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FIDUCIARY CONTRACT

Theoretical
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Abstract

Purpose – This study aims to highlight the novelty brought by the institution of fiduciary contract regulated by the New Civil Code.

Design/methodology/approach – Using comparison method, the study empirically examines the institution of the fiduciary contract, the impact of this law institution on the business environment, the conditions of validity of this contract and its effects.

Findings – The study demonstrates that the Fiducia is a progressive institution, a legal warranty instrument and a good business opportunity, but which is not widely used.

Practical implications/originality/value – Taking into account that the Fiducia is a major innovation especially in banking practice, it is necessary to harmonize the regulations of the New Civil Code with other special regulations, to prevent negative interactions that Fiducia may have within solvency law, banking law or corporate law.

INTRODUCTION

The Fiducia institution, a broadly regulated institution within the Anglo-Saxon law system (Great Britain, USA, Canada) under the name of *trust* as well as within the continental systems (France - *la fiducie*, Austria - *treuhand*, etc), was introduced in the new Civil Code in the Romanian

Legislation as well. It should also be noted the fact that this institution has been adopted

by other legal systems as well such as those in Asia, Africa or South America. The reason why this new legal institution has been imposed, shyly regulated before the entrance into force of the new Civil Code, by the Law no. 51/1995 on the lawyer profession, was the fact that it represents a progressive institution (Andor, 2012), a genuine warranty instrument as well as a good business opportunity through which a temporary ownership transfer takes place.

FIDUCIA CONCEPT

Under Article 773 of the new Civil Code, Fiducia is considered to be "the legal operation whereby one or more settlors transfer real rights, rights of claims, guarantees or other patrimonial rights or an ensemble of such rights, present or future, to one or more fiduciary who manage them to a specific purpose, for the benefit of one or more beneficiaries, all these rights forming an autonomous patrimonial mass, distinct from other rights and obligations from fiduciary patrimonies. The legal text regulates as well the forms Fiducia can take, namely: legal Fiducia, the one rising from the law, as well as conventional or contractual Fiducia, the one rising from the

understanding of the parties: the settlor and the fiduciary. (Stanculescu & Nemeș, 2013).

It is necessary to underline the fact that, although the quality of settlor may be held by any natural or juridical person, it is not the same in terms of the quality of the fiduciary. According to legal provisions, the quality of a fiduciary can be held only by credit institutions, investments and investments management companies, financial investments services companies, insurance and reinsurance companies, public notaries and lawyers.

Furthermore, another important aspect to be pointed out is the fact that the law provides certain specific conditions of validity in terms of fiduciary contract. Thus, the fiduciary contract is a solemn contract that will necessarily take the authentic form in order to be considered validly concluded, by the fiduciary contract, under the penalty of absolute nullity it shall be specified the following: real rights, rights of claims, guarantees or any other transferred patrimonial rights, the duration of the transfer that can be made for up to 33 years from the contract conclusion, identity of the contracting parties - settlor, fiduciary, beneficiary - the purpose of Fiducia as well as the scope of administration and provision powers of the fiduciary. The text of law also specifies the fact that Fiducia must be express.

Through Art. 780 of the new Civil Code it is also provided, as well under the penalty of absolute nullity, the obligation to register the fiduciary contract or changes occurred within the fiduciary contract already concluded, at the competent tax authority, at the fiduciary's request, within one month from the conclusion of the contract or the occurrence of changes.

The last penalty of absolute nullity regarding the fiduciary contract refers to Fiducia liberality interdiction. In other words, "the fiduciary contract is affected by absolute nullity if through it is achieved an indirect liberality in favour of the beneficiary".

FIDUCIA APPLICATIONS IN PRACTICE

Based on the experience of the states that have already appropriated this institution, we consider that the main applications of the fiduciary contract into practice are: fiducia constituted as management, fiducia constituted as warranty and fiducia constituted as transfer.

FIDUCIA – MANAGEMENT

The fiduciary contract concluded as management, also known under the name Fiducia-management (Chiric , 2011) is mainly used in financial investments field.

Basically, by this type of fiduciary contract, "the settlor separates a part of its patrimony with the aim of ensuring a steady income for a specific period of time from the administration/management of excluded assets, at least temporarily, from the field of general right of pledge of creditors" (Iord chescu, 2012). In this type of fiduciary contract can be grouped fiduciary contracts - liberalities and fiduciary contracts - credits.

Fiducia - liberality provides a temporary transfer made by the settlor to the fiduciary, following the expiration of a certain period of time the latter to transfer at his turn fiduciary property to the person gratified by the settlor. Practically, instead of directly transmitting from the settlor to the gratified person the ownership subject

to liberality, the settlor firstly yields to the fiduciary that will be responsible for managing these assets until such time as he will have to, in his turn, further transmit the assets ownership to the gratified person.

Fiducia - credit involves the transfer of a patrimony asset by the settlor to the fiduciary, the latter using this asset in order to lend a third party or a person not designated by the settlor.

FIDUCIA – WARRANTY

The fiduciary contract concluded as warranty was created in order to guarantee the payment of debt. In this case only, the fiduciary can also be the beneficiary of the fiduciary contract. Practically, fiducia - warranty represents a contract whereby a debtor transfers to his creditor the ownership of an asset in order to guarantee its debt payment.

Essentially, within the fiduciary contract - warranty (Togan, 2012), the settlor is the debtor of the guaranteed obligation, the fiduciary is the creditor of the guaranteed obligation or even a third party, and the beneficiary can be, either the debtor if at the contract conclusion he has fulfilled his obligations, or the creditor if the debtor has not fulfilled his obligations.

One of the advantages generated by the use of Fiducia-warranty is the fact that it creates the possibility of dividing patrimony in two or more distinct patrimonial masses, which leads to scission of creditors, whereas according to art. 786 of the new Civil Code, they can follow only the assets on which their claim right arose.

FIDUCIA – TRANSFER

Fiducia-transfer represents the version most often encountered in practice, being created with the aim of transferring the ownership right of an asset or on a patrimony, for good and valuable consideration. The onerous nature of fiduciary contract is regulated, under the penalty of absolute nullity by the text law, in Art. 775 of the new Civil Code. Therefore, if the transfer is made free of charge, the fiduciary contract is affected by absolute nullity.

FIDUCIA OPPOSABILITY

Starting from the consideration that by means of fiduciary contract the settlor transfers from its patrimony certain rights to the patrimony of the fiduciary, the law stipulates that Fiducia will be opposable to third parties only at the time of its registration within the Electronic Archive of Real Moveable Securities. Consequently, if real estate rights or real estate securities were transferred they will also have to be registered within the land register, incurring thereby a double registration. Taking into consideration the onerous nature of the fiduciary contract, in other words the fiduciary's right to remuneration, the formalities imposed by the law regarding Fiducia opposability and publicity, as well as the registration within the competent tax authorities, are established by law in the fiduciary person.

FIDUCIARY CONTRACT CHANGE

With regard to fiduciary contract change, Art. 789 par. (2) of the new Civil Code provides that in the event the beneficiary has accepted the fiduciary

contract, then this contract can be changed by the parties only with the consent of the beneficiary or, in the event this agreement lacks, with the authorization of the Court. This reason is required especially if the refusal on contract change appears as an abuse or a manifest fraud on the part of fiducia beneficiary. (St nciulescu & Neme , 2011).

FIDUCIARY ACTIVITIES UNDERTAKEN BY LAWYERS

Fiduciary activities have timidly found their regulation even since 2004, when within the Law no. 51/1995 on the organization and exercise of the lawyer profession were introduced provisions specifying the fact that the lawyer activity is also done by "fiduciary activities of receiving in the deposit, in the name and on behalf of the client, financial funds and assets resulting from exploiting or execution of executory titles, after the conclusion of inheritance proceedings or liquidation, as well as the placement and their valorisation, in the name and on behalf of the client, fund or values management activities in which they have been placed" (Breahn , 2012).

Subsequently, with the entry into force of the new Civil Code and fiducia regulation therein, the provisions of the Law no. 51/1995 have also had to be harmonized with the new normative act. Thus, under the new republished form of Law no. 51/1995 it is provided that Fiducia is one of the activities that can be undertaken by lawyers, in compliance with the regulations of the Civil Code in force.

The status of the legal profession is in addition to Law no. 51.1995 and more broadly regulates, within the Articles 93-

103, the way in which the lawyer can undertake fiduciary activities.

Thus, within the performance of fiduciary activities, the lawyer is required to comply with the limits and the duration of the assigned mandate, these aspects being expressly inserted within the juridical assistance contract concluded on this occasion. Furthermore, in the case where the content of the mandate provided to the lawyer includes the power to dispose of funds, assets, securities or to alienate the client's assets, the lawyer can perform these operations only if this aspect is expressly stated within the content of the granted mandate. Otherwise, the operation will be carried out only after the lawyer shall be specifically authorized, in writing, by the client.

When undertaking fiduciary activities, the lawyer shall act with the diligence of a good owner, proving good faith and professionalism, acting in the sole interest of his client that he does not have to influence directly or indirectly in order to obtain his own benefits, except the lawyer's fees that he charge.

In order to execute this type of mandate, the lawyer can undertake consultancy activities, operations in order to preserve the substance and value of financial funds and entrusted assets, operations to invest movable and immovable assets, securities and other financial instruments under the legal conditions. He can also manage and exploit the investments made by means of contracting material operations and to perform legal operations aimed at enhancing investments value and liquidity.

Furthermore, the normative act also provides the possibility for the lawyer to perform related activities, such as filling tax return and their payment and other

debts of the client related to the administration of such property, collecting fruit and revenues or other investments results, mediation of financial operations etc.

In order to conduct fiduciary activities, the lawyer shall open, according to the provisions of the aforementioned normative act, one fiduciary account for each client for whom he undertakes such activities, account that will be designed to deposit fiduciary funds, namely the amounts received by the lawyer with the title of initial fund or resulting from its practical application or the entrusted assets. From this account will be made all payments relating to fiduciary activities conducted by the lawyer and, in this account as well shall be collected all the amounts resulting from fiduciary activities. It is also necessary to mention the fact that in this account cannot be stored other amounts except fiduciary funds.

The lawyer shall keep a register or an equivalent record system where he shall record, for each client, the client's identity and the operations undertaken, the deadline for registering fiduciary operations being no more than 3 days after their carrying out. All such records relating to fiduciary activities undertaken must be kept for a period of at least 10 years.

CONCLUSIONS

Although in practice it is possible to register as well disadvantages in relation to the introduction and the application of the fiducia institution, in general, the emergence of this new law institution can only represent a real gain for all business players, especially for banking institutions, being thus registered an economic and

social progress, the institution itself being a progressive institution.

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