PRACTICAL ASPECTS REGARDING FIDUCIARY OPERATIONS

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Abstract

The trusts have been frequently used in the countries which function under the Anglo-Saxon law system, but it most certainly represents an innovation in the new Romanian legislation. For this reason, in this paper, we tried to highlight the main differences between the trust regulated in the Romanian Civil code and its corespondent in other legal systems. Observing that the trust in an institution that is mainly theoretical, and the reluctance of practicioners in using it, we tried to analyze the trust, regarding its practical side. In this paper, we will take into consideration the following aspects: the rights that the trustee acquires after establishing the trust, that will be explained through the new regulations regarding the division of assets, the quality of the parties and the limits in which the trustee may be held liable. Other important aspects are: the means that the new regulations provide in order to protect the interests of the creditors and at the same time, the fiduciary assets; the formalities which the law requires and the means of termination of the contract. In the end, in order to identify alternative solutions, we will compare the trust (regulated in the Civil code) with the management of assets that belong to a third party.

Keywords: *fiducia, fiduciary mass of assets, settlor, trustee, beneficiary.*

JEL Classification: K11, K12

1. Comparative Law. The corespondent of the *fiducia* in common law and French law

The trust in the Romanian law represents an innovation of the new Civil Code. It is a modern institution, which is frequently used in other law systems. The regulations regarding the trust in our law system were a consequence of the introduction of the same concept in French law. The *fiducia* in French law was created by adapting the trust from common law to the one in continental civil law, with some differences of regulatory purpose.

In common law, the trust allows the settlor to transfer property (or other rights that belong to him) to a trustee, with the purpose to manage it in the benefit of a third party (beneficiary), having a determined finality. It is specific for the trust, that the trustee has a legal ownership, in accordance with the common law, while the settlor has the equitabile ownership, in accordance with the equity law[2]. Thus, the essential difference between the *fiducia* and the trust is the simultaneous existance of two owners of property rights over the same asset or mass of assets, without being the case of joint property. This aproach is incompatible with the regulations from the Romanian Civil Code, the *fiducia* being not a division a of property, which is the case of the trust, but a division of assets.

Another trust regulation provides that it can also be created *mortis causa*[3], with the purpose to gratify a person or for charity. In the case of fiducia, it can be created only by law or contract. Also, the fiducia created with the purpose to constitute indirect donations in the beneficiary's favour is subject to the penalty of nullity[4].

Another essential difference between these institutions is the fact that the *fiducia* is subject to many form requirements, which are not present in the trust law. While the *fiducia* is required to be created in the form of an authentic document[5], in the common law system, the trust represents a consensual contract. In the UK, the trust can be created without fulfilling any form requirements, with the exception of trusts over immovable property, which require a written form, according to the *Law*

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[2] I. Popa, *Contractul de fiducie reglementat de Noul Cod civil*, in „Revista Română de Drept Privat" no. 2 /2011.

[3] Uniform Trust Code, 2010, stipulates that in the USA there are two types of trust: testamentary trusts (*trust in a wil)* and *inter vivos trusts*.

[4] Art. 775 C.civ.

[5] Art. 774 C.civ.

of Property Act[6]. In contrast with the common law system, in which the trust does not have to become public, under the Romanian law, the trustee is obliged to comply with the forms of publicity (registration of the contract in The Electronic Archive for Secured Transactions and the tax authorities). This regulation has been criticized by the doctrine, because of the fact that imposes excessive form requirements, and as a consequence, the practitioners are being reluctant in using the *fiducia*[7].

There are important differences between these two institutions regarding the quality of the parties. A controversy that has arised in the doctrine regards the holding of the capacity to become a settlor or a trustee by the same person, aspect that will be clarified later in this article, with the mention that a clear regulation in this matter does not exist. In trust law, the settlor can be a trustee at the same time[8].

The trust in the common law system has a great importance and it is widely used for the purpose of managing assets. In continental law, the *fiducia* – the corespondent of the trust – has been regulated with appropriate modifications. In the French Civil Code, the fiducia has been regulated in 2007, and the Romanian legislator has chosen to precisely undertake these regulations in the New Civil Code.

The fiducia in French law had as an inspiration the Quebec Civil Code. Nonetheless, there are essential differences between the two regulations. The Quebec Civil Code does not stipulate who is the owner of the rights transfered; it stipulates who is not: „*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.*"[9]. In our law system, these regulations would be incompatible with the provisions of art. 31 from the Romanian Civil Code, which do not allow the existance of a mass of assets without an owner.

2. Short history regarding the fiducia in the Civil Code of 1864

The Civil Code of 1864 did not make any references to the *fiducia* and in practice, this institution was almost inexistent. Nonetheless, the doctrine[10] states that the fiducia is not an innovation of the new Civil Code, being regulated in other normative acts, such as: Law no. 51/1995 regarding the organization and the exercise of the legal proffesion, which mentioned the right of the lawyer to be part of fiduciary operations.

Under another opinion[11], the operation regulated by this law did not have the nature of a fiduciary operation, but the one of trust mandate. Another argument for this thesis is the inexistance of the division of assets in the Civil Code of 1864, which is a mandatory condition for the *fiducia*.

3. *Fiducia* in the New Civil Code

The *fiducia* in the Romanian legal system represents an application of the division of assets stipulated in art. 31 para. (3) of the Civil Code[12].

In accordance with art. 773 of the Civil Code, the *fiducia* represents „*the legal operation whereby one or more settlers (constituitori) transfer rights in rem, debt rights, guarantees or other patrimony rights or a combination of such rights, present or future, to one or more trustees (fiduciari)*

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[6] Law of Property Act 1925, Section 53, lit. b): „ *a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will"*.

[7] In the period of time between 1.06.2012-1.11.2016, 60 contracts regarding fiduciary operations have been registred in The Electronic Archive for Secured Transactions, which, from our point of view, proves the limited use of this institution in Romania.

[8] D. Moreanu, *Fiducia şi trust-ul. Definiţie, utilizări practice şi deosebiri principale,* in „Revista Institutului de Cercetări Juridice "Acad. Andrei Rădulescu" a Academiei Române", no. 2/2014.

[9] Quebec Civil Code, art. 1261.

[10] A. G. Atanasiu, *Fiducia,* in „Revista română de drept al afacerilor" no. 4/2011.

[11] D.-D. Bolduţ, *Fiducia - operaţiune juridică insolită în dreptul românesc (I)*, in „Revista română de drept al afacerilor" no. 9/2014.

[12] G. Boroi, C.A.Anghelescu, B. Nazat, *Curs de drept civil. Drepturi reale principale,* 2nd ed., Ed. Hamangiu, Bucharest, 2013, p. 202.

which they carry out with a targeted purpose, for the benefit of one or more beneficiaries (beneficiari)".

Thus, the legislator stipulates that following the constitution of the fiducia, the patrimony is divided, being split from the patrimony of the settlor and transfered to the patrimony of the trustee, remaining divided from the rest of the trustee's patrimony. The mechanism of the *fiducia* leads to the creation of an autonomous mass of assets, distinct from the patrimony of the trustee, this rule being consacrated in the 2nd thesis of art. 773 of the Civil Code „*these rights shall form an autonomous patrimonial mass, distinct from other rights and obligations of the trustees' patrimony*".

Even though the legislator uses the expression „*rights are transfered*",in accordance with the provisions of art. 784 of the Civil Code, in relation to third parties, the trustee will exercise „*full powers regarding the fiduciary mass of assets*".

In our opinion, the legislator was not clear enough regarding which rights does the trustee have concerning the patrimonial mass. The doctrine has established that the trustee aquires the three property attributes: *possession, use* and *disposition*[13] because the transfer of the fiduciary mass of assets requires the transmission of a title and not of a *de facto* situation[14]. Nonetheless, the property right of the trustee is not a typical property right as described in the Civil Code.

The rights of the trustee have some limitations that are established by law, as well as by the agreement of the parties. The trustee may exercise all the attributes of the property right regarding the fiduciary mass of assets, but he may do so for the sole purpose determined in the contract, in accordance with the settlor's will[15]. The trustee is also bound in the exercise of his rights by his obligation to give account for the acts he concluded in the period the *fiducia* was in effect[16]. Another important difference between the „fiduciary property" and the „classical property" is that the classical property is perpetual, while the fiduciary property is always temporary and cannot exceed 33 years[17].

In accordance with art. 774, para. (1) of the Civil Code, the sources of the *fiducia* are the law and the contract concluded in an authentic form. Regarding the law as a source of the *fiducia*, the doctrine[18] stated that it is just a possibility the legislator has awarded himself in order to establish in the future a legal *fiducia*, the only real source of the *fiducia* being the contract.

Regarding the parties of the *fiducia* contract, these are regulated by art. 776 of the Civil Code: the settlor, the trustee and the beneficiary.

In the following, we will analyze the persons which can aquire these qualities and the posibility that one person fulfills more than one role.

The settlor is the person which transfer rights *in rem*, debt rights, guarantees or other patrimony rights. Regarding the settlor, the Civil Code stipulates that „*any natural or legal person may have the quality of a settlor in the fiducia contract*"[19]. The article does not establish any specific condition regarding the settlor. Consequently, the only condition is the one stated in the general provisions concerning the validity conditions of a juridical act, namely: the capacity of concluding contracts, in this case, the capacity to alienate these rights.

In accordance with art. 776 para. (2) and (3) of the Civil Code, the trustee can be one of the following: credit institutions, investement companies, insurance companies, public notaries and lawyers. The legislator chose to limit the quality of the trustee to this categories of practicioners, in order to protect the interests of the settlors and the beneficiaries, by confering the quality of trustee to qualified persons, which have the necessary abilities for a efficient management of the fiduciary mass of assets[20].

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[13] G. Boroi, C.A.Anghelescu, B. Nazat, *op.cit.*, p. 203
[14] A.C.Safta, M.V.Buliga, *Consideraţii privind regimul juridic şi fiscal al fiduciei*, in „Revista Română de Drept Privat" no. 4/2012
[15] Art. 779, letter f) of the Civil Code
[16] Art. 783 C. civ.
[17] Art. 779, lit. b) C. civ.
[18] Al. Berdah, *Fiducia*, in D.A. Popescu (coord.), *Specificitate şi complementaritate în dreptul privat european*, Ed. Hamangiu, Bucharest, 2012, p. 437., *apud.* David-Domiţian Bolduţ, *loc.cit.*
[19] Art. 776 alin. (1) C.civ.
[20] I.R.Urs, P.E.Ispas, *Drept civil. Teoria drepturilor reale*, 2nd ed., Ed. Hamangiu, Bucharest, 2015, p. 278.

Therefore, we agree to the opinion stated in the doctrine, that the „*essence of this contract is the trust that the settlor offers the trustee, regarding the fact that by creating a fiducia, the settlor loses control on the transfered assets*" [21]. A direct consecquence represents the interdiction of the trustee to replace himself with a third party, the contract being an *intuitu personae* contract.

Analyzing the legal provisions regarding the settlor and the trustee, the question that arises is if these two qualities could be overlapped. As long as the legislator nor regulates neither prohibits this posibility, we could think that these two qualities could be fulfilled by one person. The doctrine expressed a contrary opinion, excluding the possibility of overlapping the settlor's and the trustee's quality[22]. Supporting this opinion, the doctrine refers to the provisions of art. 774 para. (1) of the Civil Code, which regulates the sources of the *fiducia* (the law and the contract). Therefore, in the case of overlapping these two qualities, the *fiducia* would have its source in an unilateral act, which is contrary to the legal provisions stated above.

The beneficiary is the person in whose benefit the trustee exercises his rights, and who will aquire the property over the fiduciary patrimony and the end of the contract. Art. 777 of the Civil Code does not impose any limits regarding the quality of the beneficiary. The beneficiary could be the settlor, the trustee or a third party. In case the beneficiary is a third party, the mechanism of the stipulation for others comes in force. Therefore, the right that is exercised in his benefit arises at the moment the third party accepts the *fiducia*. We support this conclusion by refering to the provisions of art. 789 para. (2) of the Civil Code: „*the fiducia contract is subject to unilateral termination as long as it was not accepted by the beneficiary*".

Thus, from a practical point of view, the person which intends to create a *fiducia* in his benefit or in the benefit or a third party, has to be cautious in choosing the trustee, because following the creation of the *fiducia*, the settlor will have limited control over the fiduciary mass of assets, while the trustee will be able to exercise all the attributes of the property right over the fiduciary mass, being limited only by the purpose stated in the contract.

Another important practical aspect is the impossibility of the settlor to be a trustee at the same time. Thus, a person who intends to separate a mass of assets through this institution should not find himself in the situation in which the *fiducia* never existed because of his incapacity to be a trustee.

The parties of the contract should not forget that all the validity conditions regulated by the general provisions that apply for the conclusion of a contract (object, cause, capacity, consent) also apply in the creation of a *fiducia*, and the infringement of this provisions will lead to the nullity/anullment of the contract, with the consequence that all the operations concluded inside the fiduciary mass never existed.

4. The limits in which the trustee may be held liable

In accordance with art. 779 letter f) of the Civil Code, the *fiducia* has to mention, under the penalty of nullity, the purpose of the *fiducia* and the powers of administration and disposition of the trustee. Thus, from the moment the *fiducia* was created, the settlor gives the fiduciary property a destination compliant with the purpose of the contract. A problem which might arise in practice is the liability of the trustee, in the case of violation of this contractual provisions. The legislator stipulates some methods of measuring the eficiency of the trustee, based on which the trustee will be held liable or not:

- art. 783 para. (3) of the Civil Code regulates that „*if the act is harmful to the settlor, it will be considered that the act has been concluded by the trustee in his own name*"
- in accordance with the provision of art. 787 of the Civil Code: „*for the prejudice caused by a preservation act or an administration act, the trustee is held liable only with the rights that belong to the fiduciary mass*"

[21] D.-D. Bolduț, *loc. cit.*
[22] I. Popa, *loc cit.*

Per a contrario, we can conclude that the prejudice caused by disposition acts will be repaired only with the rights from the fiduciary patrimony, which we consider a deficiency of this regulation.

The provisions of art. 785 of the Civil Code stipulate that „*the opening of the insolvency procedure against the trustee does not affect the fiduciary mass of assets*".

The legislator neglects to regulate the situation in which the beneficiary would fall under the protection of the insolvency law. The doctrine[23] states that the opening of the insolvency procedure against the beneficiary would not have any consequences regarding the *fiducia* and does not represent a cause of termination of the contract. Thus, the liquidation or the deregistration from the Trade Register Office of the beneficiary (legal person) would lead to the termination of the contract and the transfer of the fiduciary mass to the settlor, in accordance with the provisions of art. 791 of the Civil Code.

In practice, the liability of the trustee represents an important aspect for the settlor. It is essential that the settlor is aware of the possibilities he has in order to hold the trustee liable for the acts that caused him a prejudice and to track the way in which the assets from the fiduciary mass are being harnessed.

Another situation that can be often seen in practice is the opening of the insolvency procedure against one party of the contract. Thus, it is very important for both the settlor, that due to the fact the fiduciary mass is distinct from his patrimony, the opening of the insolvency procedure will cause no effects regarding the *fiducia*.

5. The purpose of the fiducia. The situation in which the fiducia is created to the prejudice of the creditors

The doctrine[24] stated that the *fiducia* will represent an instrument at the disposal of business people in order to limit the risks of foreclosure. However, the mediate and imediate cause of the fiducia has to be licit, the legislator excluding the creation of the *fiducia* in order to avoid foreclosure.

In other legal systems, the fiducia is used for the management of rights i.e. the situation in which the settlor stipulates that the beneficiaries will be his descedents which do not have legal capacity.

The legislator, with the intention to create a legal balance, enforced rules that protect both the settlor's creditors and the assets that belong to fiduciary mass.

Art. 786 para. (1) of the Civil Code states that the assets that are part of the fiduciary mass can only be foreclosed by the creditors who have a debt regarding the fiduciary mass. There are 2 exeptions from this rule:

- the situation in which a personal creditor of the settlor has established a security interest which he has made binding, prior to creating the *fiducia*;
- the situation in which the settlor's creditors are entitled to foreclose the assets of the fiduciary mass of the trustee, if subsequently, the contract is terminated or became non-binding through an order which became permanent.

The last exception is fundamented on the fact that the assets which were part of the fiduciary mass never left the settlor's patrimony, the termination taking retroactive effects.

According to the rule established by art. 786 para. (2) of the Civil Code, the trustee's creditors have a common guarantee over the fiduciary mass. An exception to this rule is the situation in which the contract regulates the obligation of the trustee/settlor to be held accountable for a part or for all the liabilities with his own patrimony. In such case, the creditors will foreclose the assets of the fiduciary mass, and subsequently, the assets of the trustee/settlor within the limits and order regulated by the contract.

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[23] L.M.Harosa, *Scurte considerații asupra fiduciei în reglementarea Noului Cod civil*, in „Revista Română de Drept al Afacerilor" no. 9/2013.

[24] G.Piperea, *Cine se teme de Noul Cod civil?* available on: http://www.bursa.ro/cine-se-teme-de-noul-cod-civil-141170&s =print&sr =articol&id_articol=141170.html [accessed on 13.11.2016].

A very important practical aspect for the creditors is their posibility to foreclose the assets that belong to the fiduciary mass, if the *fiducia* was created in their damage, through the *paulian action* – a claim made by a creditor against a third party to rescind any transfer of property made to the third party by the debtor done to frustrate enforcement of the creditor's debt.

At the same time, the settlors should be aware of the fact that if the purpose of the fiducia is illicit, and the paulian action is made by the creditor, they will expose themselves to the risk that the assets from the fiduciary mass could be foreclosed.

6. The opposability and the validity of the *fiducia*

The Romanian legislator chose to create a strict legal framwork regarding the fiducia, establishing some conditions regarding the capacity of the trustee, the interdiction of indirect donations through the fiducia, the obligation to register the fiducia in The Electronic Archive for Secured Transactions and at the tax authorities[25].

In accordance with the Civil Code, one of the obligations of the trustee is to register the contract, in one month from it's conclusion, at the tax authority, under the penalty of nullity.

This cause of nullity represents an innovation of the legislator, because it establishes a nullity cause subsequent to the conclusion of the contract. In our opinion, the contract is presumed to be valid and will be confirmed to be valid by registering it, or will be deemed invalid if the trustee does not fulfill this obligation. In the case of the transfer of a right *in rem* over an immovable, the registration in the Real Estate Register will be temporary, if the parties request it, under the condition of subsequent tax registration.

Regarding the tax regulations in the case of transfer of immovable property, we consider that the income tax will not apply, because through the *fiducia*, the parties do not obtain a taxable income.

We deem that the formalities regarding the opposability of the fiducia are absolutely necessary, because they have the role to protect the parties' interest and their creditors.

In conclusion, regarding this provisions, the registration of this contract at the tax authorities under the penalty of nullity could cause problems in practice, due to the uncertainty that exists in the period of time between the conclusion of the contract and its registration.

7. The replacement of the trustee and ceasing of the *fiducia*

The Civil Code stipulates in art. 790 that the fiducia ceases „either at the end of the period on which the *fiducia* was created or by achievement of the purpose stated in the contract" [26]. Another way of ceasing the *fiducia* is the waiver statement from all the beneficiaries, in the case in which the parties did not stipulate the way the fiduciary operations will continue.

Regarding the termination of this contract, it is a question if the *fiducia* can end through dissolution, even if it is not expressly stated in the articles regarding the *fiducia*. Being a contract, it can be assumed that it could be terminated by ressolution, the provisions regarding the fiducia being completed with the general provisions which apply to contracts[27].

On the other hand, art. 788 of the Civil Code regulates the replacement of the trustee, which can be made only by adressing the court. An interesting fact is that the reason that leads to replacement, the breach of contractual obligations, is exactly the essential condition for dissolution.

One hypothesis would be that the legislator regulated a specific institution, which applies in the same conditions as the dissolution of the contract, yet on a restrained area (the *fiducia* exclusively).

The question that arises is if that specific institution collides with the dissolution of the contract and excludes it.

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[25] Art. 775; 776; 780, 781 C.civ.

[26] Art. 790 C.civ.

[27] C. Popa, *„Înconjurată de o maximă discreție: Fiducia"*, available on: http://dezbateri.juridice.ro/6660/inconjurata-de-o-maxima-discretie-fiducia [accessed on 13.11.2016].

Also, applying a systematic interpretation on art. 788-790 of the Civil Code, results the idea of continuity that is characteristic for this contract, thus the patrimony mass can not be abandoned and can not remain without an owner. This is the justification of the mechanism of replacing the trustee in case of breach of contract.

On the other hand, the situation in which the dissolution of the contract could be applied has the advantage of celerity, in comparison with the replacement of the trustee in court. The replacement would normally take a long time, in order for the court to name a interim administrator and afterwards naming a new trustee, process that would affect the *intuitu personae* character of this contract.

8. Comparison: fiducia vs. management of a third party's assets

Due to the formalities established by the legislator for the fiducia, the institution of managing the assets that belong to a third party would be a alternative solution.

Hereinafter, we will present the main differences between these two institutions:

Regarding the division of patrimony, in the case of the administrator, he manages the assets that belong to a third party, while the trustee manages the assets from a patrimony mass that belongs to him, even though it is divided from his patrimony.

While anyone can have the capacity of an administrator, the capacity of a trustee is detained only by the persons named in art 776 para. (2) of the Civil Code, regulations which established another condition for the creation of the *fiducia*.

The capacity of an administrator can be obtained by contract or will, while the *fiducia* has its source in law or contract. The enumeration is restricting, therefore, the *fiducia* can not be created *mortis causa*.

In case of the management of a third party's assets, in accordance with the provisions of art. 806 of the Civil Code, the administrator is restricted to aquire rights regarding the assets he manages, except the situation the beneficiary allows it. Unlike the management of a third party's assets, in case of the *fiducia*, there isn't any similar legal provision, therefore, the trustee could be the beneficiary at the same time.

Regarding the termination of contract, in the case of management of a third party's assets, the contract can be termined in one of the ways stated in art. 846 of the Civil Code, inclusively by unilateral termination from the beneficiary. The termination of the *fiducia* could be done in one of the situations stated in art. 790 of the Civil Code: at the end of the period on which the *fiducia* was created or by achievement of the purpose stated in the contract, by a waiver from the beneficiary, by opening the insolvency procedure against the trustee or when the legal person is subject to reorganisation. We deem that such a regulation in the case of the *fiducia* would be necessary, because it will grant the beneficiary the possibility to terminate the contract by dissolution.

In practice, it is very important not to confuse this two institutions, because in the case of the *fiducia*, the trustee becomes the owner of the transfered rights, being not just a simple administrator. The trustee will act in his quality of the owner over the fiduciary mass, managing his own assets, and not the ones of a third party.

However, the management of a third party's assets could be an alternative solution for the fiducia, having the advantage that the owner of the assets maintains control over the assets in his patrimony.

At the same time, the person who would like to name an administrator to manage a mass of assets that belongs to him, has to keep in sight that this mass of assets will not represent a separated mass from his entire patrimony.

In choosing one of this two institutions, it is important to keep in sight the final purpose of the operation, each of this institutions having a different finality. In the case of the fiducia, the settlor aims to separate a patrimony mass which will be subsequently transfered in the patrimony of a third party or will return in his own patrimony. In the case of managing a third party's assets, the owner aims to obtain an efficient exploitation of the assets.

9. Conclusion

In this article we tried to underline the most important theoretical aspects regarding the *fiducia*, but also the practical utility of this institution from the perspective of the national regulations, but also in regard with the opinions expressed in the doctrine.

Regardless that the practicians are being reluctant in using this institution, we consider that the *fiducia* presents some benefits for them, having the advantage of limited liability over the assets from the fiduciary mass.

From our point of view, the *fiducia* has the main advantage of division of the assets, by creating a distinct patrimony pass. A situation in which a person would be tempted to use the *fiducia*, is the case in which the settlor would find himself in the situation of incompatibility regarding companies, and by naming a trustee for a certain amount of time, this incompatibility would be eliminated. Another example of practical utility of the *fiducia* would be creating it with the purpose of security, in the case in which the debtor (the settlor) would transfer through the means of *fiducia* certain assets to the creditor (the trustee), which has the obligation to remit the assets at the end date settled in the contract, if the settlor has fulfilled his obligations.

In conclusion, the entities that have the capacity to be a trustee should encourage their clients to use this institution, its benefits being undeniable. For this reason, we consider that in the future the number of entities that will act in their quality of trustees, which for now, from the informations presented by the The Electronic Archive for Secured Transactions, is 17, will increase, and the *fiducia* will be a institution frequently used in economical transactions.

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12. Law of Property Act 1925.
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