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From Roman Law *Fiducia* to the Trust in the Romanian Civil Code

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Abstract

The fiducia, a concept that has many uses, is a legal instrument by means of which one person acquires form another person a legal right under an obligation which limits its enjoyment. After much beating around the bush and three previous failed attempts, the fiducia was adopted in France. Having as model the French Civil Code, the draft of the Romanian Civil Code included also provisions governing fiducia, subsequently retained in the adopted 2009 Civil Code. Therefore, this article attempts to highlight some of the common and national characteristics of the modern fiducia in the context of a partial restoration of the Roman law's heritage determined by the trust's expansion in the Latin law system. Although the Romanian and the French fiducia are a first step towards the introduction of a genuine trust law, it's difficult to see under what circumstances fiducia – the Roman real contract's offspring which presents yet some characteristics borrowed from the Anglo-Saxon trust – could provide an effective replacement for the trust. That's why, perhaps, the Romanian and the French legislator would have been more inspired in ratifying The Hague Convention on the law applicable to trusts and on their recognition, considering that a country's legal system, despite its legal tradition, must also be a competitive one.

Keywords: *Private law, Roman law, civil law, common law, fiducia, trust*

Preliminary Considerations

The *fiducia*, a concept that has many uses, is a legal instrument by means of which one person acquires form another person a legal right under an obligation which limits its enjoyment. After much beating around the bush and three previous failed attempts, fiducia was adopted in France[1].

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[1] *Loi n° 2007-211 du 19 février 2007* instituant la fiducie, published in the Official Journal of the French Republic no. 44 from 21 February 2007. For details, see *Dossier Législatif: LOI n° 2007-211 du 19 février 2007 instituant la fiducie*, available at https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000017758256/.

Having as model the French Civil Code, the draft of the Romanian Civil Code[2] included also provisions governing fiducia, subsequently retained in the adopted 2009 Civil Code[3]. Recently our Civil Code has received an English (unofficial) translation published in hardcover[4] where Title IV of our Civil Code which regulates „Fiducia" in Romanian was translated as „Trust" into English.

However, the amendments to the draft of the new Civil Code introducing the *fiducia* (the *trust* in the said translation) were motivated by the fact that: „The institution of the *trust*, with a very wide application in the Anglo-Saxon law system, has already been received in continental law, in some national legal systems (for example, France, Switzerland, Luxembourg). The reservations about this institution and the idea of its «transplant» into the continental legal system were defeated, as the pragmatic approach proved stronger than the theoretical approach. However, recognizing the practical usefulness of the institution of the *trust*, its reception in the various national legal systems has been done critically, so as to prevent the rejection of this «transplant».

Two requirements governed this reception. First, the institution of the trust was not only adopted but also adapted, under the name of *fiducie*, so as to be harmonized with the other national legal institutions. Secondly, the reception was done prudently, in order to avoid, as far as possible, the use of the institution of *fiducie* for illicit purposes, with special reference to money laundering and tax evasion.

That is why, in this title, it was followed as a model the Law no. 2007-211 of 19 February 2007, which introduced, in the French Civil Code, Title XIV, «De la fiducie»"[5].

Thus, since the notion of *trust* is rather a translation false friend when dealing with the Romanian *fiducia*, this article attempts to highlight some of the common and national characteristics of the modern *fiducia* in the context of a partial restoration of the Roman law's heritage determined by the trust's expansion in the Latin law system.

The Roman Law Fiducia

In the Roman law *fiducia* was a real contract formed by a *mancipatio* or an *in iure cessio* accompanied by a convention whereby *accipiens* is bound to transfer back the

[2] The works of the Commission for the elaboration of the amendments to the Draft Civil Code adopted by the Senate in 2004 were available a decade ago on the Ministry's website (http://www.just.ro/). This Commission for the revision of the draft of the new Civil Code was appointed by Order of the Minister of Justice no. 828 / C / 24 March 2006.

[3] Nowadays Law no. 287/2009 on the Civil Code, republished in the Official Gazette of Romania no.

[4] *Romanian Civil Code*, translated by Oana Gheorghiu. Edition supervised and with foreword by Flavius A. Baias. Bucureşti: Monitorul Oficial R.A., 2022.

[5] *See* Supra n. 2.

right of ownership to *tradens*[6]. Thus by means of the Roman *fiducia* one could transfer property rights which the new owner is bound to transfer back to the previous one. The fiduciant (the initial owner and subsequent owner) and the fiduciary (the temporary owner) are the parties to this contract. The *fiducia* served several purposes.

In the case of *fiducia cum amico contracta*, the transfer of property served either as a loan for use, purpose which was later fulfilled by *commodatum* (contract by which a person delivers a thing to another, to use the thing and then to return it after a certain period of time), or as a deposit, purpose which was later fulfilled by *depositum* (contract by which one receives the thing of another, on condition of keeping it and returning it in kind).

In the case of *fiducia cum creditore contracta*, the transfer of property served as collateral for a loan in the legal relationship between the creditor and the debtor, purpose which was later fulfilled by *pignus* (personal property pledged as security). The fiduciant (the debtor) transferred the right of ownership to the fiduciary (the creditor) on condition that the latter would transfer it back when the debt was paid. Thus the purpose of *fiducia cum creditore* was to give security by transfer of ownership. If the debt was paid, the debtor could demand the transfer of the right of ownership by means of *actio fiduciae*.

This action was not an *actio in rem* (the provider of a collateral by the *fiducia* had no *rei vindicatio*), but an *actio in personam* and, as a result, *actio fiduciae* didn't provide any protection for the initial owner (the debtor) from the risk of loosing the collateral, wholly or in part, in case of the creditor's insolvency. The fiduciant presented oneself to be paid competing with the other personal creditors of the insolvent fiduciary, and they were paid in proportion to the value of each debt. That's why the conviction in an *actio fiduciae* for the recovery of such collateral was infaming[7].

Given that the *fiducia* disappeared from the Roman law together with *mancipatio* and *in iure cessio* long before *Corpus Iuris Civilis* and that most of the legal concepts not incorporated into this code, like the ancient Roman *fiducia*, were consequently erased from the legal consciousness, the *fiducia* as a autonomous legal figure remained latent many centuries till it was brought back to life from the collective subconscious of the civil law as a reaction to the expansion in the civil law jurisdictions of the trust, legal institution developed in common law jurisdictions.

The Common Law Trust

According to The Hague Convention on the law applicable to trusts and on their recognition (concluded 1 July 1985) the term *trust* refers to „the legal

[6] Constantin St. Tomulescu, *Manual de drept privat roman*, Bucureşti: Tipografia Învăţământului, 1956, p. 641.

[7] René Jacquelin, *De la fiducie*, Paris: A. Giard Libraire-Éditeur, 1891, p. 161.

relationship created – *inter vivos* or on death – by a person, the settlor, when assets have been places under the control of a trustee for the benefit of a beneficiary or for a specified purpose". Also the reservation by the settler of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

The trusts in common law countries cover a great variety of purposes, for example to keep property in the family, to protect the weaker members of society even if they are not legally incapable, like drug addicts and alcoholics, to attract investors (unit trusts), to minimise tax liability (estate planning), to assemble the necessary finance for a building or engineering project (project finance trusts), to safeguard the interests of creditors (debenture trusts), to provide for employees on retirement (pension trusts), and generally to circumvent certain rules of the law without doing anything technically illegal[8]. In any case, the main function of the trust is asset management – assets are administrated by one party for the benefit of another.

Structurally, a trust requires four elements, namely: *assets* which form a patrimony separate from that of the settlor or the trustee; a *trustee* to administer the assets; a *defined purpose* other than the benefit of the trustee ("the trustee is considered merely as an instrument of conveyance; therefore, is in no event to take a benefit" – Lord Mansfield[9]), a court or a public authority with a *supervisory jurisdiction* that can be called on to intervene, at least if the beneficiaries wish it, to ensure that the trust purpose is put into effect.

Any acceptance of the trust law into a civil law jurisdiction is most likely to be a conditioned one. For example, perhaps the trust will have to be registered, or the trustee will require an official authorisation before he can act as trustee, or if a trust asset is an immovable property it will be required that the existence of the trust be mentioned in the land register, or the trustees will be required to give security, or the trustees will have to render annual accounts not only to the beneficiaries but also to a state agency.[10]

Taking into consideration that one of the impulses behind The Hague Convention was the one of attracting investments, the fact that the trust institution is recognized in a civil law country can only encourage the investments in such countries. The Hague Convention on the law applicable to trusts and on their recognition was ratified by a number of common law countries, but only few

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[8] Tony Honoré, *On Fitting Trusts into Civil Law Jurisdictions*, Oxford Legal Studies Research Paper no. 27/2008, p. 4-5, available at https://ssrn.com/abstract=1270179 or http://dx.doi.org/10.2139/ssrn.1270179.

[9] Maurizio Lupoi, *The Hague Convention, the Civil Law and the Italian Experience*, Trust Law International, vol. 21, no. 2/2007, p. 88.

[10] Tony Honoré, *op. cit.*, p. 6.

civil law countries ratified it[11]. Surely civil law countries have the freedom to ignore the trust law, to introduce it for a limited purpose, to recognize it in private international law via the ratification of The Hague Convention or to adopt a trust law based on the Anglo-American model.

Obstacles to the Reception of the Trust in the Civil Law Systems

The main reason is most probably the compromise represented by the *dual ownership*. The Anglo-American trust doesn't imply strictly speaking a transfer of property, but a *quasi-démembrement* of the property right[12] by the coexistence of two real rights: the trustee's *legal ownership* and the beneficiary's *equitable ownership*. Obviously there is one owner too many from the point of view of the lawyers in civil law jurisdictions[13], since in the Latin law system there is a limited number of rights over things and new rights can be introduced only by the legislator, they cannot be established by the parties.

What is the dual ownership? In case of the trust the ownership is divided in a way which is very different from the ways known in the Latin law system, although not necessarily incompatible with it. The trustee as *legal owner*, has the power to administer and dispose of the things, but the beneficiary as *equitable owner* has right to their value, right which should also be seen as a kind of property. This division of the property right into legal and beneficiary ownership is not impossible in the Latin law systems: it must only be created by the legislator.

If the legislator does not intervene to create a new division of ownership, the fiduciary relationships suffer due to the fact that it becomes impossible to give to both parties (the trustee and the beneficiary) a „real" protection, namely a real right. Form this perspective the trust could be defined as a fiduciary relationship whereby the creditor of the fiduciary obligation (the beneficiary) is protected by property law. That's why one could say that, without such a protection, a fiduciary relationship is not a trust.

A difficult thing to achieve in a Latin law system is the constitution of a separate patrimony, such that the interest of the beneficiary remains a real one, even if the goods themselves are disposed of and replaced by other goods, namely by attaching his interest to the substituted goods through the general real subrogation (*in iudiciis universalibus res succedit loco pretii et pretium loco rei*). On the one hand a patrimony like this would be considered as an exception to the principle of the unity of the patrimony: a person has one and not more than one patrimony. On the other hand the legislator can create the possibility of such a patrimony.

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[11] See https://www.hcch.net/en/instruments/conventions/status-table/?cid=59.

[12] Philippe Marini, *Enfin la fiducie à la française!*, Recueil Dalloz no. 20/2007, p. 1347.

[13] For details, see Maurizio Lupoi, *op. cit.*, p. 82-83.

However, in most civil law systems, the position of the beneficiaries is precarious, since they rarely enjoy a protection under property law. An exception is the Louisiana trust law which from the very beginning rested on the division of ownership between trustee and beneficiary, thus embracing a concept that evolved and matured in the common law systems[14].

Other systems have tried to balance the trustee's interest and the beneficiary's interest in different ways. An original way of tackling the matter of ownership allocation between the settlor and the beneficiary can be found in Québec. The Civil Code of Québec contains provisions governing *la fiducie* (*la fiducie* is called „trust" in the English version), provisions by which it was introduced a genuine trust law. Thus, article 1261 stipulates that „The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right".

At a first glance the trust assets seem unowned and open to occupation by the first taker. However the trustee has the powers given to administrators by articles 1299 to 1370 of the Civil Code of Québec concerning the „administration of the property of others" (*l'administration du bien d'autrui*)[15], although strictly speaking the trust assets are not owned by „another" since they are not owned by anyone. This is the original solution given by the Civil Code of Québec to the thorny matter of allocation of the ownership between the settlor and the beneficiary.

On the other hand it is expressly provided that the trustee „has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation" (Article 1278). Most probably the fact that the Civil Code of Québec denied to the trustee a real right in the trust assets had as purpose to stress the idea that as trustee he has no beneficial interest in them, though he may happen to be one of the beneficiaries[16], in which case he would have such an interest not as trustee but as beneficiary.

Although the trust beneficiaries enjoy a beneficial interest in the trust assets, there is no compelling reason to describe the beneficiary's rights as a form of ownership, when the trust is transplanted into a civil law jurisdiction, and consequently these rights can be „translated" into rights *in personam*, rights

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[14] Joachim Zekoll, *The Louisiana Private-Law System: the Best of Both Worlds*, Tulane European and Civil Law Forum, vol. 10, Fall 1995, p. 22.

[15] These articles served as model for the articles of the draft of the Romanian Civil Code governing „The administration of the property of others", provisions which also will apply to the *fiduciar*. In order to avoid the confusion with the trust we have deliberately retained the Romanian term, instead of the term trustee.

[16] Tony Honoré, *op. cit.*, p. 11-12.

which are known in civil law systems. Thus the character of the beneficiary's interest doesn't represent anymore a real obstacle to the reception of the trust in civil law systems.

Therefore it's up to the civil law legislator to decide what rights must be allocated to trust beneficiaries beyond the right to demand that the trust purposes be carried out, namely the right to demand that the trust assets be devoted to the trust purpose, which is more than a simple creditor's right to sue a debtor.

These are in a few words the main difficulties that can arise when the institution of the trust is introduced in a civil law system.

The French Law Fiducie

France, which was familiarised with fiduciary mechanisms like the Swiss *fiducie* and the English trust, is one of the civil law countries which signed The Hague Convention on the law applicable to trusts and on their recognition but didn't ratify the convention (1991). Between 1989 and 2007 three unsuccessful attempts were made to introduce *la fiducie* into the French Civil Code.

The opposition to the introduction of the fiducie was mainly due to the suspicions of the Finance Ministry concerning the risks of tax evasion and money laundry[17]. After 18 years, due to the lobbying from the banks and insurance companies, which desired a modern instrument to manage pension funds, on 19th February 2007 France introduced under the name of *fiducie*[18] its own version of the trust, in fact an institution which is more than the Roman *fiducia* as real contract, but less than the Anglo-Saxon trust.

The Romanian Fiducia

Regarding the adoption of a trust law by Romania, the draft of our Civil Code took as model the law by which the *fiducie* was introduced in France but adapted it to the specificity of our legal system.

According to Article 2011 of The French Civil Code the *fiducie* is „an operation whereby one or several fiduciants (*constituants*) transfer property, rights or security rights or a mass of property, rights or security rights, whether existing or future, to one or several fiduciaries (*fiduciaire*) who, while keeping them separate from their own patrimony, act for the benefit of one (*bénéficiaire*) or several beneficiaries in view of a specified purpose".

The Romanian Civil Code in Article 773 adapted the content of this legal definition keeping at the same time what is essential: *fiducia* is a legal operation;

[17] Philippe Marini, *op. cit.*, p. 1347.

[18] In order to avoid the confusion with the trust we have deliberately retained the French terms.

the rights transferred to the fiduciary form a patrimonial mass which is distinct from the rest of his patrimony; in this legal operation there are, typically, a fiduciant, a fiduciary and a beneficiary, but in the same time there can be more fiduciants and/or fiduciaries and/or beneficiaries; the fiduciary patrimonial mass is devoted to a particular purpose for the benefit of the beneficiary or beneficiaries.

The fiduciary's property right over the fiduciary patrimony was qualified as a *„propriété dégradée"*[19] because it concerns a limited property in point of duration and usage. Due to the fiduciary mechanism, the property right suffers a double limitation: on the one hand the fiduciary's property right is limited in his substance since the fiduciary acts in view of a specified purpose for the benefit of one or several beneficiaries, on the other hand this property right is a temporary one because the fiduciary must transfer the fiduciary patrimony at the cessation of the fiducie contract to the fiduciant or to a third beneficiary.

The *fiducia* can be established only by contract or by law and only in an express manner (French Civil Code Article 2011, Romanian Article 774). It cannot be established by will or by judgment. Evidently, each time when the legislator desires to establish a legal *fiducia* he can stipulate derogatory provisions, while the *fiducia* established by contract is governed only to the rules contained in the Civil Code and other laws.

The fiducia can be used only as a mechanism for managing assets (*fiducie-gestion*) or as a security device (*fiducie-sûreté*) similar to the Roman fiducia. Regarding the management of assets (*fiducie-gestion*), for example, it can offer to a credit institution the possibility of transferring to a fiduciary, for a limited period of time, the property over certain shares and the fiduciary would manage these shares. Thus the *fiducie-gestion* offers the possibility to entrust to a third party the management of some assets when the fiduciant cannot or doesn't want to manage these assets[20].

The *fiducia* contract is void if the constituent intends to make a donation to the beneficiary (French Article 2013, Romanian Article 775). Furthermore, under the French law, should anyone, notwithstanding the risk of invalidity, be unwise to constitute a *fiducie* with the intention of making a gift anyway, the tax consequences of such an act would be extremely severe. Thus, in order to discourage the temptation to avoid this prohibition, the tax authorities have the right to impose taxes which exceed the value of the transferred assets. According

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[19] Henri de Richemont (sénateur), *Rapport fait au nom de la Commission des Lois Constitutionnelles, de Législation, du Suffrage Universel, du Règlement et d'Administration Générale (1) sur la proposition de loi de M. Philippe Marini instituant la fiducie, Sénat* - annexe au procès-verbal de la séance du 11 octobre 2006, p. 12.

[20] Sandra Esquiva-Hesse, *L'utilisation de la fiducie dans le cadre des opérations de restructuration*, Journal des Sociétés, nº 55/2008, p. 66.

to the law which introduced the French *fiducie*, the intention to make a donation „is notably characterised where a benefit in kind or a benefit resulting from a reduction in the sale price is granted to a third party by the *fiduciaire* in the course of managing the *fiducie* estate". Thus, in the case of a *fiducie*, the French legislator introduced a new conception of the donative intent, where solely the objective element counts, namely the absence or lack of measurable consideration between the *constituent* and the beneficiary.

This prohibition was justified by the fact that in 2006 the posthumous powers (*mandat à effet posthume*), the gradual donations (*libéralites graduelles*) and the residual donations (*libéralites résiduelles*) were introduced in the French legislation. Article 812 of the French Civil Code stipulates that *powers with posthumous effect* enable anyone, during their lifetime, to appoint an agent responsible after the person's death for administering the inherited estate in whole or in part on behalf of one or more heirs and in their interests. Such powers must be justified by serious and legitimate interest in terms of the heir or the inherited estate and the maximum term is relatively short: two years in principle, extendable solely by the courts. Such an agent can solely take protective measures so long as the estate has not been accepted by at least one of the heirs specified in the powers. Taking into consideration that any heir can apply for the courts for the removal of the agent, whose powers end automatically if the heirs sell the assets specified in the powers, the argument that posthumous powers make a *fiducie-liberalité* or a trust futile is an obviously pretence.

Also, neither the *gradual donation* whereby the donor or testator obliges the beneficiary to pass on the inheritance to another person when the first beneficiary dies (French Article 1048, Romanian Article 994), nor the *residual donation* whereby the beneficiary passes on whatever is left of the inheritance or the donations to another designated person when the first beneficiary dies (French Article 1057, Romanian Article 1001) can substitute the trust where the trustee can have the duty to keep the assets received for one or more generation in order to hand them over to the designated beneficiaries.

Nevertheless the main innovation introduced by the fiducia contract is the creation of a separate estate (*patrimoine d'affectation*). Thus, the principle of unity of the patrimony has been cast aside, enabling someone to transfer temporarily the ownership of an asset to a fiduciary, while protecting this asset from fiduciary's creditors so that the transferred asset becomes an „autonomous estate" providing security solely for the fiducia's creditors and not the constituent's or fiduciary's creditors: „without prejudice to the rights of the creditors of the settlor in relation to a security interest established for the benefit of such creditors and published prior to the fiducia contract, and with the exception of cases of fraud relating to the rights of the creditors of the fiduciant, the fiduciary estate

can only be seized by the holders of claims arising from the conservation or the management of such estate" (first paragraph of Article 2025 French Civil Code, first paragraph of Article 786 Romanian Civil Code).

Thus, the introduction of the fiducia contract puts a definitive end to the principle of unity of the estate by allowing fiduciaries to have several separate estates. However, the French Civil Code includes one provision that seems inconsistent with the creation of a separate estate: „If the fiducie estate is insufficient, the fiduciant's estate constitutes these creditors' common security unless the fiducia contract stipulates that the liabilities are borne by the fiduciary in whole or in part" (second paragraph of Article 2025 French Civil Code).

This solution was not included in the Romanian Civil Code and consequently the Romanian creditors can seize only the fiduciary patrimony, if in the fiducia contract isn't stipulated that the fiduciary and/or the fiduciant are also liable (second paragraph of Article 786 Romanian Civil Code). The Romanian Civil Code's solution better illustrates both the distinction between the fiduciary patrimony and the fiduciary's own patrimony and the separation of the fiduciary patrimony from the fiduciant's patrimony.

In the absence of this distinction which fiduciant would consent, unless forced by a credit institution, to transfer assets to a fiduciary while remaining liable for the debts arising from the management of the *fiducie* patrimony over which they lost control? In a certain way it's like abandoning the ownership over a car while remaining liable for the driving mistakes of the new owner.

Conclusions

Although the Romanian and the French fiducia are a first step towards the introduction of a genuine trust law, it's difficult to see under what circumstances fiducia – the Roman real contract's offspring which presents yet some characteristics borrowed from the Anglo-Saxon trust – could provide an effective replacement for the trust. That's why, perhaps, the Romanian and the French legislator would have been more inspired in ratifying The Hague Convention on the law applicable to trusts and on their recognition, considering that a country's legal system, despite its legal tradition, must also be a competitive one.