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## **General Considerations on the Institution of Fiducia**

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**Abstract:** Of Roman origins, fiducia was under the form of a pact (the fiduciary pact) secondary to a temporary transfer of property, by which a natural person preserved the property to the benefit of the testator under a resolutive condition and during all the life of the testator; after the death of the testator the properties should be transferred either to the direct descendant, or to other person authorized by the testator by legacy. The contemporary fiducia in the continental civil law has its origins in the English right in the specific institution in the common law of the trust, which designates the judicial rapport created by acts between the living or for a death cause from a person named founder who transfers two or more goods under the control of an administrator to the benefit of a person or for a given purpose. The Regulation in The New Civil Code Part III, Title IV, articles 773-791, followed the pattern of the French Law no. 2007-211 in 19<sup>th</sup> February 2007 which introduced in the French civil code, the Title XIV "On fiducia". The Romanian legislator took in an adapted form the provisions of the French normative act operating some important changes or additions.

**Keywords:** fiducia; fiduciary patrimonial mass; the founder; the fiduciary; the beneficiary

### **1. Introduction**

#### **Characteristic elements of the contract of fiducia . Definition and the form of the contract.**

Fiducia is defined in article 773 in the Civil Code as following: "The judicial operation by which one or more founders transfer real rights, claim rights, guarantees or some other patrimonial rights or an assembly of such rights, present or future, to one or more fiduciaries who exercise them with a determined purpose to the advantage of many beneficiaries. These rights form an autonomous patrimonial mass, distinct of some other rights and obligations in the patrimony of the fiduciary" and it has the following characteristics:

- it represents a judicial operation which implies the existence of three parts ( founder, fiduciary and beneficiary) , respectively of at least two or more people;
- it can be constituted only with a determined purpose to the advantage of one or more beneficiaries;
- it is a complex judicial operation which implies may stages, respectively the transfer of patrimonial rights from the founder to the fiduciary, the exercise of these rights of fiduciary to the advantage of the beneficiary, the transfer of the emolument to the beneficiary.

All these stages form a whole unit, but as it results from the definition given in article 773 in the Civil Code, the institution of fiducia includes a series of judicial rapports which resemble the mandate and the stipulation for the other;

- it has as an object exclusively correlative patrimonial rights and obligations;
- the rights which are transferred to the beneficiary are constituted in an autonomous patrimonial mass, distinct of other rights and obligations from the patrimonies of the fiduciaries.

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The goods which constitute the object of fiducia form an autonomous patrimony named fiduciary patrimony or fiduciary patrimonial mass.

## **2. Paper Preparation**

Article 31 in the New Civil code defines the fiduciary matrimonial mass as being a patrimony of affectation and article 32 in the New Civil code adds that transfers of rights and obligations can be made from a patrimonial mass to another and it does not represent alienation. By the interdiction formulated in article 775 in the New Civil Code, the contract of fiducia is completely annulled if by this an indirect liberality is realized ( the renunciation to the right, the delivery of duty, the stipulation for the other), to the advantage of the beneficiary being admissible only the direct liberalities as far as all the fond and form conditions imposed are respected.

In conclusion, the contract of fiducia is a named, bilateral contract, with commutative title *intuitu personae* and solemnly and it is constituted of three distinctive operations, but tightly bound between them: the transfer from the founder to the beneficiary, closing an administration mandate and the transfer of the advantage to the beneficiary. It should be added that after the fiduciary achieves the obligations assumed in the purpose established by contract, he should return the founder the transferred goods or transmit them to the third party named by the founder. The sources of the fiducia in our right are the same as in the French right, article 2012 in the French Civil Code stating that: “fiducia is established by law or by contract”. In accordance with article 224 in the Civil Code, “fiducia is established by law or by contract closed in authentic form”. So, irrespective that mobile or immobile goods are taken into account, fiducia being a judicial solemnly act can be constituted only by authentic act.

Also, fiducia cannot be deduced, there is no chance that it can be presumed-as it results from article 774 paragraph 1 in the Civil Code: “It should be express”. The law establishes that in the situation in which by the contract of fiducia the beneficiary has not been mentioned, this being established later, this operation must be done by a “written act, registered in the same conditions” (article 780 paragraph 3 in The Civil Code).

Besides the request of the authentic form, the Civil Code provides another form condition, of fiscal nature. In accordance with article 780 in The Civil Code:” Under the sanction of absolute nullity, the contract of fiducia and its changes must be registered upon the request of the fiduciary, at the fiscal organ competent to manage the sums owned by the fiduciary to the general consolidated budget of the state in a month from the date of its closing. Also, when real immobile rights are comprised in the fiduciary patrimonial mass, these will be registered, under the conditions established by law, under the same sanction (of absolute nullity) at the special compartment of the authority of the public administration competent for the administration of the sums owned to the local budgets by the administrative-territorial units, where the immobile is situated.

Besides the request of the authentic form and of the condition of form, of fiscal nature, the Civil Code also establishes an opposability condition to the thirds, respectively, the registration in The Electronic Archive of Mobile Real Guarantees. Once closed, the fiduciary contract in the form and under the conditions imposed by law, this will produce effects between the parties, but, in order to produce effects to the thirds, the registration in the Electronic Archive of Mobile Real Guarantees is necessary: article 781 paragraph 1 Civil Code: “The fiducia is opposable to the thirds from the date of its mentioning in The Electronic Archive of Mobile Real Guarantees”.

In the situation in which immobile real rights or immobile real guarantees are part of the fiduciary patrimonial mass, these will be registered in The Book Land for each right. (article 781, paragraph 2 Civil Code).

### **The Parts of the Contract of Fiducia**

As we mentioned above, fiducia is the judicial operation by which one or more founders transfer real rights, claim rights, guarantees or some other patrimonial rights or an assembly of such rights, present or future, to one or more fiduciaries who exercise them with a determined purpose to the advantage of many beneficiaries.

#### *The founder*

Irrespective of the French Civil Code, which makes no mention regarding the founder, referring only to the fiduciary, article 776 paragraph 1 in the Civil Code establishes that any legal or natural person can be a founder. The founder is that person who transfers real rights, claim rights, guarantees or some other patrimonial rights to the fiduciary so that the latter should exercise them with a certain purpose to the advantage of a beneficiary. In order to make the transfer previously mentioned, the founder must have the necessary judicial capacity, respectively the whole exercise capacity. As long as the legislator regards that "any legal person" can be a founder it is presumed that not only the legal people of private law are regarded but also those of public law, and also the legal people with a patrimonial or nonpatrimonial purpose.

#### *The fiduciary*

The fiduciary is that person to whom the transfer of real rights, of claim rights, guarantees or some other patrimonial rights is made by the founder and who has the obligation to exercise/manage them with a determined purpose to the advantage of the beneficiary/ beneficiaries. The contract of fiducia is an *intuitu personae* contract because the fiduciary relations involve special qualities of honourableness, efficiency and financial stability. Article 776 paragraph 2 and paragraph 3 in The Civil Code establishes who can have the quality of fiduciary, the enumeration being express and limitative, so that no other person besides the ones mentioned by the Civil Code can have this quality.

In accordance with article 776 in the Civil Code in the contract of fiducia having the quality of fiduciary can participate the credit institutions, the societies of services of financial investments, the insurance and reinsurance societies legally founded, the public notaries and the lawyers, irrespective of the form of exercising the profession. As the French legislator (article 2015 Civil Code), our legislator stopped at the specialized fiduciary system with a qualified character, as it results from the limitative enumeration provided by articles 776 paragraph 2 and 3 in The Civil Code. Irrespective of other legislations which stipulate that in each contract of fiducia cannot exist but a fiduciary, The Civil Code provides the fact that the rights which form the object of fiducia can be transferred to one or more fiduciaries. In the situation of many fiduciaries, these are obliged, joint and several, the founder and the beneficiary being offered the possibility of acting against any of the fiduciaries. As far as the capacity of the fiduciary is concerned, this has to have full capacity of exercise. In the doctrine there was expressed the idea according to which the fiduciary who is a legal person can also have the quality of beneficiary, it will be enough that this must have limited capacity of exercise until the appointment of the administration organs because it can close administration, conservation or even disposal acts, doing this thing on its own risk. (Tripon, 2010)

#### *The beneficiary*

The beneficiary is that legal or natural person who will get the advantage produced by the goods which form the patrimonial mass and sometimes even the goods which make the object of the fiducia. The beneficiary is not part in the contract of fiducia as the founder and the fiduciary are, this being only a third in the right of obligations. In the moment of closing the contract of fiducia, the beneficiary gets a claim right against the fiduciary, but in the hypothesis in which the fiducia was finished with the purpose of transmitting the beneficiary a certain good, the latter will have the right to assert.

The Civil Code establishes in article 777 that the beneficiary of the fiducia can be the founder, that means any legal or natural person, the fiduciary or a third person, irrespective of the French Civil Code which provides in article 2016 that the beneficiary can be the fiduciary or the founder, without mentioning as a possible fiduciary a third people as the new Roman Civil Code provides.

In the contract of fiducia the attributions of the thirds must be expressly established as well as their limits. The Civil Code recognizes the right of the third to request the judge the change of the fiduciary, the right to name a temporary manager of the fiduciary patrimonial mass, as well as the right to request the fiduciary to justify the achievement of his obligations.

### **The Content of the Contract of Fiducia**

Article 779 in the Civil Code establishes the elements that the contract of fiducia must contain under the sanction of the absolute nullity:

**a) real rights, claim rights, guarantees and any transferred patrimonial rights.**

The contract of fiducia can have as an object not only principal real rights (property, charge, usufruct), but also secondary real rights.

The guarantees which form the object of fiducia can be real guarantees (mortgage, deposit) or personal.

The object of fiducia can be any mobile or immobile goods- corporal or incorporeal (claims, rights of intellectual property, mobile values, trade funds, etc).

The goods, the rights and the guarantees can be present or future (as an example, an immobile which is being built).

In accordance with article 773 in the Civil Code (as well as the provisions of article 2011 in the French Civil Code) there is provided the possibility that the object of fiducia must be formed by an assembly of such rights and goods, therefore, an universality.

In accordance with article 786 in the Civil Code, “the goods in the fiduciary patrimonial mass can be followed, under the conditions of law, by the claim titular as far as these goods are concerned or by those creditors of the founder who have a real guarantee on the latter’s goods and whose opposability is achieved in accordance with the law, previously of the establishment of the fiducia”.

Besides the claim titular as far as these goods are concerned in the fiduciary patrimony in accordance with article 786 paragraph 1 in the Civil Code the fiduciary patrimonial mass can be also followed by the founder’s creditors, but some conditions must be achieved:

- there should be a claim previous to the establishment of the fiducia;
- to have a real guarantee on the respective goods;
- the formalities for opposability previous to the establishment of the fiducia must be achieved in accordance with the law.

**b) the length of the transfer must not overcome 33 years, starting with the date of its closing.**

The contract of fiducia is a contract with determined length and the transfer of property which is given at the beginning of fiducia is temporary. The length must be comprised in the contract.

Nothing opposes that the parties extend the length of the contract of fiducia, in this case being necessary the achievement of all the formalities provided by the Civil Code for closing the contract of fiducia.

- c) the identity of the founder or of the founders;**
- d) the identity of the fiduciary or of the fiduciaries;**
- e) the identity of the beneficiary or of the beneficiaries or at least the rules that allow their determination;**
- f) the purpose of the fiducia and the length of the administration and disposal powers of the fiduciary or of the fiduciaries.**

### 3. The Purpose of Fiducia (the Cause of Fiducia)

As far as the purpose of fiducia is concerned, the New Civil Code establishes some provisions with an imperative character. So, as it results from the definition of fiducia provided in article 773 in the Civil Code, the founder transfers real rights, claim rights, guarantees or other patrimonial rights to the fiduciary/fiduciaries so that this/these exercise(s)/manage(s) them with a determined purpose to the advantage of one or many beneficiaries. The Civil Code does not define the purpose of fiducia, but this must be determined and obligatory comprised in the contract of fiducia, under the sanction of absolute nullity in accordance with article 779 letter f in the Civil Code: "The contract of fiducia must mention under the sanction of absolute nullity the purpose of fiducia and the length of the administration and disposal powers of the fiduciary or of the fiduciaries".

The cause constitutes an element on which the existence of the judicial act depends, this must exist, must be licit and moral. The achievement of the followed purpose when this appears previous to the fulfillment of the date mentioned in the contract of fiducia constitutes one of the causes of finishing the contract of fiducia in accordance with article 790 paragraph 1 Civil Code. Therefore, it is necessary that in the content of the contract of fiducia to be inserted the detailed explanations of the founder regarding the motifs and the purpose for which it appealed to the institution of fiducia besides the absolute obligatory mentions provided by article 779 in the Civil Code.

Depending on the purpose of fiducia, this can have many forms, but much lesser than the different variants of presenting the trust because the institution of fiducia lacks the variety and the versatility of the institution of the trust by which it has been inspired.

So, we can distinguish:

- fiducia with an administration purpose;
- fiducia with a guarantee purpose.

#### *Fiducia with an Administration Purpose*

This type of fiducia implies that the fiduciary must be transmitted patrimonial rights to manage by the founder with the obligation for the fiduciary to manage/ fructify, so that the resulted benefits must be transmitted to the founder. Also, at the expiration of the contract, the fiduciary has the obligation to return to the founder the given patrimony. Fiducia with an administration purpose can have many and varied applications, it can be used especially in the financial purpose and not only. By this type of fiducia, the founder transfers/ puts some funds at the disposal of the fiduciary with the purpose that these should be invested in accordance with the disposals that the founder gives to the fiduciary to the advantage of a third or even to the founder. Another application of fiducia with an administration purpose is the fiducia of immobile administration and of the building projects by which the fiduciary obliges him to manage a building project which can consist in a residential neighbourhood, one or more office buildings or living spaces, a complex of commercial spaces etc.

#### *Fiducia with a Guarantee Purpose*

Fiducia can be used with a guarantee purpose. By this judicial instrument, the founder-debtor transfers the property of one of his goods to the fiduciary (who can be the creditor or a third) with the obligation for the latter to return to the founder in the case the debt was paid, or, by contrary, to give to the creditor. Fiducia with a guarantee purpose offers the creditors the right to cover the claim from the price obtained from the sale of the good which forms the object of the fiducia or even with the good itself under the form of an operation of payment.

Not only the sale, but also the payment is realized through the fiduciary who acts as a titular/owner of the right. The good was transmitted by the founder to the fiduciary with the latter's obligation to sell or to pay in the case in which the creditors will not have received the payment of their debt. Irrespective of the deposit of dispossession, the guarantee fiducia offers the creditor exclusiveness on the transmitted good and it allows the debtor to keep the possession of the good which is the object of

the guarantee fiducia if the contract provides this thing. In the French literature the so-called “rechargeable guarantee” was considered which implies that the transmitted good by the guarantee fiducia can guarantee not only present goods, but also future ones, the guarantee does not finish once with the disappearance of the initial claim, so that the same guarantee can be used to guarantee a new future claim without being necessary the closing of a fiducia contract, if the parties stipulated in this way. (Lefebvre, 2009, p. 22)

#### **4. Conclusions**

The regulation of the institution of fiducia in the Romanian right represents a natural response of the legislator as far as the new judicial and globally economic realities are concerned. There was expressed the opinion<sup>1</sup> according to which the role of the fiducia will be felt in a primordial way in the domain of the financial investments by significantly reducing the costs in the development of new investments. Fiducia can constitute the solution even in the case of a trial when the appointment of a fiduciary can be more useful than the measure of distraint. Fiducia is applicable even in the case in which a person inherits, for example, an immobile, but he does not have the necessary capacity (be it because he is minor, be it because he does not know) to use it. This institution offers the partner of a commercial society the possibility to withdraw temporally from the sphere of business, transferring the fiduciary the duty of managing the patrimony during this time.

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\*\*\* The project of the Civil Code.

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<sup>1</sup> The project of the Civil Code, p. 146-147.