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**Timeshare Consumer Protection;
Review and Suggestions**

presented to Parliament on June 29, 2011

MEMORANDUM

Subject: Sint Maarten Timeshare Consumer Protection
From : Petrus Leroy de Weever
To : Sint Maarten Parliament
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1. Introduction

The timeshare industry is of vital importance to Sint Maarten's economy, therefore any negative events and developments may imply serious consequences.

In December 2010 the Sint Maarten Pelican Timesharing Resort was sold by the Lender in an auction pursuant to foreclosure. This foreclosure followed by the temporary closure of the resort caused a severe crisis, the effects of which are likely to continue to impact our community for some time to come.

Foreclosure on Sint Maarten timesharing resorts has occurred various times in the past and the footprint of the unfolding events is strikingly similar:

- Foreclosure invariably forms fertile ground to legal battles whereby timeshare owners are trying to regain the rights that they dearly paid for.
- The role of the Government is that of an observer in the sideline, unable to exercise any authority and influence to change the course of the events.
- The timeshare owners and our community are the losers who will suffer.
- Reputation damage to our island can be quite considerable.

The recent Pelican Timeshare Resort crisis provoked a considerable number of negative reactions in the local media and on the internet, whereby also the Sint Maarten Government and its Parliament were not spared of criticism, justified or not.

It appears from these reactions that there is a general lack of understanding of the nature of timeshare rights and the protection of the entitled parties to such rights. Timeshare is a very complex matter and it is understandable that the general public is not well informed about the different aspects thereof.

This document highlights basic aspects of the already existing timeshare legislation and it provides some recommendations to improve timeshare consumer protection.

I have carried out this exercise in an effort to assist in providing our Government with some tools to help prevent a crisis in our timeshare industry from recurring.

My Memorandum is to be considered the first step in the legislative process to enhance timeshare consumer protection to the benefit of the timeshare owners and in the interest of the people of Sint Maarten.

2. Legal Form Timeshare Contracts

There are no compulsory rules regarding the legal form in which timeshare rights are to be structured. The developer of a timesharing project is free to choose the form he pleases.

The risk exposure of a timeshare Buyer is directly related to the legal form of his timeshare right.

Among those risks are:

- the risk that a developer would not (completely) finalize the timesharing project;
- the risk that the project is not properly managed and maintained;
- the risk of uncontrolled increases of maintenance fees and other charges;
- the risk of bankruptcy of the owner of the immovable property;
- the risk of sale and foreclosure of the immovable property.

2.1. Lease Agreements

It appears that many timeshare contracts on Sint Maarten are in principle structured in a form that bears resemblance with lease agreements, with or without Club Membership Programs.

This legal form is chosen with the intention to provide timeshare owners the protection of Article 7A:1593 of the Civil Code, which entails that lease agreements are not affected by sale of the immovable property.

It should be noted however that often timeshare contracts may be mixed contracts covering not only the exclusive right to occupy and use each year a specific furnished

immovable property ("the unit") for one or more specified weeks during the duration of the timeshare contract period (sometimes up to 999 years), subject to the resort rules & regulations, but also additional rights and obligations such as the non-exclusive use of recreational facilities, laundry, cleaning and other services and amenities of the timesharing resort, affiliation to international exchange systems and sometimes investment agreements (such as rental pool agreements) and buy-back clauses.

The Court of Justice of the Netherlands Antilles ruled in its judgment of September 27th, 2002 that protection of article 7A:1593 of the Civil Code only regards rights and obligations that are directly related to the immovable property and appurtenant facilities thereto. Therefore, additional rights and obligations such as exchange systems and investments agreements and buy-back options are not covered by such protection.

One must realize that the more pronounced the additional rights and obligations are, the larger the chance that the timesharing contract will not qualify as a lease agreement.

In case the immovable property, on which timeshare rights in the form of lease agreements are based, is sold in an auction, it is a requirement that the Mortgagee (the Lender) must have granted consent to conclude the timeshare lease agreements.

Failing such consent, the (timeshare) lease agreements can be terminated and consequently the timeshare owners are left empty handed.

It should be clear that timeshare contracts bearing resemblance with lease agreements do not always qualify as lease agreements.

2.1.1. A Case in Point

Illustrative is a case where two owners had bought 3 timeshare rights in a resort on Sint Maarten. The total purchase price for those 3 contracts was quite substantial and amounted to USD 1,275,000.00

These timeshare contracts had been structured in a form bearing resemblance with lease agreements and contained the following non-disturbance clauses:

7. That debtor is allowed to rent-out the burdened property or parts of it on a "time-sharing" basis. That the actually existing and the in the future on behalf of

Debtor contracted timesharing rental agreements shall be respected by the Lender in case of a public-sale and/or foreclosure.

8. That without the written consent of the Lender the collateral may not be alienated or further encumbered with mortgage, easements or other liabilities for the benefit of third parties ..."

In July 1995 the timesharing resort was sold in a public auction pursuant to foreclosure and in December 2008 the Court of Justice ruled that the aforementioned timeshare contracts did not qualify as lease agreements. The timeshare owners appealed and presented their case to the Dutch Supreme Court in The Hague, The Netherlands.

Recently, on February 11, 2011 the Supreme Court rendered its judgment in this case and ruled as follows:

"Not decisive is whether the agreements comprise elements that as such meet the legal description of lease agreements. Decisive is: if under the given circumstances, taking into account the intentions of the parties at the time of concluding the agreements, the contents and the purpose of the agreements are of such a nature that regarded overall the agreements can be considered as being lease agreements."

The Supreme Court upheld the December 2008 decision of the Court of Justice that these timeshare agreements did not qualify as lease agreements and consequently the buyers did not enjoy the protection that they had based their claims on.

2.1.2. Pelican Timesharing Resort

In the case of the December 2010 sale (by the Lender) of the Pelican Timesharing Resort in a public auction pursuant to foreclosure, the question whether the timeshare rights concerned would survive the consequences of the auction sale was never brought to court, because the Buyer of the timesharing resort, being an affiliated party of the Lender, respected the existing timeshare rights.

The Pelican timeshare owners were members of the Tenants' Association Pelican Resort Club ("**TAPRC**"), which association was the sole shareholder of a local limited liability company ("the Company"). The Company in its turn

was the owner of the Pelican long lease rights, including the rights to all the buildings and appurtenances of the resort.

As a consequence of the auction the Company, and thus TAPRC and the timeshare owners, lost the long lease rights and the rights to the buildings and appurtenances of the Pelican Resort.

Shortly before the long lease rights were transferred to the auction Buyer, TAPRC had assigned the rights to collect future rental income and payments from the timeshare owners to a newly established Foundation ("SBBPRC").

On June 17, 2011 the Court of First Instance of Sint Maarten, 2011 ruled said assignment illegal and determined that the payments must be made to the auction Buyer.

It seems that history repeats itself, so one may expect that the legal battles are far from over.

2.2. Timeshare Apartment Rights

The most secure manner to avert the risks of sale (whether in auction or not) of the immovable property on which timeshare rights are based is provided by establishing timeshare rights in the form of "a right in rem" (in Dutch: "zakelijke recht").

Since December 1, 2005 the law indeed provides such option as Book 5 of the Civil Code was amended to include the concept of Timeshare Apartment Rights (in Dutch: "Deeltijd Appartementenrechten").

The law defines a Timeshare Apartment Right as: a share in the properties involved in the division, which includes the right, whether or not at regularly recurring times, and whether or not during fixed periods of time, of exclusive use of certain parts of the buildings, that, as appears from their lay-out, have been or will be intended to be used as a separate sections; the share may also include the right of exclusive use of certain parts of the land belonging to the building.

It should be noted that the non-exclusive right of use of recreational facilities and certain amenities inherent to the use of the common areas of the timesharing resort can be made part of the Timeshare Apartment Rights.

However, exchange programs, investment agreements and buy-back options cannot be made part of Timeshare Apartment Rights.

2.2.1. Advantages

The major advantage of a Time Share Apartment Right is that the entitled party owns a registered property (in Dutch: "registergoed") that is shielded from the foreclosure risks pertaining to the Developer or to the Operator or Manager of the timesharing resort. Furthermore a Timeshare Apartment Right can be encumbered by the right of mortgage and the entitled party can freely transfer his timeshare right to a third party.

2.2.2. Practical Aspects

Meanwhile, the Sint Maarten Land Registry ("Kadaster") has confirmed that its digital registration system ("Kadsys") has the capability to record Timeshare Apartment Rights in the Public Registers. This is crucial because a Timeshare Apartment Right cannot be legally created if it cannot be recorded in the Public Registers.

Typically timeshare rights are purchased in a rather informal way by people in a vacation mood.

Acquiring a Timeshare Apartment Right however implies executing a deed before a civil law notary, which is a totally different setting then signing a conventional timeshare contract in a resort. Under conventional timeshare right is to be understood for the purpose of this document: a timeshare right not being a registered property.

The notary fee for a deed of division of property into apartment rights is established by the Court of Justice and amounts to 0.25% of the value of the land and the buildings in their completed state (exclusive architect costs and the movable inventory of the units). The timeshare developer could include these costs, which are only a fraction of the total costs marketing and sales, into the sales price of the timeshare right.

Acquiring a Timeshare Apartment Right furthermore implies closing costs (transfer tax, registration costs and notary fees), which costs customarily are for the account of the Buyer unless otherwise agreed upon.

3. Basic Consumer Protection

3.1. Failed Intent

The Government of the Island Territory of Sint Maarten had introduced timeshare consumer protection by means of an Island Ordinance to supplement the Federal License Ordinance with regulations pertaining to the operation of immovable property for timeshare use.

However, on March 8th, 2005 the Court of First Instance on Sint Maarten declared the aforementioned supplement to the Federal License Ordinance unconstitutional and therefore non-binding.

3.2. Civil Code Protection

On December 1, 2005 specific consumer protection for Timeshare Buyers was introduced by means of Division 10A in Book 7 of the Civil Code.

The legislation is based on legislation applicable in the European Union with some adjustments thereto.

Its purpose is to provide certain protection to a timeshare Buyer, who is a natural person not acting in the practice of an occupation or conduct of a business during the purchase.

Under Seller is to be understood a Seller acting in the practice of an occupation or conduct of a business during the transaction.

The protection is aimed against aggressive sales practices and it comprises compulsory stipulations to provide timeshare Buyers with proper information beforehand.

The timeshare contract must be in the form of a written document and the Buyer has a Reflection Period of five days which allows cooling off, thinking things over and seeking expert advice.

The Reflection Period starts from the moment the Buyer receives a copy of the executed timeshare contract and during this period the Buyer may withdraw from the timeshare contract without stating reasons.

Such contract cancellation must take place by the Buyer giving writing notice to the Seller and it entitles the Seller to a cancellation fee of at the maximum 3% of the timeshare contract price.

If the Buyer has paid the purchase price in advance, then the Seller must, for the duration of the Reflection Period, provide

security for the prompt repayment of the advance payment less 3%, in case that Buyer would cancel the timeshare contract.

An example of such security would be an arrangement whereby an independent Escrow Agent would hold the purchase price in escrow during the Reflection Period.

If the Seller or a third party has provided a loan to the Buyer to finance the transaction, then such loan agreement will be dissolved by operation of law, without the Buyer forfeiting any penalty upon cancellation of the timeshare contract.

The timeshare contract must incorporate or refer to the pre contract information set forth in the "Information Decree Rights of Use in Timesharing of Real Property, Federal Decree containing General Administrative Orders".

It should be noted that the Information Decree may be amended from time to time.

The Reflection Period will be extended with at the maximum one month if the Seller did not provide all the pre contract information to the Buyer.

3.3. Information Decree (PH 2006#34) The aforementioned Information Decree stipulates that a timeshare Buyer must be provided with the following precontract information:

- the particulars of the contracting parties, including the legal form in which the Seller conducts his business. The name and place of residence of the actual real property owner;
- an accurate description of the nature of the timeshare right. The requirements to exercise that right, the statement that these requirements have been met, or which of these requirements still have to be met;
- an accurate description of the real property, its location and its cadastral identification;
- the extent to which the real property has been completed and a reliable estimate of the time required for the completion;
- the building permit number, the name and the address of the competent administrative body or bodies;
- the extent of completion of the common services such as connection to gas, electricity, water and telephone;

- guarantees for the sound completion of the real property, and, in case the completion does not take place, for the refund of all that buyer paid, the conditions on which these guarantees are given;
- the common services such as lighting, water, maintenance, and garbage collection, and the conditions on which these services are made available;
- the common facilities such as swimming pool and sauna, and the applicable conditions;
- the rules in force for the maintenance and upkeep of the real property and for accounting and administration;
- the starting date of the timeshare right, the period or periods of time during which the right may be exercised and the duration of this right;
- the purchase price, a reliable estimate of the amount to be paid for the use of the common services and facilities, the basis for the calculation of the amount of the expenses for the buyer to the use of the real property, for the calculation of amount the payments prescribed by law, such as taxes and charges, and for the calculation of additional administrative costs, such as concerning administration, maintenance and upkeep;
- a provision that the purchase does not entail expenses, charges or obligations other than those stated in the contract;
- a statement regarding participation in a system of exchange or resale of the timeshare right, as well as, if this system is administered by the seller, or by a third party, any expenses pertaining thereto;
- data concerning the right to cancel the timeshare contract during the Reflection Period, the name and place of residence to the person to whom the cancellation notice has to be addressed, and information concerning the dissolution loan agreements;
- date and place of signing the contract by each of the parties.

4. Conclusions

- Existing timeshare consumer protection legislation comes a long way, but it does not go far enough. Its application and enforcement require more Governmental involvement and control.

- Without the right tools in the form of additional consumer protection and a properly functioning system of checks and balances in place our Government will not be in a position to act decisively act and take appropriate measures to prevent a crisis in our timeshare industry or mitigate the effects thereof.
- Sint Maarten has a tourism driven economy and it cannot afford to suffer the consequences of recurring crises in its timeshare industry.
- The judgment of the Supreme Court rendered on February 11, 2011 underlines that timeshare contracts structured in a form bearing resemblance with lease agreements do not necessarily provide the desired protection against a sale of the immovable property on which the timeshare rights are based.
- A Timeshare Apartment Right is the most secure legal form that our legal system provides and the use of such option should be encouraged and in certain cases be made compulsory by the Government.
- Since October 10, 2010 Country Sint Maarten has full legislative authority to enact legislation to regulate its timeshare industry.
- Preparing legislation is a highly specialized trade, requiring at all times the input of a well experienced legislative lawyer.

5. Recommendations

- Amend the law to stipulate that timeshare rights exceeding a certain monetary value (or a certain number of weeks) must be in the legal form of Timeshare Apartment Rights.
- Establish a Timeshare Regulatory Board with the authority to monitor, supervise and enforce compliance with timeshare legislation on Sint Maarten.
- Introduce timeshare license legislation to effectively enforce compliance with the existing legislation and expand timeshare consumer protection.
- Timeshare Contracts regarding properties located on Sint Maarten must be made subject to Sint Maarten law.
- Analyze the contracts of the existing timesharing resorts on Sint Maarten and assess the risk exposure of the timeshare owners.
- Introduce sanctions for non-compliance with timeshare legislation and acts in contravention with the conditions of timeshare licenses to be issued.

- Parliament should invite Professor Jan de Boer (member of the Common Court of Justice of Curacao, Aruba, Sint Maarten and the BES Islands):
 - to discuss the status of existing timeshare consumer protection on Sint Maarten;
 - to interchange ideas of enforcing existing legislation; and
 - to deliberate on the possibilities of introducing additional protection as set forth in the Addendum to this Memorandum.
- Install a Committee of experts, which in any case must comprise an experienced legislation lawyer, with the following tasks:
 - to make recommendations regarding effectively enforcing the existing timeshare consumer protection rules;
 - to prepare additional legislation to protect timeshare Buyers and timeshare owners and in connection therewith work out and cause the ideas set forth in Addendum to this Memorandum to be implemented.

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