

The institution of Trust under Romania's New Civil Code and Common Law System

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I. Introduction

Romania's new Civil Code, which came into effect on October 1, 2011, serves as the capstone of many years of assiduous work. Among its progressive changes, the New Code establishes trusts as a legal instrument for the first time under Romanian law. Trusts (*"fiducia"* in Romanian) will increase business flexibility and encourage the investment, both European and international. Trusts were originally a creation of the common law system and have subsequently been adopted by many civil law countries. Trusts are a popular legal instrument in England, the United States and Canada, as well as in France and Luxemburg (known as *"fiducia"*), and in Germany, Switzerland and Austria (known as *"treuhand"*). While *fiducia* are similar to trusts, there are several important differences between the two instruments. American jurisprudence has defined a trust as *"a confidence placed in a person ("trustee") by making that person the nominal owner of property to be used for another's benefit ("beneficiary")*". The trustee has the fiduciary duty of administering the assets of the trust (*"trust property"*) for the benefit of another person designated by the settler. Trusts and *fiducia*, however, differ both in the form and the substance of the deed. A trust divides the property resulting from the legal estate into the property of the trustee and the equitable interest – the property of the beneficiary. *Fiducia* not only divides, but also separates the trust property from the trustee's individual property. Thus, the trustee owns his individual property and the trust property, as two entirely separate estates. A trust is created when the grantor expresses his intent (even unilaterally), either orally or in writing, to establish the trust. The *fiducia*, however, is created only when the grantor enters into a written and notarized contract with a trustee. The trust can also be subject to a *mortis causa* deed, whereas the *fiducia* cannot. Finally, a judge has greater authority to alter a trust

than he would a *fiducia*. In Romania, the *fiducia* is regulated in a very similar way as under the French Civil Code.

II. Definition

According to art.773 of the Romanian Civil Code, effective since October 1, 2011, *fiducia* is defined as “*the legal operation whereby on or more grantors transfer[s] real property rights, rights of claim, guarantees or other patrimonial rights or a group of such rights, present or future (fiduciary property) to one or more trustees who exercise such rights with a given purpose, to the benefit of one or more beneficiaries*”. These rights constitute an autonomous estate, separate from the other rights and obligations with in the trustees’ estates. Under this definition, *fiducia* is a complex contractual arrangement, characterized by the following contractual relations: transfer of rights from grantor’s estate to the trustee’s estate; management of the respective rights by the trustee for the beneficiary’s benefit under a trust deed included in the management; and transfer of profits and benefits to the beneficiary. Under the deed of *fiducia*, a distinct and autonomous estate called the “fiduciary estate” is established.

At the conclusion of a *fiducia*, the following main obligations arise; the grantor’s obligation to temporarily transfer ownership of the assets to the trustee; the trustee’s obligation to manage and preserve the received assets; and the trustee’s obligation to transfer to the beneficiary upon expiration of the term set forth in the agreement all assets and benefits accrued. This operation differentiates the *fiducia* from other similar instrument (i.e the management agreement, the mandate, etc.) through one specific characteristic – the trustee is not simply an agent or administrator, but acquires actual temporary ownership of the assets transferred by the grantor.

III. Types of *fiducia*

Under the Civil Code, a *fiducia* can be initiated in one of two ways. First, it can be established by law. There will be several Romanian laws in the future containing a “legal” *fiducia*. In order to obtain some benefits, a party will have to use a *fiducia* provided by the law. Second, a *fiducia* can be established through an authenticated agreement, with the express purpose of establishing a deed of *fiducia*

IV. Parties

The parties of a *fiducia* contract are: the grantor – who can be any natural person or legal entity; the trustee/fiduciary – who can only be credit institutions, investment companies, investment management companies, financial investment services companies, insurance companies, public notaries and attorneys at law; the beneficiary – who can be any natural person or legal entity, including a third party, the grantor, or even the fiduciary himself. Even though the beneficiary can be either the grantor or the fiduciary, he cannot serve in all three capacities, as this would destroy a fiduciary relationship.

V. Conditions of validity

A valid *fiducia* contract must be created in an authenticated form or it risks nullification. In addition, the deed of *fiducia* and its amendments must be registered with the relevant tax authority within a month of its creation. In the fiduciary estate contains immovable property, it is also subject to registration in the Land book, according to the common law rules.

VI. Opposability by third parties:

In order to be binding upon third parties, the contract must be registered with the Electronic Archive of Security Interests in Movable Property under art.781 of the Civil Code.

VII. Content

In order to be valid, the *fiducia* must explicitly state the following elements; the rights subject to transfer; the duration of transfer (not to exceed 33 years); the identity of the grantor, trustee and beneficiary; the purpose of the *fiducia*; and the extent of the trustee's management and disposal powers.

At all times, the trustee must act on behalf of the fiduciary estate and, to this end, must expressly state all of his actions regarding the assets and rights of the estate. Even though the trustee acquires a temporary ownership right, he does not become a genuine owner. The trustee does not acquire the assets for himself, but only to transfer it to the beneficiary. Furthermore, the trustee has the contractual obligation to inform the grantor of all actions regarding the *fiducia* at the grantor's request.

In relation to third parties, the trustee has the broadest power over the estates, unless the third parties are aware of the limitation of such powers. The grantor has the possibility to limit the powers of the trustee over the estate. In this regard, the grantor may specify in the contract what acts/activities the trustee is entitled of fulfill. When a third party knows the content of the contract, he will also know the limitations of the trustee's power. Thus, the third party will be aware of these limitations, and he will have the power to refuse to conclude a contract with the trustee. The third party must contact the grantor for the actual deed over estate.

The trustee is liable with his own estates for damages caused by preservation or management actions of the fiduciary estates, as well as any insolvency proceedings initiated against him.

As a rule, the grantor's creditors cannot raise any claim regarding the assets in the fiduciary estate. There are two exceptions to this rule, when the grantor's creditors are entitled to pursue these assets:

- 1) when there is a court order rendering the deed of *fiducia* void;
- 2) when the creditors have a security interest over the assets enforceable prior to the conclusion of the deed.

In case the trustee does not fulfill his obligations under the agreement, the grantor, his representative, or the beneficiary can take legal actions to replace the trustee. If the trustee becomes insolvent, the insolvency proceedings will not prejudice the assets included in the fiduciary estate.

VIII. Revocation and Termination. Effects

The grantor can unilaterally terminate the deed of *fiducia* only if the beneficiary has not yet accepted it. According to art.789 (2) of the Civil Code, if the *fiducia* deed has been accepted by the beneficiary, it can no longer be amended revoked without the express consent of the beneficiary or, in his absence, with the court's authorization.

The agreement will be terminated at the expiration of the term set forth in the contract or upon achievement of the *fiducia's* purpose, if this occurs before its expiration. The agreement will also be terminated if all beneficiaries withdraw from the deed of *fiducia* or when a court has initiated insolvency proceedings against the trustee.

At the end of the term, all assets in the fiduciary estate will transfer from the trustee to the beneficiary or, in his absence, to the grantor.

IX International private law provisions. Conflicts of law

Normally, a grantor may choose what law governs a *fiducia*. The choice of law applicable to the agreement must be expressly stated in the contract must expressly result from its content or other circumstances. An example of the latter is when the parties refer to legal provisions that are well known as specific to law or if the parties refer to a proceeding provided only by a specific law. The parties may also alter the applicable law after the execution of the deed with all parties consent.

If the parties have not chosen the applicable law or if the jurisdiction chosen by the parties does not contain regulations regarding *fiducia* then the law of the state most closely connected to the deed of *fiducia* will apply. The following factors will be considered to make this determination: the place of management of the assets in the fiduciary estate; the physical location of the fiduciary assets; the residence or office location of the trustee; the purpose of the *fiducia* deed; and the location of its execution. The law chosen under these criteria will then be applied to determine the validity of the agreement, the interpretation and effects of the agreement, the parties' rights and obligations, and the management method of the *fiducia*.

X. Conclusions

By introducing the new legal mechanism of *fiducia* into its legal system, Romania has taken another step to harmonize internal legislation with the requirements and trends in place across the European and international financial and business markets. *Fiducia* should allow for greater flexibility in the market and should represent an option for potential investors. Businesses should be able to use these contracts to lower transaction costs.

Companies developing a business in Romania will be able to use *fiducia* to avoid the significant costs associated with forming a separate company. These agreements may also be useful when a shareholder wants to temporarily suspend his contribution to a company by transferring the administration of his shares to a trustee for a limited period.

Fiducia can also be a solution during litigation, as an alternative to judicial seizure. If the parties agree to conclude a deed of *fiducia*, then the debtor will be able to continue his business activity and even earn profit.

To fully realize the benefits of introducing *fiducia* in the Civil Code, the Romanian legislature should take further steps to improve related laws, especially in the areas of fiscal and accounting law. Once the fiscal and accounting regulations have been improved, Romania will be able to provide clear answers relating to the tax rules and accountancy of fiduciary property.

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