FIDUCIA IN THE LIGHT OF THE NEW CIVIL CODE INSTITUTION OF LAW WITH UNREGULATED FINALITY

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Abstract:

The institution of "Fiducia" relatively completely regulated by the content of the art. 773-791 of the New Civil Code, represents, together to the institution of periodic property and the one of administration of one's assets, a premiere in the Romanian civil law. The apparition of this institution of law in the continental law (also in the Romanian law) is the result of a long interface process between the civil continental law and the Anglo-Saxon one, during which many institutions of law or types of contracts have been taken over in the continental law, as a consequence of the globalisation of the business relationships.

The legal mechanism of Fiducia exists in the continental law since its beginnings, more precisely even since the apogee of the Roman law. This way, this legal instrument, of assets administration can be found in the legislation of many European states, among which, we can mention the Anglo-Saxon legislation (trust), German legislation (trauhand), French legislation – legislation which represented the inspiration source of the Romanian legislator in the matter of Fiducia.

Unlike the Anglo-Saxon law, where the trust has three forms (guarantee, administration and the one concluded for performance of a liberality) in the Romanian law, fiducia has only two of these forms, respectively, Fiducia as guarantee and Fiducia as administration.

In the banking field, Fiducia as guarantee, although it has real practical advantages comparing to the most commonly used real estate mortgage, it is not used by the credit institutions, these still preferring that the reimbursement of the loans granted to be guaranteed by a mortgage contract.

Keywords: *Fiducia, Fiducia as guarantee, subjects of Fiducia, the new civil code.*

1. Origin and evolution:

The etymology of the noun "*Fiducia"* originates from the Latin word *"fìdo",* which means to trust (to have faith in someone or something), loyalty.

The origins of "Fiducia", as legal institute, can be found in the Roman law, although the institute of "Fiducia" has been taken over in the continental civil law by adaptation of the *trust*, regulated by the Anglo-Saxon law.

The fiducia contract is one of the oldest real contract, originating in the Roman law – *pactum fiduciae.*[1]

In the Roman law, fiducia was present under two forms, respectively "*fiducia cum amico"* (fiducia for administration) and "*fiducia cum creditore"*(fiducia employed as security).[2] Two elements were indispensable to be able to establish any of the two types of "Fiducie".

The first element, called "*datio*" was representing the ownership transfer and it was characterised by "*traditio*", respectively by physical delivery of the asset. "*Datio*" on its turn, could have two forms, for a "Fiducia" to be established, respectively (i) either it happened in a ritual formula before the magistrate (*in jure cessio*), (ii) either happened before five witnesses. **The second element,** was represented by a document, respectively, the convention called *pactum fiduciae.* It can be noticed that the second element has been kept also in the modern regulations of "Fiducia", meanwhile the element "*datio*" lost its application.[3]

It is also very important to specify that with regard to the modern regulations of the fiducia contract, in the Roman law, the implementation of the "Fiducia" was limited to the inheritance field, and the third party acquirer (the successor) had only the possibility to exercise a strictly personal action against the fiduciary, in case of non compliance with the contract. The Fiducia of the modern age is different from the fiducia regulated by the provisions of the Roman law and also in the light of the separation of the patrimonial assets, in the meaning that, currently, the personal assets of the fiduciary should not be confused with the ones from the fiduciary assets, as was happening in the Roman law.[4]

Although, some elements of "Fiducia" from the Roman law have been taken over in an adopted form, from the contemporary regulations, the resistance structure of the current "Fiducia" is grounded on the Anglo Saxon law, from which the *trust* has arisen, separating this way the fiduciary assets from the personal assets of the fiduciary, by implementation of the *split ownership theory* or *theory of title split*.[5]

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[1] Antoine BUREAU, *Le Contract de Fiducie :* étude de droit comparé Allemagne, France, Luxembourg, *www.juripole.fr*

[2] Alain Berdah – La Fiducie – http://www.avocats-droit-affaires.com/images/pdf/la%20fiducie.pdf – p. 2-5

[3] Alain Berdah – La Fiducie - http://www.avocats-droit-affaires.com/images/pdf/la%20fiducie.pdf - p. 1-2

[4] Cătălin R. Tripon op.cit. p. 178-179

[5] Cătălin R. Tripon op.cit. p. 191

With regard to the regulation from the Romanian civil law, it can be said that it represents a taking over of the French regulations in the matter of "Fiducia", with certain particulars. [6]

In France, as we have already mentioned, fiducia has been reintroduces as legal institute, by the law of 19th of February 2007 , currently being regulated by the art. 2011-2030 of the French Civil Code.

"Fiducia", as polyvalent legal instrument, has fallen in quite a disgrace in the historical moment of the French Revolution, and from the apparition of the Civil Code of Napoleon since 1804 and till the moment of its reactivation in 2007, "Fiducia" was forgotten, having no interest.

The Civil Code of Napoleon of 1804, almost integrally transposed in the Romanian Civil Code of 1864, has expressly prohibited the Fidei-Commissum sub-institutes which were related to the inheritance law. Because "Fiducia" was usually associated, in practice, to the fidei-commissum sub-institutes, it has been arrived to the extensive interpretation – atypical for the civil law – of an interdiction text, in the meaning that it would have in view also the legal mechanism on which we have put our attention. This interpretation *in extenso*, to which we make a reference, has been taken over by the Civil Code of 1864, from the Civil Code of Napoleon 1804, resulting therefore that "Fiducia" has never been prohibited in the private law of Romania, as we have well know, what the law does not prohibit it means that it allows .

The return of "Fiducia" in the legal actuality of nowadays can be explained by the pressure exercised on the continental private law, by the British/American system, respectively, by Common Law, system where the *trust* has born, which although it is not perfectly identified with "fiducia", still it comes near very much, as legal-economical finality, to what we understand by "Fiducia" .

Therefore, we can say that by the legal regulation of the "Fiducia" institute, Romania only follows the example of other European states, such as France, Germany, UK, Italy, Swiss, Luxemburg or Austria, making available to practitioners, of the Civil, commercial and banking law, the legal regulation of a legal instrument, extremely present in the commercial relations on international level.[7]

Now, we can say that there are two fiduciary patterns in the European private law, respectively the British pattern (*trust*), which has been taken over also by the Italian Civil Code and the French pattern (art. 2011-2031 French Civil Code) adopted also by the Romanian Civil Code of 2011, at the articles 773-791.[8]

It is essential to specify that the French pattern prohibits the indirect liberality, interdiction taken over also by the Romanian legislator, who, by the text of the art. 775 of the Civil Code, it provides that the fiducia contract by which an indirect liberality in the benefit of the beneficiary is achieved is subject to penalty of absolute nullity.[9]

2. What is the meaning of "Fiducia"?!

Notion and object of Fiducia

"Fiducia" is a civil law institute, regulated by the Romanian Civil Code, at the art. 773-791.

Therefore, by the provisions of the art. 773 New Civil Code the legislator defines "Fiducia" as being the "*legal operation by which one or more constitutors transferring real rights, receivables, guarantees or other patrimonial rights or an ensemble of such rights, present or future, to one or several fiduciaries who exercise such with a determined purpose, in the benefit of one or several beneficiaries. These rights form an autonomous mass of assets, distinct from other rights and obligations from the fiduciaries patrimonies."*

From the content of the legal definition, it does not result the way how the "Fiducia" shall be used, which will be the application of this institute, but in the doctrine[10] it has been ruled that for fiducie we have to have in view two finalities, respectively fiducia – instrument of administration and fiducia – instrument of guarantee. As voluntary and contractual regime, fiducia allows a person to legally proceed to desisting the personal assets administration, by assigning them to a trustee (the fiduciary) who has to administrate and dispose of with loyalty and attention, in the advantage of a beneficiary.[11]

With regard to the object of fiducia, the text of the art. 773 Civil Code enumerates examples only, the rights that can be object of the transfer, without the legislator refers to the assets on which holds these. But, interpreting the legal text, we shall conclude that the present or future assets – immovable and movable, tangible and intangible ones (receivables, intellectual property, securities etc.) may be subject to fiduciary transfer .[12]

From the real rights, the use and habitation can not be object of fiducia, pursuant to the provisions of

[6] Drept Civil – Drepturi Reale Principale – Editura Universul Juridic 2011– Marilena Uliescu si Aurelian Gheorghe p. 155

[7] Eugen Constantin Iordăchescu - http://www.iordachescu-law.ro/Studii-de-caz/Implementarea-fiduciei-in-practica-bancara-Modalitati-si-conlucrare-institutionala---avocat-Eugen-Constantin-IORDACHESCU--eID81.html

[8] A se vedea Ion Turcu – „Se poartă Fiducia" – 19.02.2013 – article published on the web site http://www.juridice.ro/244256/se-poarta-fiducia.html

[9] În *Common Law* , *trust* does not prohibit the performance of indirect liberalities

[10] I.Popa – The Fiducia Contract regulated by the new Civil Code, in R.R.D.P., p.127 – apud G.Boroi; C.A.Anghelescu; B.Nazat – Curs de Drept Civil – Drepturile Reale Principale –Hamangiu Publishing House 2013 – p.203

[11] A. Rățoi – Noul Cod Civil –Note Corelații Explicații –C.H. Beck Publishing House 2011, p. 269

[12] G.Boroi; C.A.Anghelescu; B.Nazat – op.cit.p.202

the art. 752 Civil code, which prohibit the assignment of these rights.[13]

The Fiducia contract is a property transferring contract, the property right of the constitutor being provisory transferred and for a determined purpose to the fiduciary, this way the fiduciary achieving the three attributes of property. Although, with regard to the ambiguity of the institution, it can be alleged that the fiducia entails only a dispossession of the assets or rights of the constitutor in the benefit of the fiduciary. In this orientation, a fiducia does not imply a veritable transfer of the property right, in the classic meaning of the notion, because at the end of the contract, pursuant to its provisions or to the law, the assets and the rights return to the patrimony of the beneficiary or constitutor. Practically, the fiduciary shall enjoy extended rights on the object of fiducia, which will make it different from the administrator of the property of others.[14]

In a quite recent article, dedicated to Fiducia, it has been affirmed for good reason, that ***the fiduciary is and is not an owner,*** the author having in view to allege such affirmation, the atypical character of the prerogatives acquired by the fiduciary, obviously relating to the common characteristics of the property right[15].

As a matter of fact, the obligations imposed by contract to the fiduciary are obligations in the interest of other person (beneficiary) and the character of the fiduciary property right is a temporary one which leads to a limitation of the exercise of the owners prerogatives, for the fiduciary the property right not being absolute nor perpetual, being transferred to the fiduciary by the constitutor, strictly in the consideration of a determined objective.

The second thesis of the text of the art. 773 New Civil Code presents also a great importance representing a taking over of the technique used in the regulation of the trust of the Anglo-Saxon and establishing, this way, dedicated assets for the fiduciary, the text corroborating to the general regulation of the dedicated assets, regulation provided by the art. 31 paragraph (2) and (3) New Civil Code. In conclusion, the assets, object of fiducia do not mingle to the assets which were in the patrimony of the fiduciary on the date of the agreement with regard to the fiducia contract, because the assets trusted shall form a particular, distinct mass – the fiduciary patrimony.

In the French doctrine[16] the affirmation according to which *fiducia makes from property a simple instrument in the benefit of a particular finality* has been made.

Starting from the legal definition, we can affirm that *"Fiducia" is the legal operation by which the constitutor provisory transfers some patrimonial rights such as the real estate right/movable property right, receivables, guarantees to the fiduciary, as the fiduciary becomes their holder for the whole period of the fiducia contract, exercising such rights for the purpose established in the contract and at the end of the fiducia contract the fiduciary shall transmit such rights to the beneficiary*.

We can notice that fiducia appears as a complex contractual operation characterised by the existence of a transfer of rights for good and valuable consideration, of an atypical mandate (irrevocable) consisting of the administration of dedicated assets in the benefit of the beneficiary and this entity – transfer, mandate, administration – practically forms the contractual relation resulted from the fiducia contract.

Also, from the content of the legal definition, it can be deducted that the object of fiducia is represented by a series of successive phases, such as: **transfer of the patrimonial rights from the constitutor to the fiduciary; administration of these rights by the fiduciary in the benefit of the beneficiary and finally the transfer of the dedicated assets from fiduciary to the beneficiary.[17]**

As it has been noticed in the specialty literature[18] the content and meaning of transfer, as it is set forth by the art. 773 of the New Civil Code, is vague, relating to the provisions of the art. 32 paragraph (2) of the New Civil Code, because the transfer of rights and obligations from one mass to the other is not an alienation.

In the reduced literature dedicated to fiducia, a series of opinions related to the regulation of the property transfer have been issued, therefore, according to one of the opinions[19] the regulation would have in view both the situation in which the transfer of the assets takes place between two different persons who have the capacity of constitutor and fiduciary, and also the situation of one single patrimony, of a person who has a double capacity, of constitutor and beneficiary. According to other opinion[20], we would find ourselves before of a property transferring synallagmatic contract, but with the existence of legal innovation according to which the transferred patrimony would not superpose on the fiduciary patrimony, each of the two patrimony having an independent existence.

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[13] Pursuant to art. 752 Civil code *The right of use or abitation can not be assigned and the asset, object of this rights can not be rented, or as the case may be, leased.*

[14] A. Rățoi – op.cit. p. 269

[15] For details, see Ion Turcu – „Se poartă Fiducia"- 19.02.2013- article published on the web site http://www.juridice.ro/244256/se-poarta-fiducia.html

[16] Ph.Malaurie, Laurent Aynes – op.cit.p.235

[17] Cătalin R. Tripon – op. cit. pag. 166

[18] M. Uliescu and A.Gheorghe op. Cit. pag 157

[19] see Cătălin R. Tripon – op. cit. pag. 187

[20] Alain Berdah, op. cit. p. 14 (http://www.avocats-droit-affaires.com/images/pdf/la%20fiducie.pdf)

3. Legal characters of the Fiducia Contract

a) Pursuant to the provisions of the art. 774 paragraph (1) thesis I of the New Civil Code, the fiducia contract has to be concluded under penalty of absolute nullity, in authentic form (*ad validitatem*), from this legal provision practically resulting a first legal character of the fiducia contract, respectively, its **solemn character**.

The correspondent of the art. 774, in the civil legislation of France is the art. 2012 Civil Code (French), with the specification that the obligatory character of the authentic form has a more limited implementation in the French civil provisions.

Therefore, pursuant to the art. 2012 paragraph (2) French Civil Code "*if the assets or guarantees transferred in the patrimony of the fiduciary depend on the community of property existing between spouses or a joint property, the fiducia contract is established by authentic document under penalty of nullity".*

In addition to the authentic form imposed by the art. 774 paragraph (1) thesis I, the legislator has provided also a minimum, compulsory content that the fiducia contract should have under penalty of absolute nullity.

Thus, pursuant to the art. 779 New Civil Code, the contract of fiducia has to comprise (under penalty of absolute nullity) all the real rights, receivables, guarantees and any other patrimonial rights object of the transfer provided by the art. 773 New Civil Code. Also, the period for which the transfer is performed has to be specified, it can not exceed 33 years from the conclusion of the contract (*in France the period of the transfer of the fiduciary property is three time longer, respectively 99 years)*, and also the parties identity but also the identity of the beneficiary or at least the rules allowing its determination and also the purpose of fiducia and extent of the administration and disposal powers of the fiduciary.

b) In principle, the fiducia contract is a contract **for good and valuable consideration** therefore the art. 784 paragraph (2) New Civil Code provides that *"Fiduciary shall be paid according to the parties agreement, and in lack of such agreement, pursuant to the rules regulating the administration of the property of others"*.

By exception, the fiducia contract can be free of charge, in the way that the activity of the fiduciary shall not be paid (disinterested act), having in view that pursuant to the provisions of the art. 793 paragraph (1) Civil code. „*except for the case in which, according to the law, the establishing document or subsequent agreement of the parties or actual circumstances, the administration is performed free of charge, the administrator has the right to a remuneration established by the establishing document or by subsequent agreement of the parties or by law, or, in absence, by court order(judgment). In this last case, the practices shall be taken into consideration and in the absence of such a criterion, the value of the services provided by the administrator"*[21]

c) From the Contract of Fiducia, mutual and interdependent obligations arise as we find ourselves before a **synallagmatic contract .**

d) The Fiducia Contract is also a **commutative contract**, the parties being aware of the extent of the obligations and rights they have one to each other since its signature.

e) The Fiducia Contract is a real rights or receivables or other patrimonial rights or an ensemble if such present or future right transferring document.

f) As for the criteria based on which the fiduciary choices are made, the fiducia contract is a ***intuitu personae*** contract.

4. Sources of Fiducia

The current regulation of the civil code admits that fiducia can arise by law or by contract. The wording given by the legislator to the article 774 New Civil Code is quite unclear, the more so as there was no special law which regulates the fiducia in addition to the civil code and neither to do at least a reference to a series of legally established fiducie or that shall be established pursuant to the law.

Probably the legislator has guessed the apparition of such normative documents by which the legal fiducia is being regulated, but till that moment we can talk only about the conventional fiducia.

Even the modifications brought to the Tax Code, or better said, its integrations, by implementation of the civil code, mention the fiducia contracts concluded pursuant to the Civil Code at the art. 25^1 C.f..

The second thesis, paragraph (1) art. 774 Civil code, provides that the fiducia should **be express,** which leads us to the conclusion that it can be established only by law or by contract concluded in authentic form, so not by court order(judgment), unlike the regulation of the *Anglo-Saxon trust*, which can be established also by the judge.

The paragraph 2 of the art. 774 New Civil Code provides that the law in basis of which the fiducia is established is integrated with the provisions of the relative civil code, to the extent in which it does have contrary provisions, which leads us to the above alleged hypothesis with regard to the apparition in the future of normative documents based on which legal fiducia shall be established.

Also, it can be noticed the exclusion of the legacy from the sources of fiducia, this exclusion being justified by the way in which the fiducia institute has been adapted in the system of continental law, not being acknowledged to fiducia the finalities specific to legacies or donations. Therefore, the legislator has inserted the art. 775 in the civil code, text that sanctions with absolute nullity the contract of fiducia, in the situation in which, through this legal operation an indirect liberality in the benefit of the beneficiary

[21] G.Boroi; C.A.Anghelescu; B.Nazat – op.cit.p.204

would be achieved. The supreme sanction in civil matter, provided by the legislator at the art. 775, follows the prohibition of the utilisation of fiducia in the purpose of elusion of the provisions of legacies and/or donations, protecting this way the forced heirship and avoiding the possibility of debtors to avoid paying the creditors.

5. Subjects of Fiducia

In the doctrine[22] it is considered that only two would be the subjects of the contract of fiducia, without making a difference between the subjects of the contract of fiducia and the subjects of the legal operation of fiducia, although if we shall refer to the legal definition, we shall notice that fiducia is a legal operation – notion more complex that the one of contract.

This way, we consider with regard to the subject of the legal operation provided by the title IV of the Civil Code that these are three, respectively (i) the constitutor, (ii) the fiduciary and (iii) the beneficiary (when the beneficiary is a third person). In conclusion, the term of subject of fiducia as legal operation should not be confused by subject of fiducia as part of the contract of fiducia, because, pursuant to the art. 776 New Civil Code part in the contract of fiducia is only the constitutor and the fiduciary, the beneficiary could be, pursuant to the art. 776 New Civil Code, both the fiduciary and the constitutor, and also a third person – situation in which the beneficiary would have the capacity of assignee(successor) case in which the fiducial operation shall represent a veritable stipulation for another.

The constitutor can be any individual or legal person, with the mention that in case of individuals these persons should have full capacity of exercise, respectively to have the right to conclude acts of disposal. With regard to the legal person, this person is presumed by the law of having full capacity of exercise, considering that among its management bodies there are individuals with full capacity of exercise.

To be considered that pursuant to the art. 778 New Civil Code, text practically taken over from the art. 2017 of the French Civil Code, the constitutor, *in absence of contrary provisions*, has the possibility to appoint a person who represents his/her interests in the execution of the contract of fiducia and to exercise the rights arisen from this contract. This text of law practically representing a legal definition of the conventional representation (art. 1295 New Civil Code), resulted from the parties will.[23]

The reasoning of this provision lies in the fact that the legislator did not limit the area of the persons who can have the capacity of constitutor, and because this capacity can be held also by an individual and many of the individuals do not have the necessary competence to supervise a contract of fiducia, the possibility to resort to the services of a third person is totally justified.[24]

With regard to the **fiduciary**, the legislator has imposed for the fiduciary a qualified character, paragraph (2) and (3) of the art. 776 New Civil Code restrictively mention the persons who have the right to conclude contracts of fiducia in capacity of fiduciaries.

Therefore, the legal text provides that "*can have the capacity of fiduciaries*" **only** the credit institutions, the investments companies and the ones of investments administration, companies of financial services, insurance and re-insurance companies, dully established, paragraph (3) completing this enumeration with other two categories of professionals, respectively, the notaries public and the lawyers, regardless the form of exercise of their profession.

We consider that this restriction imposed by the legislator with regard to the persons who have the right to be fiduciaries, was grounded on protection reasons, the purpose being the one to the try to avoid the operations of money laundry and tax evasion, because at international level it is well known that the fiducia is an institute that can be used to hide the money laundry or tax evasion operations.

We also consider that the legislator had in view, by restricting the area of the persons who can hold the capacity of fiduciary to certain categories of persons, the reduction of the above mentioned risks, because the persons specified in the legal text are subject to a a severe control from specialised authorities, such as BNR, ASF etc.

It has to be pointed out also the fact that the fiduciary independently exercises administration powers on the fiduciary patrimony, pursuant to the contractual objective. Therefore, the fiduciary has to be not confused by the employee nor the proxy of the constitutor because the property of the assigned assets is transmitted to the fiduciary[25].

With regard to the fiduciary attorney at law or notary, it can be noticed that any of them could have at least three patrimonies in the meaning of the provisions provided by the art. 31 and 33 New Civil Code, respectively a personal patrimony, a dedicated patrimony for the profession of notary or attorney at law and one or several dedicated patrimonies related to the fiduciary assets.

Till the new civil code became effective, the law 51/1995 on the exercise and organisation of the profession of attorney at law, and also the statutes of the profession, contained, as we have already mentioned above, a series of provisions regarding the

[22] M. Uliescu si A.Gheorghe op. pag 157; Dr. Bujorel Florea – Drept Civil – Drepturile Reale Principale –UJ 2011 Publishing House– p. 217

[23] See A. Răţoi –op.cit. p. 270

[24] R.Constantinovici – Noul Cod Civil – Comment on articles – work in coauthors –CH Beck 2012 Publishing House-comment of the art. 778 C.civ – p. 826

[25] See A. Răţoi – op.cit. p. 270

fiduciary activities, but these were not representative in the light of the actual civil code, being currently modified and in compliance with the common law in the matter of fiducia.

The Beneficiary of fiducia can be any person, the law having no restrictions to a particular category of persons. Pursuant to the art. 777 New Civil Code, "*the beneficiary of fiducia can be the constitutor, the fiduciary or a third person".*

In other words, both the constitutor and the fiduciary can be the beneficiary of the fiducia, the situation becoming instead very interesting when the beneficiary is a third person, this person not being a part in the contract, having a similar position to the one of the beneficiary third party within the stipulation for another (1284 and following New Civil Code).

Also, it is very interesting the issue of the plurality of capacities of the contracting parties, making us analyse whether the capacity of fiduciary could be cumulated to the capacity of constitutor!! the more so as the art. 777 N.C.C. mentions only who can be beneficiary of the fiducia illustrating also the possibilities of the plurality of this capacity but the legislator makes no reference to an eventual incompatibility or inadmissibility of superposing of the person of the fiduciary with the one of the constitutor.

According to a doctrinary[26] opinion as lons as the law does not prohibit such, it results that the two capacities can be cumulated.

Although the law does not prohibit, existing the possibility to interpret that the two capacities could be cumulated, we consider that this doctrinary opinion finds no legal support, by reference even to the definition of the contract, which according to the art. 1166 Civil code *„represents the agreement of two or several persons with the intention to establish, modify or extinguish a legal relationship".*

This way, in the hypothesis of superposing of the constitutor with the fiduciary we would not be in front of a contract, but in front of an unilateral deed. As a conclusion, no plurality of the capacity of fiduciary and the one of constitutor can exist.

Certainly the three capacities (constitutor, fiduciary, beneficiary) can not be cumulated in one single person, because this way, it could be a fiduciary relationship.[27]

With regard to the plurality of capacities provided by the art. 777 N.C.C., we specify that it is very important in the banking field, in the situation in which the bank establishes a guarantee by a fiducia contract, situation in which we shall meet two beneficiaries, but both, under condition.

This way, if we think to the hypothesis in which the debtor transfers an asset by fiducia to his/her creditor (the bank) in order to guarantee the reimbursement of the loan granted . We find ourselves in the situation in which the debtor is the fiducia constitutor and the creditor is the fiduciary, the creditor receiving an asset as subject of fiducia, asset that the creditor shall assign to the beneficiary mentioned in the contract of fiducia at the end of the contractual period. In this situation, there is the possibility that both the constitutor (the debtor) and the fiduciary (the bank) are the beneficiary of the fiduciary, in the same time.

Therefore, it can be noticed that in the above mentioned situation, we shall have a plurality of capacities – constitutor and beneficiary and fiduciary - beneficiary. To note that in order to benefit of fiducia, both the constitutor and the fiduciary depend on the fulfilment or non fulfilment of a condition. With regard to the constitutor (debtor) the constitutor shall benefit of fiducia subject to compliance with all the obligations of the credit contract and the fiduciary (the bank) shall practically become a beneficiary only in the event of non observance by the debtor of the payment obligations resulted from the credit contract.

Obviously, that in the hypothesis of guarantee a credit contract by fiducia, fiduciary can be also a third person to the bank institution, the last being only the beneficiary of the fiducal, and as well as the debtor-borrower is not a condition to be the constitutor but a third person, case in which we would found ourselves in a condition similar to the one of the third party, constitutor of a security.[28]

With regard to the beneficiary individual, we mention that it is necessary that the beneficiary have full capacity of exercise, this conclusion resulting from the fact the acceptance or waiving the fiducia are disposal acts that can not be concluded by persons with limited capacity of exercise pursuant to the art. 41 and 42 New Civil Code.

6. Content of the Contract of Fiducia

Having in view the particular importance of certain assets that can be object of fiducia, the legislator has provided *ad validitatem* also a minimum content that has to be specify in the content of the contract of fiducia. Therefore, the art. 779 New Civil Code provides, under penalty of absolute nullity, a series of minimum requirements in order for a contract of fiducia to be validly concluded.

This way, the contract of fiducia has to contain, **under penalty of absolute nullity**, all the real rights, receivables, guarantees and any other patrimonial rights that are object of the transfer provided by the art. 773 New Civil Code. It has also be specified the period for which the transfer is done, period that can not be longer than 33 days from the date of the conclusion of the contract and also the identity of parties, but also of the beneficiary or at least the rules that allow its

[26] Cătălin R. Tripon – op. cit. pag 197

[27] Hunor Burian - http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2011-1/5-burian.pdf

[28] For details, see http://www.iordachescu-law.ro/Studii-de-caz/Implementarea-fiduciei-in-practica-bancara-Modalitati-si-conlucrare-institutionala---avocat-Eugen-Constantin-IORDACHESCU--eID81.html

determination, and also the scope of fiducia and the extent of the powers of administration and disposal of the fiduciary.

The article 779 N.C.C. represents a reproduction of the content of the art. 2018 of the French Civil Code with the major difference of the maximum period of the fiduciary transfer, which, as we have already mentioned above, in the French legislation is of 99 years. From the regulation of the art. 779 let. c) it is deducted that the period of the contract of fiducia can be prolonged by agreement of the parties, but only within the maximum period of 33 years.

Although the Romanian legislator has provided a smaller period than the one provided by the French legislation, the Romanian legislator has still kept the provisions regarding the moment of the beginning of the term, respectively, from the date of the conclusion of the contract.

With regard to the scope of fiducia, the art. 773 New Civil Code provides that it has to be determined, the legislator feeling the need to introduce among the compulsory elements of the contract of fiducia also the obligation to insert in the contract the mentions regarding to the scope of fiducia (art. 779 let. f).

Indirectly it is made reference to the scope of fiducia also in the imperative provision provided by the art. 775 New Civil Code, according to which "*the contract of fiducia is subject to absolute nullity if by this contract an indirect liberality is done in the benefit of the beneficiary".* With regard to this interdiction, provided by the art. 775 Civil Code, it has been affirmed[29] that the solution adopted by the Romanian legislator slows down the development of a new law institute, reported to the trust institute from the Anglo-Saxon law systems (England, USA, Canada) where in absence of such limitation, the regulations are much more permissive, the trust implementation having a bigger variety.

Not at last, we have to specify that besides the special regulations provided by the art. 775 and 779 letter f) New Civil Code, fiducia is also subject to the general rules with regard to the scope, which has to be real, licit and moral.

With regard to the **object of fiducia,** it is represented as we have already showed above, by a series of successive stages, respectively the transfer of some of the rights provided at the art. 779 letter a), transfer which is made, pursuant to the art. 779 letter b), by conclusion of a mandate of administrations in the conditions of the art. 792 New Civil Code, but also by the transfer of the use from the fiduciary to the beneficiary. We notice that these operations, although distinct are in a closed interdependence.

Even if the mandate of administration within the contract of fiducia is similar to the mandate of administration of assets of other (792 and following of the New Civil Code), it should not be confused by this, these two mandates being different by their sources and by the capacity of the administrator of the two legal operations.[30]

With regard to the limits of the powers of administration of the fiduciary, the code provides that the extent of the powers of administration and disposal of the fiduciary has to be provided in the contract of fiducia, under penalty of absolute nullity.

This way, it results that the powers of administration and disposal of the fiduciary can be limited by contract, limitation that I consider that it can not be excessive because it would change the nature of the contract.

Still in the content of the contract of fiducia, it can be mentioned also the obligation of the fiduciary to specify the capacity in which the fiduciary acts, as it results from the interpretation of the art. 782 New Civil Code.[31]

As it has been declared[32] the text of the art. 782 represents the bridge between the institute of fiducia and the institutes of conventional representation, administration of assets of others and mandate, the delimitation from the mandate with representation being given by the lack of the obligation of specification of the capacity of fiduciary.

In the situation in which by the contract of fiducia, it is provided the obligation of fiduciary to specify the capacity in which the fiduciary acts, and the fiduciary acts failing to comply with such obligation, concluding an act in the damage of the constitutor, pursuant to the thesis II of the paragraph (3) of the art. 782 New Civil Code it shall be considered that this act has been concluded by the fiduciary on his/her own behalf.[33]

Also, by the manner of drawing up of the art. 783 New Civil Code, the legislator has integrated the provisions of the 779 New Civil Code, establishing, this way, other compulsory element, additional one, that has to be specified in the content of the contract of fiducia, respectively, the conditions in which the fiduciary should be held liable for the fulfilment of his/her obligations.

The legislator did not provide, in exchange, the content of the obligation to be held liable and neither the period in which the fiduciary has to comply with this obligation, letting both the content and the period at the free choice of the parties. From the second thesis of the art. 783, it results that the fiduciary has to be held liable to the constitutor and his/her representative, but also to the beneficiary, upon request of any of them.

It can be noticed the existence of a striking similarity between the obligation to be held liable of

[29] Cătălin R. Tripon op. cit. pag. 172
[30] see M. Uliescu și A. Gheorghe – op.cit. pag. 156
[31] see also G.Boroi; C.A. Anghelescu; B.Nazat op.cit.p.207
[32] A. Rățoi - op. cit. page 272
[33] R. Constantinovici op.cit.p. 829-830 – comment of the art. 782 Civil code

the fiduciary and the same obligation of the proxy within a contract of mandate.

With regard to the sanction that may appear for failing to insert in the contract of fiducia the conditions in which the fiduciary shall be held liable with regard to the fulfilment of his/her obligations, we consider that it can not be absolute nullity.

Therefore, although the text of the art. 783 New Civil Code is imperative, it can be noticed that the legislator did not specify also the sanction applicable in the event of failing to insert in the contract of fiducia the conditions in which the fiduciary shall be held liable with regard to his/her obligations, or if we could apply the sanction provided by the art. 779 New Civil Code, we would adopt a really illegal situation, having in view that the art. 10 of the New Civil Code prohibits the interpretation by analogy when such an interpretation would lead to the enforcement of a sanction. (the text of the art. 779 New Civil Code besides it provides a sanction is still of strict interpretation).

7. VALIDITY AND OPPOSABILITY OF THE CONTRACT OF FIDUCIA

As we have previously mentioned, the contract of fiducia is validly concluded only if the authentic form provided by the art. 774 New Civil Code and also the minimum content specified by the art. 779 New Civil Code are complied with.

For reasons of social safety, in order to eliminate the possibility of committing tax evasion and money laundry (the constitutor – beneficiary being able to take advantages of the funds illicitly obtained through fiducia) the legislator felt the need to impose another ***ad validitatem requirement*** of the contract of fiducia, respectively, the one provided by the art. 780 New Civil Code, text according to which the contract of fiducia has to be registered with the competent fiscal body or with the local public administration, under penalty of absolute nullity.

Also, the eventual modifications of the contract of fiducia have to be registered with the competent tax body, under the same penalty of absolute nullity. The registrations are performed upon request of the fiduciary within one month from the conclusion of the contract or, as the case may be, from the conclusion of the amendments.

The paragraph (2) of the art. 780 New Civil Code provides the situation in which the fiduciary assets contain real estate rights, imposing their registration, of course, subject to absolute nullity, with the specialty department of the competent local public administration authority, within the property is located, the legislator concluding that the regime of land book stays applicable, from which we can interpret that it is necessary also the registration of the contract of fiducia.[34]

The obligation of registration is kept by the legislator and in case in which the beneficiary of fiducia was not mentioned in the contract, it being subsequently appointed, the sanction in case of failure to register being also the absolute nullity.

We can draw the conclusion that the tax registration represents a validity condition of the contract of fiducia, its failure to comply being punished by the absolute nullity of the contract.

Still, this conclusion is no longer valid in the case provided by the art. 780 paragraph (4) New Civil Code, text that provides that if for the transmission of rights is necessary to fulfil special form requirements, a separate act shall be concluded, under compliance with the requirements imposed by the law, in these case, the eventual lack of tax registration attracting the enforcement of the administrative sanctions provided by the law.[35]

Unlike the regulation of the New Civil Code, in the Anglo-Saxon law, the trust is not subject to any tax registration, because the trust character is preponderantly contractual and not institutional as the case of fiducia.[36]

In view to achieve the opposability of the contract of fiducia toward third parties, the Romanian legislator, in the content of the art. 781 of the New Civil Code has regulated the fact that by its registration in the Electronic Archive for Security Interests in Movable Property the fiducia becomes opposable to third parties.

The paragraph (2) of the art. 781 New Civil Code provides that "*the registration of real estate rights, including the security interests object of the contract of fiducia can be done also the in the land register for each land separately"* emphasising this way the rights transferring character of the contract of fiducia, the legislator imposing this way a double publicity of the real estate rights.

8. POWERS OF FIDUCIARY AND ITS REMUNERATION

In relation with third persons, in which the fiduciary shall enter, it shall be considered having full powers on the fiduciary patrimony, *"acting as a true and sole holder of the respective rights except for the case in which it is proved that third parties knew the limitation of these powers*".

As specified by the provisions of art. 781 N.C.C. (*New Civil Code*), a fiduciary is opposable to third parties in the form and at the time of its listing in AEGRM (*Electronic Archive for Security Interests in Movable Property*), whereas art. 779 letter f) provides, under the penalty of absolute nullity, to insert within the contents of the fiduciary contract the scope of the fiduciary's powers, so it can be construed that, in case the fiduciary contract was listed in AEGRM, the third parties knew or ought to know any power limitations

[34] M.Uliescu and A. Gheorghe op.cit. pag 159
[35] See also R.Constantinovici op.cit.p.828 – comment of the art. 780 paragraph (4) Civil code
[36] A. Rățoi op. cit. pag. 272

of the fiduciary or, better said, it is presumed that third parties would be aware of such limitations at the time of listing the fiduciary in AEGRM.

Such an interpretation, although obviously possible in the future legal practice in the matter of fiduciary contracts, would be unfair, as it is well known the fact that in AEGRM is only mentioned the existence of the contract and not its contents, which leads to the idea that the correct solution would be the one in which the fiduciary would provide the third parties with the contents of the contract, so that they can be physically aware of the limitations of the fiduciary's powers.

It can be observed that the fiduciary acts "*as a genuine and sole holder of the rights in question*", thereby consolidating the conclusion that under the fiduciary contract no genuine transfer of ownership is performed.[37]

The fiduciary's powers may be limited under the contract, as follows from the *per a contrario* ("*on the contrary*") interpretation of the provisions of art. 779 letter f) N.C.C., following that such limitations to be specified, under the sanction of absolute nullity, in the contents of the fiduciary contract.

Even though under the contract, the constitutor has the possibility to limit the fiduciary's powers, we believe that the fiduciary will exercise its powers exclusively, and the respective constitutor will not have the ability to interfere throughout the contract's duration in the manner of fulfilling the fiduciary's obligations, having instead the opportunity to held the fiduciary accountable, and if the fiduciary either will fail to fulfil its obligations or will fulfil them poorly, thereby jeopardizing the interests entrusted to him, the constitutor will be able to request the court to replace the fiduciary, pursuant to Article 788 of the Civil Code.

Paragraph (2) of art. 784 provides that the fiduciary's remuneration shall be effected by agreement between the parties, and in the absence of such an agreement, according to the rules governing the administration of the property of others (art. 793 N.C.C.).

9. FIDUCIARY'S LIABILITY

According to art. 787 N.C.C., the fiduciary is liable, only subject to the rights contained in its patrimony, for damages caused by acts of conservation or administration of the fiduciary patrimony.

It can be observed that the law text does not also cover liability for directives that the fiduciary may order in the performance of the fiduciary contract, the legislator considering, perhaps, that they can be assimilated to certain acts of administration in relation to the entire fiduciary patrimony[38] .

Obviously, the fiduciary's liability may be enforced only by court order.

The legislator also provided the sanction of fiduciary's replacement, if he fails to fulfil its obligations or jeopardizes the interests entrusted to him, for this purpose, granting to the constitutor, his representative or to the beneficiary, a right of legal action to obtain a court order for the fiduciary's replacement.

The institution of fiduciary's replacement, as regulated by art. 788 N.C.C., a text which provides both cases of fiduciary's replacement and a number of procedural issues, according to which, **until settling the replacement request**, it shall be appointed a provisional administrator of the fiduciary patrimony, subject to the provisions of art. 792 and the following of the N.C.C.

The provisional administrator shall be appointed [39] according to paragraph (2) of art. 788 N.C.C., by the constitutor, its representative or, in the absence thereof, by the beneficiary, and if each of them simultaneously appoints one provisional administrator, the appointment made by the constitutor or the one made by its legal representative shall have priority.

Given the wording of art. 788 para. (4) N.C.C., a text according to which *"the appointment of a new fiduciary and provisional administrator may be ordered by the court only with the consent thereof"*, we consider that the text of paragraph 2 should be redrafted (by the legislator) for the purpose of replacing the verb "to appoint" with the verb "to nominate". There are two theses which would lead, *de lege ferenda* ("*with a view to the future law*"), to the need of such replacement, namely (i) the one according to which an administrator cannot be unilaterally appointed, considering the necessity for its acceptance of the provisional mandate and (ii) the one for removing the contradiction between the text of paragraph (2) and the text of paragraph (4) on the appointment of a provisional administrator.

Paragraph (3) provides that the mandate of the provisional administrator shall cease when the court shall rule on the replacement request, irrespective of the judge's ruling, and the second thesis states that the fiduciary's replacement request shall be settled urgently and with priority.

We believe that the regulation on the fiduciary's appointment by the court may hinder this operation in practice, because it would be much easier for the court to limit itself to ordering the fiduciary's replacement, following that the constitutor in question, based on the court order for replacement, to obtain the consent of a new fiduciary and, subsequently, to operate the amendment of the fiduciary contract, according to art.

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[37] A. Răţoi - work, quote, page 273

[38] A. Răţoi - work, quote, page 274

[39] We believe that the correct expression would be ***shall be nominated***, given that an appointment is to be made by the court after having first obtained the prior express consent of the provisional administrator

788 para. (6) reported to art. 780 and 781 N.C.C. so that the fiduciary's replacement shall take effect.

It can be seen that, compared to the registration provided by art. 780 N.C.C., that is to be undertaken by the fiduciary, art. 788 para. (6) requires that both the constitutor and his representative, as well as the new fiduciary or the provisional administrator, may register the amendment to the fiduciary contract.

We do not understand why the provisional administrator is listed among the people mentioned in para. (6), given that its mandate ended at the time the court ruled on the request for replacement, probably the legislator intended to also highlight the need for the emergence "on scene" of the provisional administrator, only that the wording of the legal text is really unclear.

10. LIMITATION OF FIDUCIARY'S LIABILITY IN CASE OF INSOLVENCY AND DEPENDING ON THE SEPARATION OF PATRIMONY ASSETS

By drafting art. 785 N.C.C., the legislator regulates the cases of limitation of fiduciary's liability in the event of opening the insolvency proceedings against him, stating that, in this situation, the fiduciary patrimony assets are not affected.

The wording of art. 785 N.C.C. is merely a takeover of the provisions of art. 2024 of the French Civil Code, and stresses not only the separation of the fiduciary patrimony assets from the rest of the patrimony strictly owned by the fiduciary, but also the limitation of the fiduciary's liability when he acts in his own name and concerning his own patrimony assets, without prejudice to the fiduciary patrimony.

Please note that the application of article 785 cannot be extended in the case of a notary - fiduciary or attorney - fiduciary, because Law no. 85/2014 does not apply to these categories of individuals. [40]

Art. 786 N.C.C. provides when can be pursued the goods contained in the fiduciary patrimony assets, the purpose for which the legislator restrictedly lists, in the contents of para. (1), the cases in which the constitutor's lenders may pursue such goods. Thus, the goods contained in the fiduciary assets may be pursued by the holders of claims arising in connection with such goods or by those lenders of the constitutor who have a security interest over his goods, and whose enforceability is acquired prior to the conclusion of the fiduciary contract.

With regard to the other lenders of the constitutor, the second thesis of article 788 para. (1) provides that they have the right to pursue the goods contained in the patrimony assets only where they would produce a definitive court order by which it would be admitted a Paulian action (to revoke), provided by article 1562 N.C.C., so that the fiduciary contract will be terminated with a retroactive effect, or in case a fiduciary contract shall become unenforceable subject to a court order, but also with a retroactive effect.

Considering that the listing of such cases has a limitative nature, it follows that the two situations set out above represent the exception, and the rule being the one according to which the constitutor's lenders may not pursue the goods forming the fiduciary assets.

Under paragraph (2) article 786 N.C.C., the legislator instituted the rule according to which fiduciary lenders benefit only from a general specialized pledge over the fiduciary assets, **except** when the fiduciary contract provided for an obligation of the fiduciary and/or the constitutor to be liable, with their own personal assets, for a part or all of the liabilities of the fiduciary contract.[41] In the exceptional circumstances referred to in paragraph (2), the liability of the fiduciary and/or the constitutor will be assumed only when the fiduciary lenders did not settle their claims following the execution of the fiduciary assets, such liability resembling the one of the guarantor who has not waived the benefit of discussion provided for in article 2294 N.C.C.

11. TERMINATION, AMENDMENT AND RESCISSION OF THE FIDUCIARY CONTRACT

The provisions of art. 789 N.C.C. provide for the situations in which the fiduciary contract may be terminated, amended or, as appropriate, rescinded, stating that as long as it was not accepted by the beneficiary, the fiduciary contract may be unilaterally terminated by the constitutor, highlighting the fact that only upon the beneficiary's acceptance the fiduciary mechanism becomes complete.

Basically, para. (1) of art. 789 N.C.C. states an exception to the irrevocability principle of the legal act's effects, thus making possible, in the matter of fiduciary contracts, the unilateral termination of the contract, but only by the constitutor and only until its acceptance by the beneficiary. For that matter, the wording of art. 789 para. (1) of the Civil Code represents an application of the provisions of art. 1276 of the Civil Code, generally regulating the unilateral termination.

We can see that the legislator does not stipulate whether the acceptance of the fiduciary contract by the beneficiary must take a certain form. It is obvious that in a situation of plurality of qualities, the acceptance is no longer worth discussing, because the acceptance of a fiduciary contract coincides with the conclusion of such contract.

Alternatively, in the case of a third-party beneficiary of the fiduciary contract, what form should take its manifestation of acceptance of the fiduciary contract?! As mentioned above, in the case of a third-

[40] According to art. 3 para. (1) of Law no. 85/2014 - *The procedures provided by this law apply to professionals, as defined in art. 3 para. (2) of the Civil Code, **except for those exercising liberal professions**, as well as those in respect of which special provisions are provided concerning their insolvency regime.*

[41] R. Constantinovici – work, quote, page 832 – comment of art. 786

party beneficiary in relation to the contract, the fiduciary contract appears as a real provision of another contract, so that the acceptance of the contract by the beneficiary shall be also made by reference to the provisions of art. 1286 Civil Code, but not even this legal text provides for the acceptance form and manner *ubi lex non distinguit nec nos distinguere debemus (where the law does not distinguish, we ought not to distinguish)*, it appears that acceptance can be both explicit and tacit.[42]

As a personal opinion, we reckon, for a better practical accuracy, that the acceptance of the beneficiary should take at least a written form, *ad probationem*, though it should not be ruled out the fact that the form of acceptance should be the same as the one of the fiduciary contract, in view of the particular importance that fiduciary assets may have and, at the same time, of the power that an authentic document confers to a legal civil act.

In the event that the beneficiary expresses its acceptance, the law provides that the act of recognition of the fiduciary contract can no longer be amended or rescinded by the parties or unilaterally terminated by the constitutor, except when the beneficiary gives its consent for this purpose or, in the absence of such consent, only with the authorization of the court.

The text of paragraph (2) may be regarded as an application of the theory of unpredictability, mentioning that the amendment or adaptation of the contract may also be required for other reasons than those restrictedly provided by art. 1271 N.C.C., since the law does not distinguish between such reasons.

12. CESSATION OF THE FIDUCIARY CONTRACT

The fiduciary contract ceases after the expiry of the term for which it was concluded or if the purpose for concluding the contract was achieved and occurred before the expiry of the term.

Also, the fiduciary contract may cease if all beneficiaries waive it and, without existing a clause in the contents of the contract stating how fiduciary relations are to be conducted in such a situation, the cessation of the contract shall occur on the date on which registration formalities are completed for the last waiver.

Last but not least, the fiduciary contract ceases at the moment of ordering the opening of insolvency proceedings against the fiduciary or when, according to the law, the effects of the legal entity's reorganization are occurring.[43]

In addition to the causes provided for in art. 790 N.C.C., we believe that there is a fifth case of cessation of the fiduciary contract, respectively the situation of cessation of the statute of attorney or notary, under the law.

Last but not least, regarding the *intuitu personae (on a personal basis)* nature of the fiduciary contract, the death or cessation of the fiduciary's existence, may lead to cessation of the effects of the contract.[44]

13. EFFECTS OF THE CESSATION OF THE FIDUCIARY CONTRACT

According to art. 791 N.C.C., upon cessation of the fiduciary contract, the fiduciary patrimony assets existing at that time are transferred to the beneficiary, and in his absence, to the constitutor.

The cases in which the transfer is operated towards the constitutor are provided by art. 790 para. (2) N.C.C., in the remaining cases the transfer is operated only towards the beneficiary.

Also, we can distinguish between the assumptions according to which, at the time of cessation of the fiduciary contract, there is a beneficiary or not, and not because he would have waived the fiduciary contract, but because he either has not been determined under the rules of the contract, or because the beneficiary - a natural person, is deceased and has no heirs, or the beneficiary - a legal person, has ceased to exist under the law.

After cessation of the fiduciary contract, the fiduciary patrimony assets transmitted to the beneficiary or the constitutor shall exist until performing the payment for fiduciary debts, as a patrimony of affectation regulated by law, according to art. 31 para. (3) final thesis N.C.C., so that after paying the fiduciary debts, the fiduciary patrimony assets shall merge with the patrimony of the beneficiary or the constitutor, as appropriate.

The wording of art. 791 N.C.C. is obviously unclear, if we consider the situation where among the goods forming the fiduciary assets we can also find real estate, thus wondering how is to be conducted the transfer of ownership from the fiduciary to the beneficiary or the constitutor? Under the law? Under the contract, which has just ceased? But how will such ownership be tabulated, under which act? We believe that the legislator should complement the provisions of art. 791 N.C.C., and must clearly regulate the situation in which the fiduciary patrimony contains real estate.

14. THE MAIN EFFECTS OF THE FIDUCIARY CONTRACT

A. The transfer effect

As shown in this paper, upon the conclusion of the fiduciary contract, it is operated a transmission with a private title of one or more patrimonial rights, from the constitutor to the fiduciary.

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[42] Cristina Zamşa - the New Civil Code - Comment on articles - co-authored paper - CH Beck 2012 publishing house - comment of art. 1286 Civil Code – page 1354

[43] For details on this manner of cessation of the fiduciary contract, see Ion Turcu - "Se poartă Fiducia" - http://www.juridice.ro/244256/se-poarta-fiducia.html

[44] G. Boroi; C. A. Anghelescu; B. Nazat – work, quote, page 212

The patrimonial rights subject to the transfer may be, under art. 773 N.C.C., real estate rights (movable or immovable property), rights for claims, but also guarantees, such as mortgages or even a specific claim that was previously assigned (*anticipated*) to the constitutor as a guarantee, indicating that such rights can be both present, thus existing at the time of conclusion of the fiduciary contract, and also in the future.

As soon as the fiduciary contract was concluded and registered under art. 780-781 N.C.C., the fiduciary becomes the exclusive owner of the rights forming the object of the fiduciary contract, and the constitutor no longer has the opportunity to exercise such rights throughout the period for which the fiduciary contract was concluded, the only one able to stand on such rights is the fiduciary.

As we have seen, the transfer of property or other rights from the constitutor to the fiduciary is temporary (throughout the duration of the fiduciary contract) and with a contractually determined purpose, thus bringing a number of limitations to the rights transmitted to the fiduciary.

Although there is a transfer of ownership or other rights from the constitutor to the fiduciary, we must not confuse the fiduciary property with the common property, the fiduciary having, besides rights, a series of obligations established under the fiduciary contract, obligations that must be met in order to achieve the purpose for which the fiduciary contract was concluded in the first place.

Throughout the entire period for which the fiduciary contract was concluded, the fiduciary, even though it "*acts as a genuine and sole holder of the rights in question"*, must not lose sight of the purpose of the fiduciary contract, the mission entrusted to him by the constitutor under this contract, and the fiduciary cannot exercise at its sole discretion the fiduciary ownership.

We can conclude, in this respect, the fact that the fiduciary property confers only a temporary exclusivity to the fiduciary and is not an absolute one, thus observing the major difference compared to the common property, which is of an absolute and perpetual nature.

By its nature, the legal operation of the fiduciary contract involves a number of limitations, the parties being able to limit, in their turn, the legal operation itself, under the powers of the convention.

For this purpose, the parties to a fiduciary contract may decide, in the event that the object of the fiduciary contract would be the ownership over a building, that such constitutor shall use, during the performance of the contract, the building in question, although the fiduciary has acquired, as guarantee, the ownership over that building. The example given resembles very much the situation of the real estate lease contract of the **leaseback** type **(*sale and leaseback*)**, where the landlord alienates the property to the leasing company, which thus becomes the owner, afterwards concluding a lease contract for the building in question, so that at the end of the lease contract, the funder (the leasing company) will transfer ownership back to the user.

Also, under art. 779 letter f) N.C.C., the parties may impose a number of limitations on the acts of administration or directives that the fiduciary may conclude in the exercise of its prerogatives obtained under the fiduciary contract. From the wording of the regulations regarding fiduciary contracts, it can be inferred that in the absence of a stipulation to the contrary, the fiduciary may conclude acts of conservation, administration and/or directives, without needing the consent of the constitutor or beneficiary; however, it is necessary to mention that, according to art. 779 letter f) N.C.C., in the contract it must be provided, under penalty of absolute nullity, the extent of the powers of administration and directive of the fiduciary.

Interpreting *per a contrario* the provisions stipulated by art. 779 letter f), it follows that the parties to the fiduciary contract may establish a limitation of the fiduciary's powers, thus allowing him to conclude solely acts of conservation or acts of conservation and administration. However, we consider that limiting the powers of the fiduciary to the extent that he shall be entitled to perform only acts of conservation, would lead to a change in the legal nature of the contract, resembling more to a storage or mandate contract, by onerous title, is true, rather than a fiduciary one. In conclusion, we believe that the fiduciary's powers may be limited under the contract, but such limitation should not be a major one because it could lead to a requalification of the contract.

The Romanian legislator did not provide, in the matter of fiduciary contracts, the method for bearing the risks associated with losing movable or immovable property, in the event where such goods are included in the fiduciary assets.

Given the absence of a legal provision expressly providing the taking over of the risk of property destruction, within the fiduciary contract, we believe that, in the matter of fiduciary contracts, the general provision is applicable, as established by art. 558 N.C.C., covering the risk of destruction of the property, thus resulting that, in the absence of a provision to the contrary, the fiduciary, after becoming the owner of the property, will also bear the risk of fortuitous destruction thereof.[45]

The fact that under the fiduciary contract is operated a transfer of ownership, atypical for that matter, but still operated, the fiduciary must be guaranteed as well. The law provides for the right of the constitutor to hold the fiduciary accountable; however, the law provides no specific liability in what concerns the constitutor, in the event where the

[45] See also G. Boroi; C.A. Anghelescu; B. Nazat – work, quote, page 203

fiduciary would be prejudiced either by the defects of the goods forming the fiduciary patrimony or by third parties that would be entitled to claim such property or even by acts attributable to the constitutor, and even if such acts occurred after the conclusion of the fiduciary contract.

We believe, regarding this situation, that the constitutor must borne the obligation to guarantee the fiduciary, just like the seller guarantees the buyer in the matter of a contract of sale and purchase, following that such application will be made without restrictions, and in the matter of the fiduciary contract, of the provisions of art. 1695 and the following N.C.C., but also those of art. 1707 and the following N.C.C., provisions that regulate the guarantee against eviction, respectively the guarantee against defects of the property in question.

B. Separation of the fiduciary's personal patrimony from the fiduciary patrimony assets

Patrimony separation, in the matter of fiduciary contracts, is of the utmost importance, being governed by the second thesis of art. 773 N.C.C., a regulation which is corroborated by the general provision regarding the patrimony of affectation, as provided by art. 31 para. (2) and para. (3) N.C.C.

Patrimony separation, in the matter of fiduciary contracts, gives rise to a fiduciary patrimony distinct from the personal patrimony of the fiduciary, thus protecting the fiduciary against incurring obligations arising in relation to the goods forming the fiduciary assets.

At the same time, the fiduciary, under the fiduciary contract and within the powers which have been conferred by it, may give directives regarding the goods forming the object of the patrimony of affectation, following that any goods acquired in exchange for the alienated ones to be also included in the fiduciary assets.

In conclusion, we believe that through the conclusion of a fiduciary contract, there is a transfer of patrimonial rights from the patrimonial assets of the constitutor to a fiduciary patrimony, which is distinct from the personal patrimony of the fiduciary. However, we must not confuse the transfer of patrimonial rights conducted according to art. 773 and the following N.C.C., with an alienation of such rights, as art. 32 N.C.C. provides that in case of affectation, the transfer of rights and obligations from a patrimony asset to another does not constitute an alienation.

C. The effects of the fiduciary contract in relation to the constitutor's lenders

As we mentioned above, the parties to the fiduciary contract are represented by the constitutor and the fiduciary, whereas the beneficiary, if not confused with one of the contracting parties, has the status of *habentes causam*, and in relation to the constitutor's lenders, the contract is merely *res inter alios acta (a contract concluded between others, which cannot adversely affect the rights of those who are not parties to it).*

Usually, the third parties are not affected by the conclusion of a certain legal document, in the meaning that the act is not in their benefit neither in their detriment. With regard to the contract of fiducia, it can be quite a lot in the detriment of the creditors of the constitutor, who will no longer foreclose the assets of fiduciary mass, unless to the extent in which they hold security interests on the fiduciary assets, registered prior to the establishment of fiducia.

This way, as we have already showed at the point 10 above, the Art. 786 of the New Civil Code provides when the assets from the fiduciary patrimony can be seized, purpose in which the legislator has restrictively enumerated at the paragraph (1) the cases in which the creditors of the constitutor can put these assets under seizure.

In practice, it shall be probably, the tendency of some legal persons to protect a series of patrimonial rights, using the legal operation of fiducia in the detriment of its creditors, than, after the establishment of fiducia, the respective constitutor, legal person, to ask the court to open the procedure of insolvency.

We consider, that in the light of the provisions of the art. 117-118 of the Law 85/2014 the legal administrator can make a request to the syndic judge by which it can request the annulment of the contract of fiducia, request that shall be allowed by the syndic judhe, but only subject to the conditions provided by LPI.

Short opinion on the implementation of fiducia in the contemporary legal practice

Although, more than 3 years have passed since the appearance of the Civil Code, the fiducia is not used in practice in any of its forms[46] situation that leads to a penury of case law.[47]

We can not understand why, from the multiple applications of the fiducia as guarantee or fiducia as administration, in practice, at least the fiducia as guarantee of the banking loan is not used.

A mortgage contract concluded in view to guarantee the reimbursement of a banking loan does not grant to the mortgagee the same advantages as the ones of which it can benefit in case in which it should conclude a contract of fiducia to guarantee the reimbursement of the loan.

This way, if a bank concludes a loan credit for the reimbursement of which the borrower guarantee with a mortgage on a property, in case of opening the proceeding of insolvency of the borrower, the bank shall file lodgement of claim, this way, acquiring the capacity of participant in the procedure of insolvency

[46] Unlike the Anglo-Saxon law, where the *trust* has three forms (guarantee, administration and the one concluded for performance of a liberality) in the Romanian law, fiducia has only two of these forms, respectively, ***Fiducia* as guarantee and *Fiducia* as administration**.

[47] Ion Turcu – „Se poartă Fiducia" - http://www.juridice.ro/244256/se-poarta-fiducia.html

of the borrower, but without foreclose the mortgaged property, waiting either to collect the receivables according to an eventual reorganisation plan either it shall assist to the bankruptcy procedure till the liquidation of the asset of the debtor.

In exchange, having in view the same hypothesis but replacing the contract of real estate mortgage with a contract of fiducia as guarantee, in which content the lending bank shall cumulate the capacities of fiduciary -beneficiary, the opening of the procedure of insolvency of the constitutor – borrower shall not cause more problems to the credit institution with regard to the recovery of the debt, because in its capacity of fiduciary, the bank is the owner of the property subject to fiducia, and if the constitutor-borrower shall not pay the loan, the bank shall not be restricted by the procedure, the bank being able even to alienate the property, object of fiducia.

In this case, the bank could be in the table of the obligations of the constitutor debtor, strictly to recover the unpaid remuneration, established by the contract of fiducia, and even for an eventual difference uncovered by the value of the asset, subject to fiducia.

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