease agreement shall be concluded between the purchaser and the vendor, which is concluded usually for a period of 5 or 10 years. These agreements in most cases also contain a clause according to which the owner can within the prescribed period, use the premises alone. To this agreement, the provisions of the Civil Code⁷ of the lease are used with. It does not apply to the provisions of the Act dated 21 June, 2001 On the protection of the tenants' rights, housing resources of municipalities and amending the Civil Code⁸, because of the exclusion of the body of Art. 2 Section 4 of the Act.

In spite of similar structure the condo system differs from the system apart with the content of the agreements. The main differences revolve around three issues, namely: shaping amount and method of payment of rent (income from lease of real estate); the determination of costs

³ Act of 24.6 1994 on ownership of premises, consolidated text, Journal U. of 2004, No. 141, item 1492.

⁴ SZREDER J., Evaluation of investment opportunities in the holiday property market in Poland, Studies and works Faculty of Economics and Management, Olsztyn 2014, № 36, T.1. - S.425

⁵ WATRAKIEWICZ M., The property shared by the Act on Ownership of Premises, Quarterly Private Law, Warszawa 2002, z. 3. - S.637; Gola A., [in:] Rental and ownership of premises. Rules and comment A. Gola, J. Suchecki, Warszawa 2000. - S.178; A. Proksa, [in:] The new housing law with commentary, A. Proksa, A. Mączyński, Kraków 1995. - S.134.

⁶ STRZELCZYK R., [in:] The ownership of premises, R. Strzelczyk, A. Turlej, Warszawa 2010. - S.77; The judgment of the Regional Administrative Court of 10.6.2010 r., III SA/Gd 142/10, Lex nr 643861.

⁷ Act of 23.4.1964 Civil Code, uniform text. U. of 2014 Item 121.

⁸ Acts Laws of 2005 No. 31, item 266, as amended.

to which it is obliged to bear by the owner of the premises and the premises management principles and common property of landlords.

Analysing the first of the indicated differences it may be noted that, in practice, have developed three types of determining the rent that constitutes profit for landlord. The first involves the payment of a fixed amount of approx. 5-10 percent of the purchase value of the premises, in the form of rent to be paid per month or quarter the most commonly. The rent is constant regardless of the entire hotel occupancy and use of the apartment. In some cases, apart from a constant rental amount the seller also agrees to repay the loan taken out by the purchaser for investment purposes. The second defines the landlord's share in the revenues or profits from the rental, by most frequently 50/50. It should be noted that in the market there are many variants of this solution. Some developers - hoteliers offer systems based on the share of revenues or profits from a particular apartment. Others offer systems based on revenue share or profits from all units at the facility that are then divided in the proportions resulting from the size or the selling prices of individual apartments. The so-called third system mixed based on the principle that for the first 2-3 years landlord is entitled to a permanent, annual rent at the level of 6-10 per cent, and then share in the revenue of 50/50. The example of of Western countries, also in Poland, most frequently during the first few years (usually 4-5) the landlord receives a constant rent, approx. 6-8 percent gross. It is therefore an amount higher than the profit from the bank deposit or government bonds. On the annual deposits an average of 4.51 per cent can be earned and two-year - 4.44 percent. At the end of the payment of a fixed amount of the rent the owner participates in the profits from the rental of all the apartments.

The second difference concerns the cost, of which is obliged to pay the owner of the premises. The condo-hotel expenses are associated with the operation and repairs of the building and also rooms which are a separate property, most frequently it shall be borne by the company managing (where the operator can also be a developer). Owners of individual apartments are exempted from the obligation to pay the cost of the parts of the building that are accessible to all users, such as restaurants in the building or spa. The company managing most often covers the costs of exploitation of the room (excluding periods when the owner alone uses his room). The company also bears the cost of mobile equipment of the apartment meaning the furniture, appliances and electronics. The owner only pays the property tax. The operating costs, including costs of management of common property the company managing pays. At the same time the owner of the apartment, in the period when he dwells in it, is frequently entitled to a package of free additional conventional hotel services, such as room service. In the apart system, in most cases, the costs are charged on owners of the apartments. Included in these costs are not only the costs of repair of the apartment itself but also the costs of purchasing the equipment. The owners bear the cost of maintaining the common property, including the repair fund, fees for waste disposal and wastewater discharge fees, water supply and heating, often protected and real estate taxes. The amount of these charges despite the standard and nature of the investments does not differ from the standard amount of such charges of landlords in the traditional housing areas. The owner does not bear any costs of infrastructure building, such as restaurant or spa & wellness. These costs are borne entirely by the company managing, although guests living in the same apartment can use these rooms.

The difference between the agreements concluded in a condo hotel and apart systems also specify managing entity both the premises and common property owned by the landlords. With the contracts concluded in a condo hotel system the management is usually entrusted to a hotel operator or developer who had built it. However, in the agreements concluded in the apart system a specialized company is entrusted with the management but not the developer. Analysis of the principles of the issues executed by the administrator of the board is beyond the scope of this article. This issue focuses on the question of whether it is acceptable in the

system of separate ownership applicable in Poland to entrust the board of the developer (or the operator of the hotel), the management will cover all routine administration and operations beyond the ordinary management without the permission of the apartment owners to decide about the fate of common property.

III. PURCHASE OF PROPERTY SYSTEMS CONDO AND APART IN POLAND

In Poland, the concept of condominium and apart systems, is an alternative to traditional investment instruments such as funds, bank deposits or the stock market. Income derived from renting a room or apartment in a condo-hotel or in an apart-hotel may in fact be much higher than the average rate of return on the bank deposit. Condo hotels, with their innovative acquisition of individual investors or institutional investors into individual premises are a very attractive way for rapid development of hotel infrastructure particularly given the difficulty in obtaining bank loans for construction of hotels in the system of one hotelier-owner. The development of this type of investment in Poland also shows that Poles are committed to investing in real estate. The advantage of investments in real estate include great hedge against inflation and changes in the economic situation. According to a research conducted by Deutsche Bank in 2015 45 per cent of Poles consider investing in real estate as the most profitable. Additionally insecurity in the banking market following the recent downturn in the US, led to growing interest by customers to withdraw their capital from banks while seeking for other forms of investment of their capital. The development of this type of investment has focused so far mainly in tourist destinations such as Kolobrzeg, Sopot and Zakopane. It can be noted, however, that more and more offers of flats in the system apart in large urban areas are emerging. The largest and longest running business in this market are primarily Zdrojowa Invest Kolobrzeg, Qualia Development, Kristensen Group and Condohotels Management group of Ostróda.

On the one hand, it is projected to further develop this type of investment in Poland. On the other, it should be noted that the willingness to invest in real estate in a condo hotel and apart system in recent years is lower than that in 2007-2008⁹. Various factors can influence the decline of interest, among which the lack of awareness of the principles of the purchase of the investment in the system Second home¹⁰ should be mentioned. In order to increase the attractiveness of this type of investment it is worth therefore legally regulate this type of contract, giving them greater legal transparency should be considered.

IV. SUMMARY

The subject of this article is the issue of buying real estate in the condo and apartment (*second home*) systems, which constitute an investment alternative. Due to the lack of legal regulations which would clearly state the difference between conditions of buying housing estate in the condo and the apartment system, it is possible to observe confusion of those terms and inconsistency in describing the conditions of buying estates in the aforementioned systems in the literature and practice. The aim of the article was to describe the similarities and differences between contracts concluded in the *condo* and *apartment* systems as well as differences between the content of those agreements. The analyses resulted in an indication that the lack of legally transparent rules of purchasing real estate in the systems analysed leads to uncertainty of potential investors in relation to the shape and legal effects of the purchasing contract, and, as a consequence, it can result in a lower attractiveness of investments on the real estate made in the condo and apartment systems.

⁹ Szreder J., *Evaluation of investment...*, S.426.

¹⁰ Chrabąszcz K., *Condo Investment...*, S.56.

KLÚČOVÉ SLOVÁ

právo nehnuteľností, nehnuteľností, druhý dom, nadobúdanie nehnuteľností, vlastnícke parvo vlastníka

KEYWORDS

property law, real estate, second home, acquisition of real estate, property rights of the owner

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