SOME CONSIDERATIONS REGARDING THE REGULATION OF „FIDUCIA" IN THE CIVIL CODE OF THE REPUBLIC OF MOLDOVA AND IN THE CIVIL CODE OF ROMANIA

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Abstract

The „fiducia" represents a new institution in the legal system of the Republic of Moldova, being introduced by the Law on the modernization of the Civil Code and the amendment of some legislative acts, no. 133 of 15.11.2018, in force since 01.03.2019. In the process of elaborating the legal framework, the legislator took into account international legislative developments, including the provisions of the Civil Code of Romania. However, the basic source of regulation in the Republic of Moldova was the Book X – „Fiducia" of the Draft Common Frame of Reference of the European Union. Therefore, there is a considerable difference between the „fiducia" under the Civil Code of the Republic of Moldova and the „fiducia" under the Civil Code of Romania. This article aims to present in a comparative aspect the institution of „fiducia" in the light of the regulations of both states. Mainly, some terminological issues will be discussed and some conceptual similarities and differences will be revealed, which concern important aspects such as: sources of „fiducia", fiduciary parties, conditions, grounds for termination of the „fiducia" etc.

Keywords: *„fiducia", trust, sources of „fiducia", fiduciary contract, fiduciary parties, termination of „fiducia".*

JEL Classification: K11, K12, K15, K22

1. Introduction

The fiducia represents a new institution in the legal system of the Republic of Moldova, being introduced by the Law on the modernization of the Civil Code and the amendment of some legislative acts, no. 133 of 15.11.2018, in force since 01.03.2019.

According to the Information Note[2] to the draft of this law (hereinafter Information Note), the introduction of the institution of fiducia in the Civil Code of the Republic of Moldova (hereinafter also *C.civ.RM*) aimed to modernize national private law, to respond to practical needs in the increasingly complex civil and commercial circuit, but also to ensure the implementation of some novelties introduced by other modifications and completions operated by the same law. Following these goals, the Book 3 of the Civil Code of the Republic of Moldova was completed with *Title IV - "Fiducia"*. In the process of elaborating the legal framework, the legislator took into account the legislative developments at the international level, including the provisions of the Civil Code of Romania (hereinafter also *C.civ.Rom.*). However, the basic source for the regulation in the Republic of Moldova was the content of Book X - "Fiducia" from the Draft Common Frame of Reference of the European Union (hereinafter *DCFR*).

Taking into account the fact that the Romanian legislation is also indicated as a source of inspiration for the legislator, the natural question arises: to what extent is the fiducia regulated in the Civil Code of the Republic of Moldova similar to the fiducia regulated in the Civil Code of Romania? We will try to offer the answer in the content of this paper through the prism of the analysis of some important aspects. The subject is of particular interest because, due to its common history, culture and language, there is an inseparable link between these two legal systems and between the needs and perceptions of society. The civil laws of the Republic of Moldova and Romania are based on similar institutions and principles, and in the specialized doctrine the authors cite each other and often analyze legal issues in terms of jurisprudence in both states. Therefore, it is really curious if there is the same common thread in the matter of fiducia.

To elucidate this topic, we will mainly use the comparative method and present the regulations

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[2] Information note on the Draft Law on Modernizing the Civil Code and amending and supplementing some legislative acts, the document is available online at: http://particip.gov.md/public/documente/131/anexe/ro_5067_NFCivilNew.pdf (last accessed at 06.11. 2020), p. 98.

of the two states in terms of essential similarities and differences. In particular, we will highlight the sources of inspiration of legislators in both states, the similarities and conceptual differences between these two regulations, terminological issues, similarities and major differences in various concrete aspects (sources of fiducia, parties, conditions, grounds for termination, etc.).

2. Sources of inspiration for fiducia regulation

In order to perceive the essence of the two existing institutions in Romania and in the Republic of Moldova, which both bear the name of "fiducia", it is useful to mention the basic sources from which the legislators were inspired.

The fiducia introduced in the Romanian Civil Code (Law no. 287 of 17.07.2009), in force since 01.10.2011, "was inspired by the similar regulation of French law"[3], i.e. the provisions of the French Civil Code, which were introduced by the Law no. 2007-211 from 19.02.2007. This fact is also revealed by a simple comparison of structure: in the French Civil Code fiducia is regulated in Book III ("*Des nouvelles manières dont on acquiert la propriété*"), Title XIV ("*De la fiducie*"), which contains 21 articles (art. 2011 - art. 2030), and in the Civil Code of Romania - in Book III ("On goods"), Title IV ("Fiducia"), which includes 19 articles (art. 773 - art. 791). Of course, the similarity is confirmed especially by the content of the provisions contained in these two civil codes.

The fiducia introduced in the Civil Code of the Republic of Moldova by the Law on the modernization of the Civil Code and the amendment of some legislative acts, no. 133 of 15.11.2018, in force since 01.03.2019, as we mentioned before, is based on Book X - "Fiducia" from DCFR, developed by the academic environment in Europe[4]. Analyzing structurally, we note that the rules on fiducia are found in the DCFR in the Book X ("Fiducia"), which contains 10 chapters - 116 articles, and in the Civil Code of the Republic of Moldova - in the Book III ("Obligations"), Title IV ("Fiducia"), which contains 10 chapters - 107 articles (art. 2055 - art. 2161). Again, the similarity is argued precisely by the content of the rules. The Information Note states that, in addition, the latest legislative developments at international and European level have been studied and taken into account, of which the following are particularly noteworthy: a) The French Civil Code; b) The Civil Code of Romania; c) Quebec Civil Code; d) the draft EU Directive on Protected Funds (draft EU Directive on Protected Funds), published in 2004. However, if we analyze the content of the rules, it is clear that the Civil Code of the Republic of Moldova has almost taken over the provisions of DCFR, with some indispensable adaptations.

Therefore, if the Romanian fiducia is considered to be "almost faithfully seconded"[5] by the French fiducia, then about the fiducia in the Republic of Moldova we can say that it follows with a similar fidelity the model of fiducia in DCFR.

3. Identical terminology, different regulation

As we reported above, both in the Civil Code of Romania and in the Civil Code of the Republic of Moldova is regulated the institution called "Fiducia".

According to art. 773 C.civ.Rom., "Fiducia is the legal operation by which one or more constituents transfer real rights, rights of claim, guarantees or other patrimonial rights or a set of such rights, present or future, to one or more trustees exercising them for a specific purpose, for the benefit of one or more beneficiaries. These rights constitute an autonomous patrimonial mass, distinct from the other rights and obligations from the patrimonies of the trustees." Respectively, in accordance with art. 2055 C.civ. RM, "fiducia is a legal relationship in which a party (fiduciary) is obliged to become the owner of a patrimonial mass (fiduciary patrimonial mass), to administer and dispose of it, in accordance with the conditions governing the report (conditions of trust), for the benefit of a beneficiary or to promote a purpose of public utility."

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[3] Daniel Moreanu, *Fiducia și Trust-ul*, C.H. Beck, Bucharest, 2017, p. 11.
[4] Information note on the Draft Law on Modernizing the Civil Code and amending and supplementing some legislative acts, pp. 98.
[5] Sergiu Golub, *Notarul fiduciar - de la teorie la practică*, „Buletinul Notarilor Publici", vol. 1, no. XXII, 2018, p. 11.

The wording by which the legislators chose to define trust differs, but the terminology used in the two legislations is identical and includes the same fundamental notions, such as: "trust agreement", "constituent", "trustee", "beneficiary", "fiduciary patrimony" etc. In this sense, the question arises whether these two institutions are identical? The answer is no: although the "trust" in Romania and in the Republic of Moldova are similar in many respects, they are not identical, because there are some essential differences between their regulations.

Following the regulation in the spirit of DCFR, the concept of trust in the Republic of Moldova is more comprehensive than the concept of trust in Romania or France, in the sense that the regulation in the Republic of Moldova is more developed and less restrictive - more sources of trust are provided, not trusts-liberalities are forbidden, fewer conditions are imposed for the establishment of a trust, there are no restrictions regarding the persons who can hold the quality of trustee, etc. Therefore, the trust in the Republic of Moldova can find a much wider applicability and, by comparison, presents itself as an institution much closer conceptually (but we note that it remains, however, far enough away) from the original trust, which is of Anglo-Saxon origin. Therefore, this "closeness" to the institution of English and American law presupposes, of course, that there are a multitude of problematic issues concerning the compatibility of the institution with the legal system of the Republic of Moldova, the solution of which remains at the expense of doctrine. A large part of these conceptual problems also exists regarding the Romanian or the French trust, being already approached in the specialized literature.

Therefore, the research of the works of Romanian and French authors can contribute enormously to elucidating the essence of fiducia in the Republic of Moldova (the subject not yet addressed in the national legal literature), along with analysis and other sources of trust in common law and trust-like mechanisms introduced in the legislations based on the civil law system. Studying various works, we notice that, in the Romanian and French doctrine, many authors clearly delimit "fiducia" from "trust", identifying similarities and differences. This approach, which links certain characteristics of the institution to one name or another, we perceive as a result of the fact that the regulation of trust in Romania and France is much more restricted than that of common law or Quebec (for comparison, we refer to both models, because in the cradle of these two systems the trust/"fiducia" knows the most advanced developments). Therefore, in Romania and France was introduced an institution that had as prototype the common law trust (it was wanted that the institution has the same functions, to meet the same needs of the civil or commercial circuit), but which was adapted to the specifics of the system. civil law and therefore underwent a real change from the original mechanism, which dramatically removed the concept of "fiducia" from the concept of "trust".

In these circumstances, it is fully justified to delimit 'fiducia' from 'trust' and to keep the term 'fiducia'/'fiducie' even in English writings, without translating it as 'trust'. For example, in the paper "The French *fiducie*, or the chaotic awakening of a sleeping beauty", François Barrière intentionally did not translate the phrase "fiducie" into English and even made the following statement: "When using the English language, civilian legislation and doctrinal writers often use the term 'trust' for these institutions within their law. However, the present text employs the term 'trust' for the common law's institution of the trust, and the French term fiducie for the transplants, adaptations and analogues of the trust within civil law jurisdictions."[6] We notice that most Romanian authors[7] also use the phrase

[6] François Barrière, *The French fiducie, or the chaotic awakening of a sleeping beauty*, in Lionel Smith (ed.), *Re-imagining the Trust: Trusts in Civil Law*, Cambridge University Press, Cambridge, 2012, p. 222.

[7] In this regard, see: Günay Duagi, *The fiduciary management and its applications in the Romanian law*, „Perspectives of Law and Public Administration", vol. 8, no. 2, 2019, p. 257-264; Günay Duagi, *Comparative analysis between fiducia and other contracts in the Romanian Civil Code*, „Juridical Tribune – Tribuna Juridica", vol. 8, no. 2, 2019, p. 257-264; Cornelia Lefter, Günay Duagi, *The parties of fiduciary contract*, „Juridical Tribune – Tribuna Juridica", vol. 7, no. 2, 2017, p. 77-88; Mihnea-Dan Radu, *Fiducia: from fides to trust and the New Romanian Civil Code regulation*, „Valahia University Law Study", vol. 20, no. 2, 2012, p. 238-246; Luminița Gheorghe, *Fiducia in the New Civil Code: an example of vitalization by international business law of the relationship between romanian law and common law*, „Perspectives of Business Law Journal", vol. 3, no. 1, 2014, p. 276-283; Camelia Ignătescu, *Regulatory challenges the notion of fiduciary in the New Civil Code*, „European Journal of Law and Public Administration", vol. 2, no. 1, 2015, p. 25-31; Daniel Moreanu, *The trust under Romanian law. form of patrimony split for natural and legal persons*, „Perspectives of Business Law Journal", vol. 4, no. 1, 2015, p. 79-86; Bazil Oglindă, *Practical aspects regarding fiduciary operations*, „Perspectives of Business Law Journal", vol. 5, no. 1, 2016, p. 220-227.

"trust" in English writings, without translating it as "trust".

We discuss these issues in order to determine how to interpret multiple important texts aimed at *fiducia*, which could serve to elucidate the essence of the existing institution in the Republic of Moldova. As we mentioned above, when we study sources from Romanian or French literature, we often encounter the description of the institution of *fiducia* first delimited by the concept of trust, being submitted a series of defining elements of trust. In these circumstances, an important question arises for us: will these defining elements (attributed to *fiducia* in Romanian and French literature) be valid for *fiducia* in the Republic of Moldova? From what has been studied so far, we can conclude that these characteristics attributed to *fiducia* (by trust distinction) are perfectly valid in the context of Romanian or French law, but not all of them will be valid in the context of the legislation of the Republic of Moldova. Thus, even if the existing institutions in all 3 legal systems are called "fiducia" in the Republic of Moldova differs from Romanian "fiducia" and "fiducie à la française".

For clarity, we will present an example. In the work "Fiducia in the light of the New Civil Code", the author Burian H. concludes: "Without denying the major similarities between fiducia and trust, these two institutions of law can not be confused, due to significant differences between them. In a brief presentation the distinctions are as follows: 1) The first important difference with practical significance is that the trust is a division of property […] In another approach, the fiduciary law separates the fiduciary estate from the estate trustee; 2) The trust may be constituted by a contract concluded mortis causa, while the fiducia may not; 3) The trust can also be established by an express and unilateral manifestation of will of the founder, while the fiducia is conditioned by the conclusion of a written contract, usually in authentic form; 4) In the regulation of the trust the constituent (settlor) can be at the same time fiduciary (trustee); 5) The judge has a wider competence in the matter of the trust, if in the case of the fiducia."[8] The same conclusions are drawn by Trocan L.M. in the paper "Some considerations regarding the legal regime of the trust and fiducia"[9]. In this context, we mention that of all these distinctions, only the first is valid for the delimitation of the trust in the Republic of Moldova from the institution of the fiducia. All other differences cannot be taken into account, because, according to the legislation of the Republic of Moldova, the trust can be established both by will, and by a unilateral declaration of fiducia, and on other grounds; the founder may also be a fiducia and/or beneficiary; the court can have multiple interventions in a fiducia.

In these circumstances, the question may even arise whether, in general, the institution in the Republic of Moldova should be included in the notion of "trust" or "fiducia"? and if, from a terminological point of view, it is necessary to call this institution in English "fiducia" (keeping the phrase intact, as many Romanian and French authors do) or "trust"?

Analyzing this problem of terminology, we notice that there are situations in which both variants - "fiducia" and "trust" are used together in various acts, in the French version or, respectively, in the English version. For example, in the Civil Code of the Province of Quebec, Canada, Chapter II (from Title VI of Book IV), in the English version it is entitled "The trust", and in the French version - "De la fiducie"; similarly, in DCFR, Book X, in the English version is entitled "Trusts", and in the French version - "Fiducie". Respectively, it seems that it would not be wrong to call in English "trust" the institution regulated in the Civil Code of the Republic of Moldova (but the maintenance of the phrase "fiducia", of course, we do not consider it wrong!). In this regard, we reiterate that the basic source of the Moldovan legislator was the DCFR, in the content of which, in English, the phrase "trust" is used. Moreover, we mention that, in the Russian version of the Civil Code of the Republic of Moldova, the institution is called "траст" (word that reproduces the original phonetic form and almost faithfully transposes the written form of Anglicism "trust" in the graphic signs of the Russian alphabet).

In these circumstances, although there are terminological similarities, from a conceptual point

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[8] Burian Hunor, *Trust in the light of the New Civil Code*, without details about the publication, the document is available online at: http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientiaiuris/2011-1/5-burian.pdf (last accessed on 06.11.2020).

[9] Laura Magdalena Trocan, *Unele considerații privind regimul juridic al trustului și al fiduciei*, „Rolul jurisprudenței în dezvoltarea noului drept român", papers presented at the scientific session of the Institute for Legal Research "Acad.Andrei Radulescu" (10 May 2019), Ed. Universul Juridic, Bucharest, 2019, p. 158-164.

of view we cannot identify the fiducia in the Republic of Moldova with the Romanian or French fiducia, nor with the one in Quebec, nor with many other instruments generically called "trust-like". which the legislators of different states have tried to adapt and implement the progressive institution of the trust) and, of course, not even with the original trust itself. The provisions of the Civil Code of the Republic of Moldova on fiducia follow the model of the Book X of DCFR, so the mechanism regulated in the Republic of Moldova can be assimilated only with the mechanism of DCFR, but must be taken into account those few adjustments that the legislator considered required.

In summarizing these reflections on terminological and conceptual aspects, we conclude that not all differences between "fiducia" and "trust" (or the characteristics attributed to them), which have been enshrined in the literature, will be valid in the context of Moldovan legislation - some may be retained and others lose their relevance. What is important, in the end, is that the comparative analysis of the fiducia in the Republic of Moldova and the fiducia in Romania cannot be based on terminological similarities, but should be oriented towards what is essential, i.e. the content of the norms.

4. Conceptual problems - similarities and differences

In view of the legislation of the Republic of Moldova, there are the same problems of compatibility of the new institution with the civil law system and the same obstacles (as under the rule of Romanian or French law), which do not allow the creation of real trusts. These impediments result from the tradition of civil law. For example, in the literature are stated: the lack of the concept of division of property; the existence of the theory of the uniqueness of a person's patrimony[10]; the existence of the *numerus clausus* rule, which limits real rights to those expressly provided for by law and "makes it impossible to create rights with hybrid features in respect of a trust"[11]; the rule of publicity of real rights, which does not allow the preservation of an essential feature of trusts - confidentiality (as mentioned in the literature: "that's the whole essence of a trust. It's that it's private. It's like a contract. Nobody needs to know about it There is no register of trusts."[12]); the principle of unlimited powers held by the legal owner[13], etc.

Despite these "obstacles", in an adapted form, the trust was introduced in the Civil Code of the Republic of Moldova. Most of the debates in Romanian and French doctrine, which deal with these conceptual issues, are also valid regarding the trust in the Republic of Moldova. However, there are some aspects that differentiate the regulations in the Republic of Moldova from those in Romania.

First of all, we draw attention to the fact that, although the Moldovan legislator maintained the theory of uniqueness of the person's patrimony (the fiduciary patrimonial mass does not constitute a patrimony, but constitutes a patrimonial mass that is part of the fiduciary patrimony), in the Civil Code of the Republic of Moldova (unlike the Civil Code of Romania) there is no express regulation of the patrimonies (patrimonial masses) of affectation. However, the idea of the existence of some divisions of the patrimony results both from the norms that regulate the trust, and from the content of art. 888 C.civ.RM - "Common guarantee of creditors", para. (3) which provides: "Creditors whose claims arose in connection with a certain division of the patrimony, authorized by law, must first pursue the goods that are the object of that patrimonial mass. If these are not sufficient to satisfy the receivables, the other assets of the debtor may be pursued, unless the debtor is liable, according to the law or the contract, only with that patrimonial mass."

Another key difference concerns the rights of the beneficiary, which is one of the major differences between the existing mechanisms in civil law systems and the Anglo-Saxon trust. Usually, in institutions similar to the trust that exists in the civil law system, the fiduciary acquires title to the

[10] Luminița Tuleaşcă, *The concept of the trust in Romanian law*, „Romanian Economic and Business Review", vol. 6, no. 2, 2011, p. 155.
[11] Valerio Forti, *Comparing American Trust and French Fiducie, „*The Columbia Journal of European Law Online", vol.17, no. 28, 2011, p. 31.
[12] Kenneth Reid, Hiroyuki Watanabe, *Principles of European Trust Law and Draft Directive on Protective Funds*, without details of publication, article available at the web address: *http://www.win-cls.sakura.ne.jp/pdf/32/13.pdf* (last visited on 06.11.2020), p.116.
[13] Daniel Moreanu, *Fiducia și Trust-ul*, C.H. Beck, Bucharest, 2017, p. 92.

fiduciary patrimony mass, and the beneficiary obtains a right of claim - a right to ask the fiduciary for the benefit when it must be transferred.

Thus, according to the Romanian Civil Code, "the beneficiary acquires on the basis of the trust contract rights of claim that he can exercise against the fiduciary under the legal provisions related to the stipulation for another"[14]. The conclusions formulated by Christian von Bar regarding the French fiducia can also be attributed to the Romanian fiducia: "on closer inspection, the beneficiary has only a simple right of claim […] the beneficiary does not even have a right of suite (droit de suite) to a third party in bad faith."[15]

Similarly, according to the Civil Code of the Republic of Moldova, what the beneficiary acquires under a fiducia is a right of claim - the right to demand the execution of the fiduciary obligations insofar as they relate to the beneficiary's right to benefit or vocation to benefit, according to para. (1) in art. 2058 C.civ.RM, including the right to be transferred the benefit when the conditions of the fiducia are met. The idea that the right acquired by the beneficiary is a claim is also supported by the content of art. 2156 C.civ.RM ("Assignment of the right to benefit"), which provides that, in general, the assignment of the right to benefit is governed by the provisions on the assignment of debt and only the assignment free of charge applies to the legal provisions on donation. However, the nature of the beneficiary's right is a subject whose research is of greater interest than it may seem at first sight, as is clear from the work signed by Christian von Bar - "The real regime of trust, fiduciary fund and fiducia. English law in the field of civil law?"[16]

In view of the provisions of the Civil Code of the Republic of Moldova, the remedies available to the beneficiary are, in principle, binding (for example, the right to request the execution by the fiduciary of the fiducia obligation to capitalize the claim against the debtor of the fiducia; according to paragraph (2) of article 2073 C.civ.RM). However, the beneficiary also has a specific right, which we cannot fail to draw attention to. According to para. (2) in art. 2065 C.civ.RM, the beneficiary may claim a right of trust from the acquirer who knew or, reasonably, should have known that the fiduciary has the right of trust contrary to the conditions of the fiducia. This right of claim seems to pave the way for a remedy of a real nature. As indicated in the literature, "the action in claim is a real action […] because it is based on the right of property as a real right."[17] In this sense, we ask ourselves - what is the nature and "source" of this right of the beneficiary? Can we consider this remedy of the beneficiary (in the case of the trust in the Republic of Moldova) a real remedy? The problem is that the right to claim belongs, according to the general rule, to the owner, but the beneficiary is not the owner, in fact, he has no real right over the fiduciary patrimony. Therefore, even if the remedy of the claim is, as a rule, of a real nature, this nature is called into question in the case of the right of claim which the beneficiary has.

Of interest on this subject are also the conclusions formulated by Christian von Bar regarding a similar right that the beneficiary and the constituent have according to para. (3) in art. 6:318 of the Hungarian Civil Code: "What at first sight seems to be a matter of a real nature - the action of the beneficiary (but also of the constituent, who transmitted the goods) directed, pursuant to § 6: 318 para. (3), against the acquirer in bad faith or of the one who acquired for free, having as object the restitution in the administered patrimony of the acquired goods - proves to be, at a closer look, a legal remedy of purely obligatory nature. After all, the third party acquired it from the entitled party."[18] The author does not indicate why the remedy is "purely obligatory", but is clear in expression when he gives preference to this idea over the idea of "real nature".

In the literature it is revealed that under the rule of Mexican law the beneficiary has a right of claim: "Mexican law establishes a similar remedy by giving the beneficiaries the right to claim (*rei vindicatio*) the trust property that has been illegally transferred by the trustee", the quoted author

[14] Ibid, p. 223.
[15] Christian Von Bar (author), Dan-Andrei Popescu (translator), *Regimul real al trustului, fondului fiduciar si fiduciei. Drept englez în spaţiul dreptului civil?* „Studia Universitatis Babeș-Bolyai Iurisprudentia", no. 4, 2018, p. 26.
[16] Ibid, p. 5-34.
[17] Sergiu Baieș, Nicolae Roșca, *Drept civil. Drepturile reale principale*, 3rd ed., Chișinău, 2016, p. 156.
[18] Christian Von Bar (author), Dan-Andrei Popescu (translator), *op. cit. (2018*), p. 21.

questioned the right of claim of the beneficiary in the context of the analysis of real remedies (although the owner is the trustee)[19]. So, unlike Christian von Bar, Rafael Ibarra Garza does not seem to dispute the real nature of this remedy. From the above, it results that the problem of the nature of the beneficiary's right to claim exists not only in the light of the legislation of the Republic of Moldova but also of other states, and the opinions of doctrinaires on this subject may be different.

This right of claim of the beneficiary is a specific one, being a new element for the civil law of the Republic of Moldova, which can generate theoretical debates. For example, if an analysis of the nature of the right acquired by the beneficiary under the fiducia would start from this right of claim, the question can be asked in reverse: whether the beneficiary has a real right over the fiduciary patrimony? Based on the provisions of the Civil Code of the Republic of Moldova, such a hypothesis is not possible because the beneficiary does not own the property over the fiduciary patrimony (this patrimonial mass is contained in the fiduciary's patrimony) and does not have any other real (limited) right, because his right does not correspond to any right provided in art. 454 of the Civil Code and no legal provision expressly establishes any other real right than those provided in art. 454 C.civ.RM. In conclusion, during the existence of the trust, the beneficiary has no real right over the fiduciary patrimony, but has only a right of claim and the specific right of claim, expressly provided by law, which together creates a sui generis status.

Of course, there are many other differences between the regulation of fiducia in the legislation of the Republic of Moldova and in that of Romania, which we will set out below in terms of several important aspects.

5. Sources of fiducia

According to para. (1) in art. 774 C.civ.Rom., "The fiducia is established by law or by a contract concluded in an authentic form. It must be express." Therefore, only two sources of the fiducia are regulated: the law and the contract. The literature argues that this rule is of a limiting nature, with several authors arguing that other sources of fiducia (for example, wills or judgments) are not permitted because "to the extent that the legislature would to have considered the hypothesis of other potential sources of fiducia, he would have mentioned them *expressis verbis*".

In the Civil Code of the Republic of Moldova, the sources of trust are regulated in art. 2074 - "Foundations of trust". According to para. (1) of this article, "the trust is constituted by a contract of trust, by a unilateral declaration of constitution of the trust, by will. In the cases expressly provided by law, the trust is constituted by administrative act or court decision." Comparing this norm with the provisions of the Civil Code of Romania, we notice that in both regulations the source of the trust can be the contract, but under the legislation of the Republic of Moldova, in addition to this topic are listed several: unilateral declaration of fiducia, will and, in the cases expressly provided by law - the administrative act and the court decision. We would like to mention that, at this moment, no rule in the legislation of the Republic of Moldova expressly provides for the possibility of establishing a trust by an administrative act or by a court decision, which means that these sources are not currently valid, but they may exist in the future, if the legislator deems them appropriate under certain conditions. At the same time, it is easy to notice that in para. (1) in art. 2074 C.civ.RM the law is not indicated as a source of a fiducia. Thus, the question arises whether fiducia can be established under the law? We consider that the answer is affirmative, because, although this ground is not expressly indicated, it results from the content of para. (2) of the same article: "The law under which the trust is established shall be supplemented by the provisions of this title, insofar as it does not contain provisions to the contrary". Inserting this norm, we believe that the legislator took into account that trusts can also be established by law. Therefore, we consider that the omission to expressly indicate the law as a potential source of trust is not an intentional one, but may be the result of the inspiration of the legislator from several sources. In this sense, we draw attention to the fact that the provision contained

[19] Rafael Ibarra Garza, *An ideal regime for the express trust—a comparative analysis: English, French, and Mexican law*, „Trusts & Trustees", Oxford University Press, vol. 26, no. 4, 2020, p. 345.

in para. (2) in art. 2074 C.civ.RM is an identical takeover of the provision of para. (2) in art. 774 C.civ.Rom., and this despite the fact that in the Romanian doctrine the formulation of this norm is criticized as "a factor of potential confusions" and it is recommended to revise this provision in the sense of clarifying it or even repealing it in its entirety.[20]

Another difference between the articles cited above is the lack in the content of art. 2074 C.civ.RM of the final thesis from par. (1) in art. 774 C.civ.Rom.: "it must be express". Although this phrase can also be seen as a necessary condition for building a trust (a topic that we will address below), we will analyze it in this section, in the context in which it is researched and the article that includes it. Regarding this thesis, the following were mentioned in the Romanian doctrine: "considering the novelty of the contract, its birth must be expressly assumed by the contracting parties" [21] and that it "aims to eliminate from the landscape the implicit forms of trust (constructive trust and resulting trust)."[22] Although such a provision is not included in art. 2074 C.civ.RM, we consider that even under the rule of the regulations of the Civil Code of the Republic of Moldova, the trust must be expressed. This conclusion is valid at least for fiducias established by contract, unilateral declaration and will (main sources) and results from several distinct rules. In accordance with letter a) of para. (2) in art. 2075 C.civ.RM, the trust contract must provide the express agreement of its parties to constitute a fiducia (under the sanction of absolute nullity, according to paragraph (1) of art. 2060 C.civ.RM). According to para. (2) in art. 2076 C.civ.RM, the same rule applies accordingly to the declaration of fiducia. Therefore, the intention of the founder to set up a trust must be explicitly mentioned in the content of the declaration. Regarding the will, according to art. 2077 C.civ.RM, "in case it is provided that the fiducia is constituted at the death of the founder, the declaration does not produce effects unless it is included in a testamentary disposition" - para. (1); to it "the legal provisions regarding the inheritance and, in particular, the legal provisions regarding the subsequent inheritance apply to him" - para. (2). The express character of the testamentary disposition also results from the norms regarding the inheritance.

6. The parties to the trust

Art. 776 of the Civil Code of Romania, entitled "Parties to the fiducia contract" concerns only the quality of founder and fiduciary, and the provision regarding the beneficiary of the fiducia is included, separately, in art. 777 C.civ.Rom. Based on the mentioned articles, but also from the other provisions regarding the fiducia, the parts of the fiducia contract are only the constituent and the fiduciary. In this sense, even in the Romanian doctrine it is mentioned that "the beneficiary is not part of the fiducia contract, he does not participate directly in its signing and execution." The fact that the beneficiary is not a party to the contract does not diminish its importance, as it is in any case regarded as an „element which may decisively influence the fate of the contract".[23]

In the light of the legislation of the Republic of Moldova, the subject concerning "parties" must be approached from two aspects: "parties to the fiducia" and "parties to the contract of fiducia". As there are several potential sources of fiducia, the Civil Code of the Republic of Moldova emphasizes not the "parties to the fiducia agreement", but the category "parties to the fiducia". Thus, according to para. (1) in art. 2056 C.civ. R.M., "the constituent, the fiduciary, the beneficiary and the assistant of the fiducia are parts of the fiducia." The first roles are essential for building fiducia, and the existence of the assistant is optional. In this context, the question arises which are the parties to the fiducia agreement? Proceeding from the content of para. (1) in art. 2075 C.civ. R.M. - "Fiducia contract", the obligatory parts of a trust contract are (as in the case of the Romanian trust) the founder and the fiduciary. The participation of the beneficiary and the fiducia assistant (if any) is not mandatory at the stage of concluding and signing the contract, but there are no impediments for them

[20] Daniel Moreanu, *op. cit.* (2017), p. 181-184.
[21] Ibid, p. 231.
[22] Sergiu Golub, *Fiducia. Condițiile de fond și de formă. Efectele contractului de fiducie*, „Revista Română de Drept al Afacerilor", no. 4, 2017, p. 71.
[23] Ibid, p. 59.

to be part of the contract.

The roles of the parties, under the rule of both laws, are, in principle, similar. Regarding the assistant of the fiducia (which is not provided in the Romanian legislation), according to para. (4) in art. 2056 C.civ. R.M., this "is the person who, according to the conditions of the fiducia, has the right to appoint or revoke the fiduciary or to give his consent to the waiver of the fiduciary, as well as other discretions and powers expressly provided."

In art. 2056 C.civ. R.M., the following are also expressly indicated: "a fiducia may have one or more constituents, fiduciaries, beneficiaries and assistants of the fiducia, both initial and subsequent" - para. (6) and "unless otherwise provided in this title: a) the founder may also be a trustee and/or beneficiary; b) the fiduciary may also be a beneficiary; and c) any of the parties to the trust may also be an assistant of the fiducia"- para. (5).

The major difference between the regulations in Romania and in the Republic of Moldova concerns the category of persons who can hold the quality of fiduciaries. If art. 776 C.civ.Rom. limits this category to: credit institutions, investment and investment management companies, financial investment service companies, legally established insurance and reinsurance companies; notaries public and lawyers, regardless of the form of exercising the profession, then in the civil legislation of the Republic of Moldova there is no limitation in this regard. In general, the Civil Code of the Republic of Moldova does not contain any conditions for holding the quality of part of the fiducia. Therefore, any natural or legal person (with some clarifications that we consider appropriate and that we will mention below) can be the founder, fiduciary, beneficiary, assistant of the trust.

Similar to the existing situation under the empire of para. (1) in art. 776 C.civ.Rom, according to the regulations of the Republic of Moldova, any natural or legal person may be a constituent. Thus, the clarifications made in the Romanian doctrine are perfectly valid for the Republic of Moldova: "the general provisions regarding the capacity to use and exercise apply *mutatis mutandis* and will have to be respected […] The only condition that the natural or legal person must fulfill what he wishes to hold as a constituent under the contract of trust is to be the holder of the rights in re or ad rem which he intends to transfer."[24]

Regarding the fiduciary, as we mentioned above, unlike the regulations in Romania, which provide "a severe limitation of the scope of persons who may hold the status of fiduciary"[25], the Civil Code of the Republic of Moldova does not provide any conditions for holding this quality (not even in terms of usability and exercise). Therefore, any legal person or any natural person can be a fiduciary. Although not expressly indicated in the Civil Code, we consider that in terms of the natural person would be appropriate, in principle, two conditions: to have full capacity to exercise and not be subject to any measures of protection (contractual or judicial, i.e. protection temporary - in which case the person retains full exercise capacity). The necessity of observing these conditions, we deduce it, to a certain extent, as a conclusion from the *per a contrario* interpretation of the provision from letter a) art. 2135 C.civ. R.M., but also by the nature, extent and complexity of the powers, rights and obligations of the fiduciary. However, in the absence of limitations expressly provided by law, the subject remains debatable and there may be different opinions or even situations in which it may be established that these conditions should not be imposed (for example: the effect of the protection measure is a small interference in the life of the person with full capacity to exercise, there are other fiduciaries, the conditions of the fiducia are very well adjusted to the case, etc.). In any case, we consider it important that, in addition, the person who has the status of trustee - on the one hand, and the conditions of the trust - on the other hand, allow the "functioning" and achievement of the purpose of the fiducia.

Analyzing the category of "beneficiary", we notice that the Romanian civil legislation does not contain any restrictions regarding the possession of this quality. Thus, it was mentioned in the literature that "any person can be a beneficiary, and the text of art. 777 is meant to eliminate any doubt regarding the category of beneficiaries which, like that of the constituents, does not include any

[24] Daniel Moreanu, *op. cit.* (2017), p. 190-191.
[25] Sergiu Golub, *op. cit.* (2017), p. 60.

limit".[26]

Similarly, the Civil Code of the Republic of Moldova does not provide any restrictions in this regard. Therefore, the beneficiary can be anyone - any legal or natural person (including a minor or an adult protected by a contractual or judicial protection measure). Moreover, according to para. (3) in art. 2087 C.civ. R.M., the person may be a beneficiary even if he was born or constituted after the establishment of the fiducia. Assuming that the beneficiary can also be a person who was born later, the question may arise whether the beneficiary must be at least conceived at the time of the establishment of the fiducia or not? The Civil Code of the Republic of Moldova does not provide for such a condition. In addition, analyzing the regulations on subsequent inheritance (application of trust in matters of succession), we note that the subsequent heir may also be a natural person not yet conceived or a legal person not yet constituted (which will be constituted later). We consider that this situation is possible not only in the case of a trust constituted by will (trust that arises from the moment of the deceased's death), but also in the case of any other type of fiducia. Therefore, we consider that, under the rule of the regulations of the Republic of Moldova, by reference to the moment of establishing the fiducia, the beneficiary may be any natural person alive or conceived or unconcepted, as well as any legal entity established or to be established. It is important that the beneficiary is "sufficiently determined by the constituent or determinable in another way on the date when the benefit becomes due" - paragraph (1) of art. 2087 C.civ. R.M.

As mentioned above, the Civil Code of the Republic of Moldova does not contain any express provisions regarding persons who can hold the position of fiducia assistant. However, taking into account his rights, duties and obligations (largely aimed at controlling the activity of the fiducia), we believe that the same qualities must be met as in the case of the fiduciary, i.e. a fiduciary could be a legal person or a natural person which has full exercise capacity and is not subject to any protection measures. Again, in the absence of limitations expressly imposed by law, this subject remains open for debate (as does the subject "fiduciary").

7. Conditions for establishing the trust

In the light of the Romanian Civil Code, the analysis of the conditions regarding the establishment of the fiducia aims, in general, at the conditions that must be observed for the validity of the trust contract. As it results from the legal provisions and is also mentioned in the doctrine, for the valid conclusion of a fiducia contract the following conditions must be observed: the general substantive conditions (common for any contract), the observance of the express character imposed by the provisions of para. (1) in art. 774 C.civ.Rom., the conditions imposed *ope legis* regarding the content of the contract (the obligatory elements that any fiducia contract must contain), the condition regarding the authentic form, the condition *ad validitatem* regarding the fiscal registration of the fiducia contract, the special condition of validity imposed by the provisions of art. 775 C.civ.Rom ("Prohibition of indirect liberality")[27]. Along with these, we emphasize that the conditions of opposability are also relevant.

By comparison, analyzing the regulations in the Republic of Moldova, we identify some similarities and some differences. First of all, in addition to the conditions necessary for the valid conclusion of a contract of fiducia, we also distinguish the conditions necessary in the case of the establishment of the fiducia by unilateral declaration or will. In the following, we will analyze all the situations and highlight only some specific aspects.

Under the provisions of the Civil Code of the Republic of Moldova, for the valid conclusion of the fiducia contract, it is necessary, as in the case of the Romanian fiducia, compliance with the general substantive conditions and compliance with the mandatory content of the contract para. (2) in art. 2075 C.civ. R.M. In contrast, the condition regarding the authentic form (authentic form is not required, but only the written form) and the one regarding the fiscal registration are not imposed *ad*

[26] Flavius Antonius Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, 2nd ed., Ed. C.H. Beck, Bucharest, 2014, p. 886.
[27] Daniel Moreanu, *op. cit.* (2017), p. 236.

validitatem. At the same time, there is no limit in terms of trust-liberalities (they are not prohibited), which is a big conceptual difference between the fiducia in the Republic of Moldova and the trust in Romania. In addition to the conditions mentioned above, similar to the regulations in Romanian legislation, the Civil Code of the Republic of Moldova also provides for certain conditions of opposability of the fiducia.

Regarding the condition of form - aspect that is the object of many debates in the Romanian doctrine, in accordance with para (1) in art. 2078 C.civ. R.M., the fiducia contract must be concluded in writing. We consider that the written form is mandatory, under the sanction of absolute nullity, because para. (1) in art. 2060 C.civ. R.M. provides the following: "unless otherwise expressly provided in this title, the provisions of this title are mandatory under the sanction of absolute nullity." The authentic form is mandatory only to the extent required by the general rules. Thus, according to para. (2) in art. 2078 C.civ. R.M., "if for the constitution or, as the case may be, the transmission of a right, the law requires an authentic form, the fiducia contract, in order to produce such a legal effect, it is also concluded in an authentic form". Therefore, the authentic form will be mandatory if the fiducia contract will constitute or transfer a right over a real estate - according to letter a) of art. 323 C.civ.RM; on the social part (from the share capital of a limited liability company) - according to par. (9) in art. 25 of the Law of the Republic of Moldova on limited liability companies, no. 135-XVI from 14.06.2007; on a mortgage - according to para. (1) in art. 684 C.civ. R.M. and in other cases provided by law. According to para. (4) in art. 2078 C.civ. R.M., the requirement regarding the conclusion of the fiducia agreement in authentic form "shall be considered met even if, based on the written fiducia agreement, the founder and the fiduciary concludes an act of handing over the right of fiducia in authentic form."

The publicity formalities are relevant in terms of two aspects: 1. the establishment or transmission of the title for the benefit of the fiduciary, according to para. (1) in art. 2063 C.civ. R.M. ("a right becomes a right of fiducia and enters the fiduciary patrimonial mass by establishing or, as the case may be, transmitting the title over it for the benefit of the fiduciary according to the publicity formalities or other formalities provided by law") and 2. the enforceability of the fiducia.

The opposability of the fiducia is regulated in detail in the content of art. 2067 C.civ. R.M. In principle, the opposability of the membership of a right held by a fiduciary to a fiducia estate can be achieved in two ways: 1) by registration in a register provided by law (- if the right of fiducia must be registered in a publicity register of a constitutive nature, then the fiducia is to be registered in the same register, - if for the right of fiducia the law does not provide an advertising formality, the fiducia is to be registered in the register of real securities), thus obtaining the absolute opposability (to all persons); 2) through effective knowledge, under the conditions of para. (2) in art. 2067 C.civ. R.M., even if the fiducia was not registered, thus obtaining the relative opposability (only to the persons who know). At the same time, para. (3) of the same article provides for the regime of opposability of prohibitions and encumbrances, thus, “if the conditions of the fiducia include a conventional prohibition of alienation or encumbrance of a right of fiducia or if the fiduciary is obliged, in certain circumstances, to transmit the title to a certain beneficiary, these encumbrances are opposable if the publicity formality of the encumbrance provided by law has been fulfilled, according to the nature of the good, or if the third party has known the given circumstance in another way.” The fiduciary has the obligation to ensure the fulfillment and maintenance of the opposability formalities.

With regard to the conditions for the establishment of a trust based on a unilateral declaration, the following will be applicable: the general substantive conditions; the conditions for the declaration to be drawn up by the constituent and for its content to show unequivocally that the constituent will be the sole fiduciary - according to para. (1) in art. 2076 C.civ. R.M.; the conditions regarding the content of the declaration, which are similar to those concerning the content of the fiducia contract - according to para. (2) in art. 2076 and para. (2) - (5) of art.2075 C.civ. R.M.; the condition regarding the obligatory authentic form, under the sanction of nullity - according to para. (3) in art. 2078. The conditions of opposability are those mentioned above.

Regarding the fiducia constituted by will, para. (1) in art. 2077 C.civ. R.M. stipulates the following: “in case it is provided that the fiducia is established at the death of the founder, the

declaration does not produce effects unless it is included in a testamentary disposition". Thus, in order for a fiducia to arise under a will, the general conditions applicable to the validity of the testamentary provision must be complied with.

8. Grounds for termination

The grounds for termination of the fiducia contract are regulated in art. 789 and art. 790 of the Civil Code of Romania and are the following: unilateral denunciation by the constituent, if it has not yet been accepted by the beneficiary - according to para. (1) in art. 789 C.civ.Rom.; revocation by the parties (the constituent and the fiduciary), after the acceptance of the beneficiary, only with his consent or, in his absence, with the authorization of the court - according to para. (2) in art. 789 C.civ.Rom.; fulfillment of the term - according to para. (1) in art. 790 C.civ.Rom.; achieving the goal pursued (when it occurs before the deadline) - according to para. (1) in art. 790 C.civ.Rom.; waiver of all beneficiaries (if the contract does not specify how the fiduciary relationship will continue in such a situation) - in accordance with para. (2) in art. 790 C.civ.Rom.; the situation in which it is ordered to open the insolvency procedure against the fiduciary or the effects of the reorganization of the legal person occur, according to the law - in accordance with para. (3) in art. 790 C.civ.Rom.

As in other aspects approached above, in the matter of termination of fiducia we identify some similarities and some differences between the legislation of Romania and that of the Republic of Moldova.

The Civil Code of the Republic of Moldova regulates the grounds for extinguishing the fiducia, without distinguishing between the sources on the basis of which the fiducia was established. Therefore, the grounds for extinguishing a fiducia are the following: the resolution, which can be made by different parts of the fiducia, in different circumstances, namely: the resolution by the founder or beneficiaries under a right provided by the conditions of the fiducia; the resolution by the constituent of the fiducia free of charge - pursuant to art. 2144 C.civ. R.M.; the resolution by the exclusive beneficiary of the fiducia (or the beneficiaries, as the case may be), which has full exercise capacity - based on art. 2145 C.civ. R.M.; the resolution by the fiduciary - under the conditions of art.2149 C.civ.RM; confusion of rights and obligations (if the sole fiduciary is also the sole beneficiary, and the fiduca is for the exclusive benefit of that fiduciary; the rule applies accordingly and if there are several fiduciaries) - pursuant to art. 2150 C.civ. R.M.; the expiration of the term of the fiducia or the fulfillment of the extinct condition - based on para. (2) in art. 2141 C.civ. R.M.; loss or exhaustion of the fiduciary patrimonial mass (when the fiduciary no longer holds any right of trust and is not expected to acquire such rights) - in accordance with art. 2142 C.civ. R.M.

Therefore, under the rule of the regulations of the Republic of Moldova, the fiducia parties have the right to resolution in several situations and even have the possibility to stipulate in the contract the circumstances in which one of them (fiducia parties) has the right to fiducia resolution and the effects of the resolution on the fiduciary patrimony. However, among the grounds for termination of fiducia provided by the Civil Code of the Republic of Moldova, there is no insolvency or reorganization of the fiduciary. For this situation, the parties can provide the solution in the contract - termination of the fiducia, the right to resolution, the right to change the fiduciary, etc.

As regards the fiducia constituted by will (in which case the rules regarding the subsequent inheritance apply), it ceases at the moment of the occurrence of the subsequent inheritance, but also under the conditions provided in art. 2261 C.civ. R.M., according to which the designation of the subsequent heir ceases to produce legal effects at the expiration of the term of 30 years from the date of opening the inheritance if the event leading to the subsequent inheritance did not occur before the expiration of that term.

9. Conclusions

A comparative analysis of the regulations aimed at fiducia, contained in the Civil Code of the Republic of Moldova and the Civil Code of Romania, allowed the identification of similarities and

essential differences, contributed to the creation of a broader vision on the subject and facilitated the identification and research of theoretical and practical problems in the field.

In order to elucidate whether in these two legislations there is the same common thread in the matter of fiducia, we analyzed separately several aspects aimed at regulating this institution: the sources of inspiration of legislators, terminological and conceptual issues, sources of fiducia, parties, conditions on the establishment of the fiducia and the grounds for its termination. At the same time, during the paper, we stated some questions that we consider relevant and we tried to provide comprehensive answers.

In the summary of the reported, we conclude that, although the "fiducia" in Romania and that in the Republic of Moldova are similar in many respects (including in terms of terminology), these two institutions are not identical, because there are multiple essential regulatory differences. Following the spirit of the DCFR, the concept of fiducia in the Republic of Moldova is more comprehensive than the concept of fiducia in Romania or France, in the sense that the regulation in the Republic of Moldova is more developed and less restrictive - more sources of fiducia are provided, not prohibited fiducies-liberalities, for the establishment of a fiducia fewer conditions are imposed, there are no restrictions regarding the persons who can hold the quality of fiduciary, etc. All these differences open, under the rule of regulations in the Republic of Moldova, a much broader perspective of the application of fiducia, but the extent to which the potential of this institution will be exploited we will be able to appreciate only in time.

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