

THE TRUST UNDER ROMANIAN LAW. FORM OF PATRIMONY SPLIT FOR NATURAL AND LEGAL PERSONS

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Abstract

The trust represents, according to the father of English modern legal history, Frederic William Maitland, „the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence”. Its special flexibility, has transformed the trust, initially linked with the common law systems, into a legal instrument adopted and integrated, specifically during the last few years, under civil law systems with which, previously, it has been deemed to be incompatible. The objective of this study is to review to which extent the trust is present and/or may be integrated under Romanian law, considering the modernist split patrimony theory introduced by the Romanian legislation under the Civil Code, as of its October 1st, 2011, its entry into force date. The research methods that we envisage using are the following: the comparative analysis, through which we aim at reflecting the legal existence of the trust under various legal systems, specifically the common law systems, and the economic analysis within which we propose to describe the economic reasons for which the trust is so widely used in the international business arena. We assess that the importance of this study is considerably greater in the international environment of the sole European and world wide market under which the existence of legal instruments (such as the trust) accessible to certain persons (natural, but more specifically legal persons) and out of reach to others, confers the former with a major competitive advantage.

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JEL Classification: K21, K22

1. Preliminary considerations

The trust constitutes, in the opinion of one of the greatest jurists and historians of the English law, which is considered the father of the English legal history, Frederic William Maitland, “the largest and most important Englishmen's achievement in the field of jurisprudence”. The flexibility of this legal instrument in the implementation of both the business and the existence of natural and legal entities, made the trust, an instrument fundamentally linked to common law systems (systems of law based upon the principle of the case-law's prevalence), to be adopted and integrated, particularly lately, in civil law systems with which previously it was believed to be incompatible.

The main objective of this study is to review the extent to which the trust is present and/or can be integrated into Romanian law, bearing in mind the modernist approach to the patrimony affected to a specific purpose doctrine (in Romanian language: “*patrimoniul de afectatiune*”) and the patrimony split/division granted by the Romanian legislator, together with the entry into force of the Civil Code with effect as of October 1st, 2011.

The research methods that we propose are: comparative analysis, through which we aim at reflecting the existence of the trust in different legal systems, in particular common law, and economic analysis, in which we propose to describe the economic motivation for which the trust is so current in the international business world.

We consider that the importance of this study is all the more great as, in the general climate of internationalisation, the existence of legal instruments available to certain persons (natural, but also legal persons) in the context of a single market at European level and the global market for mass production of goods, services and trade at international level, brings those who have these tools a major competitive advantage. Therefore, it is vital to analyze and to assess to what extent the Romanian professionals can benefit from the trust, for the organization and leading of economic activity at competitive nature.

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2. Trust as an object of “Legal Transplant”

The trust is part of the “legal transplants” category, a process extremely spread, through which the legal systems have borrowed from one another. The phenomenon of “legal transplant” has been identified even in the Code of Hammurabi, XVII Century B.C. Although different points of view have been expressed with regards to the possibility of borrowing in the field of law, the reality is that the societies have borrowed from one another various items, so that it is unlikely that specifically the law should be left out of the reciprocal exchange process.

In the category of legal institutions which have been taken over by systems belonging to different cultures and even to various families of law, *the trust*, representing, essentially, an Anglo-Saxon specific instrument, perfectly fits into the legal institutions sphere, which are likely to be subject to “legal transplants”, meaning as deployment, *tale quale*, in the framework of a legal system which, until that moment, it was not specific to.

There have been several definitions conferred to the legal transplantation process, moreover dissenting opinions were formulated about the practical possibility of actually existing such a mechanism, taking two (2) conflicting viewpoints whose main exponents were Alan Watson and Pierre Legrand.

Out of the given definitions, we note the one issued by Alan Watson, who defined the *legal transplants* as “moving/panning a legal rule or system from one country to another or from a person towards another”².

In the realm of the debate concerning the concept and the very existence of “legal transplants” several theories have been developed out of which the most important are: the “displacement” theory (in Romanian language: “*teoria transferista*”), “based upon the idea that the society and the State in which it acts represent distinct entities, which therefore have a self-reliant and autonomous existence”³, respectively the “cultural” theory which deems that the law cannot be detached from the original purpose for which it was issued and implemented.

“Regardless of its point of view on “legal transplants”, the existence and their number cannot be ignored. At European level, all 28 Member States are subject to an internal process of legal transplantation of the legislation issued in Brussels and Strasbourg. As far as Romania is concerned, the process of “legal transplants” is one with deep and roots, starting from Organic Regulations and the Civil Code from 1864. One of the most recent examples of “legal transplants” is represented by the Civil Code in which *in corpore* institutions they have been taken from various legislations, such as the French Civil Code (see, *exempli gratia*, fiducia), Quebec Civil Code (see, *exempli gratia*, administration of the property of others), etc.”⁴.

In continuation of the analysis process of the implementation of various legal frameworks in the root of third law systems, it was created the following typology of legal transplants, having in regard to factors which may constitute stimuli, *recte*:

- (i) *cost-saving transplant*;
- (ii) *externally-dictated transplant*;
- (iii) *entrepreneurial transplant*; and
- (iv) *legitimacy-generating transplant*⁵.

² In this respect, see Alan Watson, *Legal transplants: an approach to comparative law*, University of Georgia Press, USA, 1974 (ed. 2nd, 1993), *apud* Frances Foster; Edward Foote, *American trust law in a chinese mirror*, in „Minnesota Law Review”, no. 602/2010, SUA, p. 608.

³ For a detailed analysis of the “legal transplant” definition and the history thereof, see Daniel Moreanu, „*Transplanturile legale*” (I). *Definiție, istoric și dezbateri cu privire la existența acestora.*”, in the „Romanian Review of Private Law”, no. 4/2014, Bucharest, p. 158.

⁴ *Ibidem*, pp. 159-160.

⁵ For detailed analysis regarding the taxonomy of “legal transplants”, see Daniel Moreanu, „*Transplanturile legale*” (II). *Taxonomia și factorii care contribuie la succesul unui “transplant legal”*”, in the “Romanian Review of Private Law”, no. 6/2014, Bucharest, p.120 *et seq.*

Also, there have been identified “horizontal transplants”, which occur between national legal systems and “vertical transplants” that occur in the ratio between national legal systems and international law.

The entire analysis above, has been completed with the identification of elements that contribute to the success, or on the contrary, to the failure of the “legal transplant” procedure, and in this respect it has been identified more relevant factors⁶, *recte*:

- a) the reputation, understood as the quality image of donor in the entity’s eyes receiving the legal transplant in question;
- b) the compatibility, within the meaning of the philosophy that exists between the entity and the donor;
- c) the voluntary undertaking, consisting of the non-imposition from the outside of the legal model, but rather, a takeover based upon its understanding of the importance of, and the intrinsic benefits;
- d) the nature of the legal transplanted mechanism, which means legal mechanism is allocated to an area which, on the basis of experience, it has been shown to express more chances of successful taking-over;
- e) the proven effective resolution of the transplanted legal instruments to constitute specific solution for both legal and economical issues.

“To the extent to which all of the conditions set out above are met and the “legal transplant” is successful, the advantages which they bring are obvious:

- a. reducing the time of deployment and low risk as regards the failure and the rejection danger;
- b. taking over juridical institutions which have proved to be useful in time within another system(s) of law; and
- c. reducing the creation and deployment costs.”⁷.

“In recent era, Romania has been subject to massive legal transplant process of the *acquis communautaire*, a permanent process which has not always been implemented in accordance with the legislation that already existed. On the other hand, the Civil Code represents, by certain institutions, another recent example of “legal transplant” about which we think that its represent, with certain inherent and minor exceptions, an example of successful acquisition of certain modern institutions and adaptation of the legislation specific of the XXI-st Century”⁸.

3. The potential compatibility of *the trust* with civil law systems

First of all, it is important to note that, over time, it was considered, in the international doctrine, that there is an essential incompatibility between *the trust* and the civil law systems, explained on several stages, such as: the existence of limitations which stems from theory/principle “*numerus clauses*”, understood as a civil law specific principle which limits the number of potential rights *in rem* which may be established by the parties, on the one hand, and, on the other hand, the fact that the existence of other rights *in rem* is not possible in the absence of issuing such legal exceptions.

From another point of view, it was deemed that the trust is not likely to be integrated in the sphere of a civil law system, considering the publicity system of rights *in rem* with which it would be incompatible, also bearing in mind the confidentiality which characterizes *the trust’s* existence and development.

Furthermore, it was considered that *the trust* would limit and restrict the unlimited powers principle from which the legal owner should benefit, as it is known that, in the case of *the trust*, there is a separation between the “legal” title and the “equitable” title.

⁶ For detailed analysis of factors that contribute to the success of legal transplant process, see *ibidem*, p. 126 *et seq.*

⁷ *Ibidem*, p. 129.

⁸ *Ibidem*, p. 129.

There have also been scholars who have estimated that the incompatibility would result from the limits of the inheritance reserve (in Romanian language: “*rezerva succesorală*”) (i.e., „the mandatory successor”) specific to civil law systems, within the framework of which, with certain exceptions, there are inheritance quotas imposed *ope legis* on the *de cuius*.

However, the most powerful and numerous arguments in support of an organic incompatibility in *the trust*’s “transplantation”, as part of a civil law system consists in the limits resulting from the duality of ownership ensuing from the so-called *split ownership theory* on which we want to stop our attention in the follows lines.

The property duality is considered, perhaps, the most important feature of *the Anglo-Saxon trust*, created by *the equity* subsystem, part of *the common law* system. By means of rules covered by *the equity* subsystem, it produces the separation phenomenon / the property right split-up to which we have referred to in the foregoing, resulting, on the one hand the legal title (belonging to *the trustee*) and, on the other hand, the equitable title (which is part of the beneficiary’s patrimony)⁹.

As it has been noted in the doctrine, the property split-up constitute “maybe the greatest obstacle in the way of adopting the trust by any jurisdiction with a civil law tradition”¹⁰.

We have to underline that, in addition to the property right split-up, another important highlight of the trust involves its confidentiality, which, in the same way as in respect of many other contracts, should not be recorded in a register, and should not be brought to the public’s knowledge. An author¹¹ retains, in this respect, that many European states are reluctant in adopting the trust, not because the property right split-up, but due to the formalities relating to its publicity.

4. The trust’s definition

There are multiple definitions conferred to *the trust* in the international doctrine which has not been able to stop on a single one, taking into account the multiple and extremely varied uses, which, as noted, are limited only by the lawyers’ imagination¹².

Perhaps the most simple and, at the same time, the most expressive definition conferred on *the trust*, state that this is, in fact, “placing your confidence in another person”¹³.

From another author point of view, *the trust* is defined as “an equitable obligation which makes a certain person to deal with the property on which it is in control, for the benefit of certain people, of whom he can also be part, while any one of these persons may enforce that obligation”¹⁴.

In the United States of America’s *Uniform Trust Code* (UTC), it is considered that *the trust* take birth/are formed at the time in which a person, the so-called *settlor*, transfers goods to another person, called *trustee*, and those assets are held “in trust”, for the benefit of an identifiable appointee or to a valid purpose.

From another point of view, “trust is a right in respect of a property, real or personal, owned by a person for the benefit of another person. This involves two interests, one legal and other

⁹ The legal title or property is also referred to in the doctrine as “legal property” (formal property), while the equitable title or property is also called the “de facto property” (substantial property); in this respect, see Radu Rizoiu, *Garanțiile reale mobiliare. O abordare funcțională*, Legal Universe Publishing House, Bucharest, 2011, p. 460.

¹⁰ In this respect, see Kathryn Venturatos Lorio, *Louisiana trusts: the experience of a civil law jurisdiction with the trust*, in “Louisiana Law Review”, no. 5/1982, USA, p. 1721.

¹¹ In this respect, see Kenneth Reid; Hiroyuki Watanabe, *Principles of European trust law and draft directive on protective funds*, article available at the web address: <http://www.globalcoe-waseda-law-commerce.org/activity/pdf/32/13.pdf> (last visited on 08.03.2013), p. 10.

¹² For the analysis of the trust’s definition see also Daniel Moreanu, *Fiducia și trust-ul. Definiție, utilizări practice și deosebiri principale*, in the “Institute for Legal Research Magazine “Acad. Andrei Radulescu” of Romanian Academy - Studies and Legal Research”, no. 2/2014, Bucharest.

¹³ In this regard, see Donovan Waters, *The future of the trust from a worldwide perspective*, in „Journal of International Trust and Corporate Planning”, no. 4/2004, United Kingdom, article available at the web address: http://www.londontrust.net/filedepot/file/Essays/Journal_of_ITCP_The_Future_of_the_Trust_from_a_Worldwide_Perspective.pdf (last visited on 21.04.2014), p. 227.

¹⁴ In this respect, see Tony Honoré, *Trusts: the inessentials*, no data for the publication, article available at the web address: <http://users.ox.ac.uk/~alls0079/Burn.pdf> (last visited on 19.05.2013), p. 14, the work cited there.

equitable; the trustee holds legal title or the legal interest and the *cestui que trust* or the beneficiary holds title or equitable interest¹⁵.

Last but not least, it is worth mentioning that, at international level, *the trust* is governed by the Convention on the law applicable to *trusts* and their recognition issued at Hague in 1985¹⁶ which gives a definition of trust through Article 2 providing the following: *the trust* is "a legal relationship created -*inter vivos* or *mortis causa*- by a person (settlor) when the goods *have been placed under the control* (ns. subl. - D. M.) of the trustee for the benefit of a beneficiary or for a specific purpose".

5. The *trust*'s essential features. Form of patrimony split for natural and legal persons.

The Hague Convention to which we have referred hereinabove stipulates the main features which legal deed has to meet in order to be qualified as a *trust*, namely:

- (i) the assets must constitute a separate fund and do not represent part of *the trustee's* patrimony;
- (ii) the title over the assets which constitute *the trust* is held by *the trustee* or by another person, in the name of *the trustee*; and
- (iii) *the trustee* has the power and the obligation, for which it is responsible, to manage, use or dispose of the goods, in accordance with the terms mentioned through *the trust* and based upon the special powers imposed on it under the law¹⁷.

The trust represents, in essence, a means of separation of a person patrimony (natural or legal) through the establishment of the distinct patrimonial masses, separated from the rest and the patrimony which is allocated to fulfil a specific purpose determined in this respect.

6. The *trust*'s existence under Romanian law

Fortunately, the 2009 Civil Code editors, which entered into force as from the date of October 1st, 2011, have understood the importance of existence, under Romanian law, of legal instruments which to carry out the versatile functions that can be carry out by *the trust* in the Anglo-Saxon legal system. In this respect, it was introduced, under Romanian law, an institution which was previously only tangential mentioned in the law on practice of the lawyers' profession, namely *fiducia*, covered by Title IV of Book III of the Civil Code, with marginal name "Fiducia", which represents Article 773-791 dedicated to this revolutionary legal instrument.

The nineteen (19) articles dedicated, *expressiv verbis*, to the *fiducie* have as source of inspiration similar provisions mentioned in the French Civil Code¹⁸, introduced in 2007, by Law no. 2007-211, as subsequently amended. Taking into consideration the fact that French Civil Code's relevant articles, namely Articles 2,011-2,030, are similar to Articles 773-791 of the Civil Code, an author had noticed that "the Romanian legislator took over, in a suitable form, the French legal

¹⁵ In this respect, see John Sears, *Trust estates as business companies*, Publishing House Vernon Law Book Company, USA, 1921, paper available at the web address: <http://ia600301.us.archive.org/18/items/trustestatesasbu00sear/trustestatesasbu00sear.pdf> (last visited on 26.05.2013), p. 1.

¹⁶ In this respect, see *Convention on the law applicable to trusts and on their recognition*, issued by the Hague Conference regarding Private International Law (*Hague Conference on Private International Law*), Hague, 1985, available at the web address: http://www.hcch.net/index_en.php?act=conventions.text&cid=59 (last visited on 11.05.2013). The Hague Convention was signed in 1985, entered into force in 1992 and, at the beginning of 2012, it was ratified by a number of 12 countries, namely: Australia, Canada (not entirely), China (only Hong Kong), Italy, Luxembourg, Liechtenstein, Malta, Monaco, Netherlands, San Marino, Switzerland and the United Kingdom. France is one of the signatories of the Hague Convention, but has not yet ratified it. In the past years, more and more countries have adopted *the trust*, such as: South Africa, Russia, Israel, Japan, China, etc. It therefore results a growing importance of this legal instrument.

¹⁷ In this respect, see Daniel Moreanu, *op. cit. supra* n. [12].

¹⁸ The fact that the French regulation represented the inspiration source for the Romanian ruler is recognized from the content of the reasons (in Romanian language: „*xpunere de motive*”) to the Civil Code's Law project where it is mentioned that „Upon the compilation of the text, the Law no. 2007-211 has been taken into account by which Title XIV – About *fiducie* has been introduced in the French Civil Code”; in this respect, see the Resons to the Civil Code's project, available at the web address: www.just.ro (last visited on 08.01.2015), p. 8

provisions, operating some changes or important additions”¹⁹. At its turn, it seems that the French legislator used as a source of inspiration Articles 2,011-2,030 from the Quebec Civil Code.

It was considered that the *fiducie*, together with the standard clauses, the adhesion contract, the market practice (in Romanian language: “*uzurile*”) and other such similar instruments “issue from the commercial law or the business law and reshape other contracts”²⁰. In another opinion, it is considered that “the *fiducie* is a new institution in the Romanian civil law”²¹.

The main effect of the *fiducie* is it will determine separation of rights transferred *via* its execution from the rest of the trustee’s (in Romanian language: “*fiduciar*”) patrimony. As mentioned by Prof. Valeriu Stoica, “the legal operation of *fiducie* determines a split of the trustee’s (*fiduciar*) patrimony”²².

The *fiducie*’s definition is carried out by the Article 773 of the Civil Code whose marginal title is “Notion” and which stipulates that “the *fiducie* is the legal operation whereby one or more settlers (in Romanian language: “*constitutori*”) 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 (in Romanian language: “*fiduciar*”) which they carry out with a targeted purpose, for the benefit of one or more beneficiaries (in Romanian language: “*beneficiari*”). These rights shall form a autonomous patrimonial mass, distinct from other rights and obligations of the trustees’ patrimonies”.

In the doctrine, it has noted that the *fiducie* “is deemed as a legal operation, which emphasizes, from the beginning, the complexities and originality in the context of legal regulations applicable to assets”²³.

“At first view, we can notice that the definition attributed to *fiducie* by the Civil Code meets the three items considered as mandatory for qualifying a *trust* within the meaning of the Hague Convention. This situation has been determined, at its turn, by the fact that the French definition assigned to the *fiducie* has as source of inspiration, according to some opinions, even Article 2 of the Hague Convention”²⁴.

Although certain legal mechanisms of fiduciary concern, as well as stipulation for others (in Romanian language: “*stipulația pentru altul*”), the sale with repurchase option (in Romanian language: “*vânzarea cu pact de răscumpărare*”) or donation with undertakings (in Romanian language: “*liberalitatea cu sarcini*”), there were also in Civil Code from 1864, they present important differences as compared with the current regulations of the *fiducie*, and, from this point of view, the legislator of Romanian Civil Code in force, should be congratulated for the act of courage and the understanding of the contemporary reality, by introduction a judicial mechanism that seems to be exhibiting important similarities to the Anglo-Saxon *trust*.

Although in the preamble to the legal project regarding the Civil Code, the stated legislator’s aim was “**placing the trust institution in Romanian civil law** (ns. subl. - D. M.)”²⁵, the differences between the *fiducie* and *trust* are essential. Perhaps the main difference between the *fiducie*’s institution and the *trust* (existing in both Article 775 of the Romanian Civil Code²⁶, as well as in Article 2,013 of the French Civil Code) is the prohibition expressly stated, under the absolute

¹⁹ In this respect, see Burian Hunor, *Fiducia în lumina Noului Cod Civil*, without details of publication, article available at the web address: <http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2011-1/5-burian.pdf> (last visited on 03.01.2013), p. 32.

²⁰ In this respect, see Gheorghe Piperea, *Dreptul comercial. Întreprinderea*, Publishing House C. H. Beck, Bucharest, 2012, p. 9.

²¹ In this respect, see Corneliu Bîrsan, *Drept civil. Drepturi reale principale în reglementarea noului Cod civil*, Hamangiu Publishing House, Bucharest, 2013, p. 14.

²² In this respect, see Valeriu Stoica, *Drept civil. Drepturile reale principale*, 2nd Edition, Publishing House C. H. Beck, Bucharest, 2013.

²³ In this respect, see Flavius Antonius Baias; Eugen Chelaru; Rodica Constantinovici; Ioan Macovei (coordinators), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664*, C. H. Beck Publishinh House, Bucharest, 2012, p. 823.

²⁴ In this respect, see Daniel Moreanu, *op. cit. supra* n. [12].

²⁵ In this respect, see *Expunerea de motive la proiectul Legii privind Codul civil*, available at the web address: www.just.ro (last visited on 08.01.2015), p. 8.

²⁶ Based upon the corroborated interpretation of Article 775 provisions with those of paragraph (2) of Article 984, the correct conclusion is that, *de lege lata*, the *fiducie* cannot be used for creating donations (in Romanian language: “*liberalități*”) neither directly nor indirectly.

nullity penalty, to constitute indirect donations (in Romanian language: “*liberalități indirecte*”) (or to be subject to a liberal intention) in the beneficiary’s favour.

It is to be noted that the obvious and substantial similarities between the two (2) institutions, have led to points of view in accordance with which the *fiducia* / the *trust* can represent an instrument of economic incentives, which contributes to the horizontal and vertical economic development. Thus, the *fiducie* is deemed as a means of economic incentivizing by introducing into the civil circuit certain assets which, otherwise, would have had low chances to be capitalized.

The French model of the *fiducie* (*la fiducie*) which, as we have mentioned *supra*, was taken over by the Romanian legislator, knows two (2) main ways to practical use, *recte*: the *fiducie*-guarantee, and the *fiducie*-administration/management. The *fiducie*-guarantee (equivalent of Roman law concept of *fiducia cum creditore*) constitutes a guarantee by the debtor to discharge the obligation undertaken towards the creditor by the handing-over to the latter of a particular asset subjected to compulsory guarantee in question. The *fiducie*-administration/management (equivalent of Roman law concept of *fiducia cum amico*) means a contract whose purpose is to ensure the assets’ administration which, as a rule, holds also the capacity of beneficiary.

Through the *fiducie*, it is produced a patrimony division allocated to a specific purpose (in Romanian language: “*afecțiune*”) of one person (natural or legal) by separation of rights and obligations assembly from the rest of the patrimony and the prosecution by a third party for the benefit of another person indicated by the right holder. The effect of this division/split consists of an absolute limitation of the creditors’ rights to follow the respective assets, exclusively in what regards the creditors whose claims were born in connection with the fiduciary patrimonial mass, and the inability to follow up other debtor’s property, subject to the terms and conditions expressly stipulated by the provisions referred to under Article 786 of the Civil Code.

Also, the fiduciary patrimonial mass is protected against the trustee’s (in Romanian language: “*fiduciar*”) insolvency hypothesis, as it is stipulated, *expressis verbis*, by the provisions of Article 785 of the Civil Code.

Under Romanian law, one possible use of the *fiducie* may consist in that in which a credit institution uses the *fiducie* as a means of guaranteeing the credit granted, earning through this the property object in question, without carrying out the procedure of forced execution which is costly both from the point of view of time involved, as well as the financial resources. Also, please note that there are currently credit institutions in Romania offering fiduciary accounts as a product.

We note, at the same time, the existence of legal aspects which may give rise to differing interpretations. A potential controversy, which gave rise already to conflicting opinions in legal literature, is represented by the possibility of overlapping the settlor’s (in Romanian language: “*constitutor*”) and the trustee’s (in Romanian language: “*fiduciar*”) capacity. Although there are points of views in both directions, our perspective was that there is no possibility of combining settlor’s (in Romanian language: “*constitutor*”) and the trustee’s (in Romanian language: “*fiduciar*”) capacity, conclusion resulting from Article 774 of Civil Code, which stipulates that the *fiducie*’s origin discharger can be found in the contract (meaning bilateral legal deed) or in the law. In conclusion, the point of view in accordance with which the *fiducie* may have origin in a unilateral legal act, is contrary to the relevant legal provisions themselves.

One of the main advantages offered by the *fiducie* to civil circuit consists in that it is a practical solution to deploy in place of an association or a stand-alone company, throughout the possibility of sharing certain assets of an natural or legal person, without it being necessary to create separate legal entities. The effect is that of creating distinct and specialized creditors categories, and the settlor’s (in Romanian language: “*constitutor*”) liability for its other businesses shall not reach the patrimony dedicated to the *fiducie*.

7. Conclusions

Francis Bacon said that “new laws are similar to drugs prepared by pharmacists; though remedied sickness, produce disturbance on the body”²⁷. This assertion is also valid in respect to the *fiducie*, a revolutionary instrument with valences that we are just beginning to find out, but it should be used with great caution, since it may produce “disturbance” to the Romanian legal system. The role they one expects from the legislator is to create efficient mechanisms to deter, prevent and penalize any potential harm of fraudulent use of this legal instrument.

We consider that the banking field is the area in which the *fiducie* is possible to become familiar, and develop on both short and long term. The *fiducie* represents a Roman law institution (*pactum fiduciae*), assessed in the international doctrine (particularly French doctrine) as one of the most ancient *in rem* contracts. It’s introduction under the Romanian Civil Code represents one of the major innovations brought by the new regulations.

The conclusion and execution of the *fiducie* contract involves an attitude of proactive compliance and legal operation symbiosis of all persons involved.

First of all, the creator (in Romanian language: “*constituitor*”) (equivalent of the *settlor/grantor*) which, considering the disposal of part of its assets to the trustee’s (in Romanian language: “*fiduciar*”), places its trust in another person, securing the purpose that is wants to reach, the person which will be beneficiary of their intended purpose, and the limits of powers within the framework of which it is allowed to act. Second of all, the trustee (in Romanian language: “*fiduciar*”) must give proof of professionalism and dedication in exercising the powers conferred upon it by means of the *fiducie* contract. Third of all, as a matter of principle, even though the beneficiary does not devolve upon it specific obligations, it cannot be excluded, *de plano*, imposing a set of undertakings, having regard to the benefits which it obtains under the *fiducie* contract.

Although we appreciate that, as yet, the *fiducie* is not enough known and used, we hope that, in the future, its use shall grow, having regard to many advantages which it can give. The Civil Code’s legislator has displayed a real act of courage and understanding of the international legal context by entering this new and truly innovative juridical institution.

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²⁷ In this respect, see, Francis Bacon, *The works of Francis Bacon*, Vol. IV, Publishing House C. Baldwin, London, 1819, p. 182.

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