

## THE TRUST ACCORDING TO PRESENT CIVIL REGULATION

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### **Abstract**

*Originally, the fiduciary deed is a legal operation inspired from the Anglo-Saxon Institution of Trust. For the first time in the Romanian legal system, the trust is regulated under the Title IV of the Third Book “Regarding the Goods” of the New Civil Code. The Article 773 defines fiduciary deed as the legal transaction by which one or more settlors transfer real rights, securities or other property rights, or a set of such rights, present or future, to one or more trustees that exercise them with a defined purpose, for the benefit of one or more beneficiaries. These rights form an autonomous property fund distinct from the other rights and obligations in the assets of the trustees. Thus, the trust is a real application of a patrimony divisibility.*

**Keywords:** *trust, divisibility, property fund, law, contract.*

For the first time in the Romanian legal system, the trust is regulated under the Title IV of the Third Book “Regarding the Goods” of the New Civil Code (NCC).

Originally, the fiduciary deed is a legal operation inspired from the Anglo-Saxon Institution of Trust.

Spread from the UK and the US to many countries of common law tradition in the twentieth century and after it was rooted in several Latin American countries, the trust was the subject, in 1985, of a private international law convention signed in Hague, which provided for the recognition of the trusts formed under the law that authorized them. Unilaterally, what it is prohibited in the international conventions, a common law institution could therefor penetrate into the civil law countries. The Convention evoked the possibility for citizens of a country of civil law system to form “home” or “intern” trusts subject to foreign laws. However, few continental law states ratified it (Italy in 1990, the Netherlands in 1995, Luxembourg in 2004, Switzerland in 2007), but it instigated the takeover of the legal institution in the new laws [1].

The first step was made within the Canadian state of Quebec legal system. It knew fiduciary by will, by donation, or by the title of guarantee from the nineteenth century[2].

The trust institution is rooted in the subsystem of the equity law, which includes a set of rules emerging in the Anglo-Saxon law from the need to lessen the rigidity of the common-law system. Thus, by trust, the so-called settlor, who is the owner of a good/an asset, transmits the property over that good to one or more persons called trustee(s), with the intention that the asset be held in trust for the benefit of another person, named the beneficiary. It is not necessary for the settlor, trustee and beneficiary to be different persons. The Settlor can validly establish a trust in which to declare a trustee for the benefit of one or more beneficiaries, as he may himself be one of the beneficiaries. Following the transmission of the right, the trustee is recognized by the common law as the owner of the property right, and by the equity law as the holder of the so-called “legal title”, which confers a specific and strictly regulated role on the fiduciary duties, which are required to be managed only for the benefit of the beneficiaries. The Beneficiaries are the holders of the so-called “fair title”, which entitles them to benefit from property’s management by trustees for their benefit[3].

With reference to our legislation again, the Article 31 par. 3 of the NCC provides that the special-purpose assets is the fiduciary property, constituted according to the provisions of Title IV of the Book III, those affected to the exercise of an authorized profession, as well as other patrimony determined by law [4].

The Article 773 defines fiduciary deed as the legal transaction by which one or more constitutors transfer real rights, securities or other property rights, or a set of such rights, present or future, to one or more trustees that exercise them with a defined purpose, for the benefit of one or more beneficiaries. These rights form an autonomous patrimonial fund distinct from the other rights and obligations in the assets of the trustees.

The trust is thus a real application of an assets’ divisibility[5].

In the process of division or assignment, the assets’ holder will is essential. Thus, special-purpose assets cannot arise in the absence of the holder’s will expression. The division of the assets into patrimonial funds is achieved through their affiliation to a certain purpose. In other words, each property fund can be regarded as a miniature sum of assets that is affected by a specific purpose, which imparts to it a special legal regime. The purpose therefor becomes the central element of all goods and assets that constitute themselves into a universality. It must be strong enough to attract around it the positive

and negative values that contribute to its achievement. Since special-purpose assets exist only to the extent of their legal recognition, the aim pursued by its holder must be a legally acceptable one, capable of giving rise to such a fund of assets. The legislator's intention is not sufficient for the formation of the special-purpose assets, but it must be joined by the purpose stated by its owner[6].

The persons engaged in the legal transaction of trust are the constituent, i.e. the holder of the fiduciary rights, who acquires and exercises the rights and the beneficiary is the one in whose favor the rights are exercised by the fiduciary. There may be more constituents, more fiduciaries or more beneficiaries.

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Although the legal provision in Article 773 NCC only refers to the transfer of real rights and entitlements, it is obvious that when it comes to the transfer of rights, consideration must also be given to the transfer of the assets that these rights bear[7]. With regard to the main real rights, may be the object of the fiduciary the following: the right of ownership, the land surface right, the usufruct, the servitude, but in the case of the latter only with the dominant tenement. The right of use and of legal housing cannot be transferred through the fiduciary operation, because they cannot be ceded, regulations in this sense being included in the Article 752 Civil Code [8].

The fiduciary has the attributes of a property owner, possession, use and disposition, and he is free to dispose of his possessions, his right being limited to the purpose of the fiduciary and the duration of the trust, which cannot exceed 33 years from the date of the contract conclusion. In exercising these attributes, the fiduciary must be worthy of the confidence the settlor has given him, so that he will have to give the right to property a use consistent with the purpose for which he has received the property. In other words, the trust consists in making out of ownership a simple tool to achieve a goal.

So that the doctrine considered two practical consequences, namely the trust management and the fiduciary warranty[9].

In the case of the first form, the fiduciary may entrust a third party that he or she trust in, his or her enterprise, securities portfolio, etc., in order to be managed by the trustee and with the burden on the latter to reconstitute the fruits and to remit the property, upon completion of a term, either to the fiduciary himself or to a beneficiary designated by him. The fiduciary thus having become the owner would have the most extensive management powers. In the second variant, the fiduciary allows the debtor to remit to the creditor a good or an ensemble of goods with the task of transferring it to the former, in case of repayment of the debt. The creditor who becomes immediately the owner will also have the right to make a claim. However, if he can perform certain acts, he will not be able to do it for his own satisfaction [10].

As it is shown in the text of the Article 773 NCC, securities form the object of the trust, such as surety, mortgage, and pledge.

However, according to the Article 775 NCC, irrespective to its object, the trust cannot be the means by which an indirect liberty is made for the benefit of the beneficiary; otherwise the fiduciary contract is void, absolute nullity being applied.

As regards the purpose of the fiduciary, the exercise of the fiduciary's rights is performed only for the benefit of the beneficiary, even when he or she is the settlor. The rights thus transferred to the fiduciary retain their distinct, autonomous character from the rest of their patrimonial rights and obligations.

### **The Trust's Sources [11]**

According to the Article 774, the fiduciary deed is established by law or contract concluded in an authentic form. It follows from that provision that the trust cannot arise from the will or judicial decision.

Also in the text of the 1 par. of this article, it is stated that the trust must also be expressive.

If the trust is constituted by a contract, it presents several legal features, namely:[12]

- It is a solemn contract, concluded in an authentic form (ad valitatem), the sanction of non-compliance being absolute nullity;

- It is an intuitu personae contract, as its conclusion is based on the professional qualities or training of the fiduciary;
- It is a synallagmatic contract;
- It is a contract on a purely basis free or expensive;
- It is a commutative contract but it is also admitted that in certain cases the fiduciary contract can become arbitrary when the duration of the contract, which cannot exceed 33 years, depends on a future and uncertain event, such as the lifetime of the beneficiary;
- It is a rights' transfer contract.

According to par. 2 of the Article 774 NCC, the fiduciary provisions of the new Civil Code represent the common applicable law in the matter, and those legal provisions supplement the law under which the fiduciary is established, unless otherwise provided.

### **The Parties of the Fiduciary Contract**

According to the Article 776 NCC, the parties to the trust agreement are the settlor and the fiduciary. The paragraph 1 of this Article provides that any natural or legal person may be a settlor of the trust agreement.

The paragraph 2 of the Article 776 NCC provides that only credit institutions, investment and investment management companies, financial investment services companies, legally established insurance and reinsurance companies can act as trustees, and according to paragraph 3, may have the status of fiduciaries public notaries and attorneys-at-law, irrespective of the form of exercise of the profession.

The Article 777 of the NCC provides that the beneficiary of the trust may be the settlor, the fiduciary or a third person. If the beneficiary is a third party, it is not a party to the trust agreement, and in this case, the legal provisions on the stipulation for the other shall apply.

The settlor and the fiduciary must have full exercise capacity. In the case of a juvenile or a court injunction, the fiduciary contract may be terminated by the guardian, only with the approval of the family council and the authorization of the guardianship court, subject to the sanction of the annulment of the act. However, according to the Article 144, paragraph 4 NCC, the guardian may, without the approval of the family council and without the authorization of the guardianship court, alienate the goods subject to

degradation, spoilage, alteration or depreciation as well as those rendered useless to the minor.

According to the Article 778 NCC, unless the contrary is stated, the settlor may at any time designate a third party to represent his or her interests in the performance of the contract and to exercise the rights arising from the fiduciary contract.

As regards the identity of the beneficiary, if it is not identified at the beginning of the trust agreement, according to the Article 779 letter E) NCC there must be rules in the contract for its subsequent identification. If the beneficiary is a settlor or a fiduciary in the same contract, of course it is known from the beginning.

As in the case of the settlor and the fiduciary, the beneficiary must have full exercise capacity, given that, according to the Article 788 paragraph 1 NCC if the fiduciary fails to fulfill his or her obligations or endangers the interests entrusted to him or her, the beneficiary may request the replacement of the fiduciary in court, and according to the Article 789 paragraph 2 of the NCC, upon acceptance by the beneficiary, the contract cannot be modified or revoked by the parties or unilaterally denounced by the settlor only with the agreement of the beneficiary or, in its absence, with the authorization of the court.

The right exercised in the beneficiary's benefit is affected by a suspensive condition consisting in accepting the fiduciary by the third party. Thus, according to paragraph 1 of the Article 789 NCC, for as long as it has not been accepted by the beneficiary, the fiduciary contract may be denounced unilaterally by the settlor.

### **The Content of the Fiduciary Contract**

The Article 779 NCC contains the provision that the fiduciary contract must state, under the sanction of absolute nullity:

- A) The real rights, securities, guarantees and any other transferred property rights;
- B) The duration of the transfer, which may not exceed 33 years from the date of its conclusion;
- C) The identity of the settlor or settlors;
- D) The identity of the trustee or trustees;
- E) The identity of the beneficiary/ beneficiaries or at least the rules enabling them to be determined;

F) The purpose of the fiduciary and the extent of the administration and disposal of the fiduciary or the trustees.

### **The Fiduciary's Obligations**

The Fiduciary, in addition to other obligations that may be relied upon under the fiduciary act, has two express obligations under the new Civil Code, namely the obligation to register the fiduciary tax (the Article 780 NCC) and the obligation to be held accountable (the Article 783 NCC).

Thus, according to the Article 780 NCC, under the sanction of absolute nullity, the fiduciary contract and its amendments must be registered at the request of the fiduciary, within one month from the date of their conclusion, to the fiscal body competent to administer the amounts owed by the fiduciary to the general consolidated budget of the state. Where the property fund includes real estate rights, they are registered according to the legal provisions, under the same conditions, in the specialized department of the local public administration authority competent to administer the amounts owed to the local budgets of the administrative-territorial units within which the property is located, the land book provisions remaining applicable.

If the case where the beneficiary designation is later, it must be done under the same sanction by a written document registered under the same conditions.

If certain special forms requirements are demanded for the transfer of certain rights, a separate act will be concluded in compliance with the legal requirements. In these cases, the lack of tax registration implies the application of the administrative sanctions provided by the law.

Regarding the obligation of the fiduciary to be held accountable, according to the Article 783 NCC, the fiduciary agreement must include the conditions under which the fiduciary is held accountable by the settlor for the fulfillment of his or her obligations. The fiduciary also has to report, at specified intervals in the trust agreement, to the beneficiary and to the representative of the settlor at their request.

As mentioned above, if the fiduciary fails to perform his duties or jeopardizes the interests entrusted to him/her, the settlor, his or her representative or the beneficiary may file an action for the replacement of the fiduciary.

### **The Liability and the Replacement of the Fiduciary**

According to the Article 787 NCC, for damages caused by acts of preservation or management of the fiduciary property, the fiduciary is liable only with the other rights contained in his or her patrimonial assets. In other words, the fiduciary answers with his own property only for damages caused by acts of conservation or administration.

Regarding the fiduciary's management acts, the Article 795 provides that the person entitled to the simple administration is required to carry out all the acts necessary for the preservation of the goods, as well as the acts that are useful for them to be used in their ordinary purpose, and the Article 800 stipulates that the person empowered with full administration is required to preserve and exploit the goods, in a profitable way, to increase the property fund or to affect the patrimonial assets, insofar as represents the interest of the beneficiary.

In respect to the damages caused by disposition acts, the provisions of the Article 786 of the NCC shall apply, so that the fiduciary property may be prosecuted, under the law, by the holders of accounts receivable arising in connection with such property or by those creditors of the settlor who have a real surety upon his or her assets, and whose opposition is acquired, according to the law, prior to the establishment of the trust. The right to pursue may also be exercised by the other creditors of the settlor, but only by virtue of the final judgment of admission of the action whereby the fiduciary contract has been terminated or rendered inoperative in any way with retroactive effect.

The paragraph 2 of the Article 786 NCC states that the holders of receivables arising in connection with the assets in the fiduciary property may only pursue those goods unless, by virtue of the fiduciary agreement, the trustee and / or the settlor is required to answer for a part or for the whole fiduciary's passive. In this case, the assets of the fiduciary property will be pursued first and then, if necessary, the assets of the fiduciary and / or the settlor, within the limit and in the order provided by the fiduciary contract.

As we have mentioned above, if the fiduciary fails to perform his or her duties or jeopardizes the interests entrusted to him or her, the settlor, his or her representative or the beneficiary may sue the replacement of the fiduciary.

Pending the settlement of the replacement request, the settlor, his or her representative or, in their absence, the beneficiary shall appoint a provisional administrator of the fiduciary property. If the settlor, his or her representative or the beneficiary designates a provisional administrator at the same time, the designation made by the settlor or by his/her legal representative shall prevail.

The temporary trustee's mandate shall cease upon the replacement of the trustee or the final rejection of the replacement claim.

The solution of the replacement of the fiduciary is solved urgently and above all. The appointment of the new fiduciary and the provisional administrator may be ordered by the court only with their consent.

If the court has appointed a new fiduciary, he or she shall have all the rights and obligations set out in the fiduciary agreement.

The settlor, his or her representative, the new fiduciary or the provisional administrator may register this change of the fiduciary status by applying the provisions of the Article 780 (tax registration) and 781 (fiduciary opposition). Replacement of the fiduciary occurs only after this registration.

### **The Termination of the Fiduciary Contract**

According to the Article 790 NCC, the fiduciary contract terminates:

- When the term is completed;
- When the pursued goal is achieved, if it occurs before the deadline;
- If all the beneficiaries give up the fiduciary, and the contract did not specify how the fiduciary relationships will continue in such a situation. Disclaimers are subject to the same registration formalities as the trust agreement. Termination occurs at the date of completion of the registration formalities for the last waiver declaration;
- At the time when opening the insolvency proceedings against the fiduciary or at the time when the legal entity's reorganization takes place, according to the law.

According to the Article 789 NCC, for as long as the beneficiary has not accepted it, the settlor may denounce the fiduciary contract unilaterally.

The fiduciary contract may also cease by the death or termination of the fiduciary's existence, as the fiduciary contract is a contract of *intuitu personae*.

The loss of the status of a lawyer, a public notary, or the suspension of their profession when they act as fiduciary leads to the termination of the fiduciary contract [13].

Regarding the effects of the trust, the Article 791 NCC contains provisions according to which, when the trust contract ceases, the existing fiduciary assets at that time are transferred to the beneficiary and, in the absence thereof, to the settlor. However, the confluence of the fiduciary patrimonial fund in the property of the beneficiary or the settlor will occur only after the payment of the fiduciary debts.

### **The Trust with Foreign Element**

The new Civil Code also contains specific regulations applicable to the fiduciary with a foreign element in the Book VII – “Provisions of Private International Law,” Title IV – “Fiducia” (articles 2659-2662), which contains provisions regarding:

- The determination of the applicable law to the trust, based on the settlor’s will;
- The determining of the applicable law to the trust, based on objective localization criteria;
- The scope of the applicable law to the trust;
- The applicable law in special situations.

By regulating legal relations with a foreign element, the Law no. 71/2011 implementing the new Civil Code partially repeals the Law no. 105/1992 on the legal relations of private international law, the Civil Code adopting certain provisions of the old regulation but adapted to the new socio-economic requirements imposed by Romania’s accession to the European Union [14].

### **The Choice of the Applicable Law**

According to the Article 2659, the trust is subject to the law chosen by the settlor, and the provisions of the Article 2.637 on matters of a general nature concerning the determination of the law applicable to the substantive requirements of the legal act are applicable.

### **The Objective Determination of the Applicable Law**

According to the Article 2660, in the absence of the applicable law choice, and if the chosen law does not know the institution of the trust, the law of the State with which the trust has the closest links applies. To this end, one shall take into account:

- A) The place of administration of the fiduciary property, designated by the settlor;
- B) The place where the fiduciary goods are situated;
- C) The place where the trustee has his or her habitual residence or, where appropriate, the place where is the registered office;
- D) The purpose of trust and the place where it is to be performed.

From the analysis of the provisions of the Article 2660 the following can be seen:

- The determination of the applicable law to the trust on the basis of the objective location criteria is subsidiary to the application of the law chosen by the settlor;
- The objective determination of the fiduciary operations also applies if the settlor has chosen an applicable law, but it does not recognize the institution of the trust;
- The objective localization criterion is the notion of the “closest links.”
- The legal qualification of the “closest links” is represented by the 4 alternative situations envisaged at the letters a) – d) [15] from the above mentioned Article.

### **The Area of Applicability**

As to the scope, the Article 2661 NCC states that the determined law, according to the Article 2659 and the Article 2660 is applicable to the conditions of validity, interpretation and effects of the trust, as well as its administration. This law determines in particular:

- A) The appointment, the renunciation and the replacement of the fiduciary, the special conditions that a person must fulfill to be appointed as a trustee, and the transmission of the powers of the fiduciary;
- B) The rights and obligations of the trustees;
- C) The right of the fiduciary to delegate in whole or in part the performance of his or her duties or the exercise of his or her powers;
- D) The powers of the fiduciary to administer and dispose of the assets of the fiduciary patrimonial fund, to constitute securities and acquire other assets;
- E) The fiduciary’s powers to make investments and placements;

- F) The restrictions upon the duration of the trust as well as upon the powers of the fiduciary to constitute reserves from the asset management's income;
- G) The relationship between the fiduciary and the beneficiary, including the personal liability of the fiduciary towards the beneficiary;
- H) The modification or termination of the trust;
- I) The distribution of the assets that make up the fiduciary patrimonial fund;
- J) The obligation of the settlor to report the way the fiduciary patrimonial fund was administered [16].

### The Law Applicable in special situations

The Article 2662 states that a fiduciary element susceptible to be isolated, in particular its administration, may be subject to a separate law.

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