The parties of fiduciary contract

Professor **Cornelia LEFTER**[1]
PhD. student **Günay DUAGI**[2]

Abstract

The parties of the fiduciary contract in general, and the fiduciary in particular represent the "engine" that moves the gear of this innovative institution. This study is dedicated to the analysis of the most important aspects regarding the parties of fiduciary contract as they are briefly regulated by civil Code, both by reference to current national regulation and practice and by reference to international law and practice. On one hand, it is relevant that there are some restrictions imposed by the legislator on the fiduciary capacity and, on the other hand, there is a partial lack of correlation between the current legislation regulating the activity of the qualified subjects of the potential fiduciaries with the provisions of civil Code. At the same time, very useful regulations have been issued for some of the fiduciary categories (investment companies and lawyers) that facilitate their access to this institution and the use of fiduciary agreements in practice. However, in general, the lack of clarity and insufficient legislation, as well as unawareness by some potential beneficiaries of this institution, keeps the utilization of fiduciary contracts at a low level in practice.

Keywords: *the parties of the fiduciary contract, settlor, fiduciary, beneficiary of the fiduciary contract, fiduciary-lawyer, Romanian civil Code*

JEL Classification*:* K12, K15, K22.

1. Introduction

Through an innovative and modern approach, the creators of civil Code from 2011[3] have introduced the fiduciary contract among the Romanian civil law institutions[4].

This extremely useful initiative has led to the possibility of using fiduciary contracts in the Romanian legal system, and thus aligns it with other more advanced jurisdictions such as France, Italy, Luxembourg, Germany and Canada.

---

[1] Cornelia Lefter – Department of Law, Bucharest University of Economic Studies, contact@lefter.org
[2] Günay Duagi – Doctoral School of Law, Bucharest University of Economic Studies, gunayduagi@yahoo.com
[3] Civil Code dated 17 July 2009 (Law no. 287/2009 on the civil Code) – Published in the Official Gazette of Romania no. 511 of 24 July 2009.
[4] Regarding the regulation of the fiduciary contract in the Romanian Civil Code, see Bazil Oglindă, *Practical aspects regarding fiduciary operations*, „Perspectives of Business Law" Journal, vol. 5, issue 1, 2016, p. 221-223.

We notice that, in the explanatory memorandum of civil Code, in the chapter dealing with "*fiducia"*, the legislator initial intention was, actually, to import the "*trust*" *tale quale* in the Romanian legal system. However, given the incompatibility of the trust with the continental law system due to the split of ownership, which is specific to this institution, the result was the adoption of a solution much closer to the Romanian legal system, namely the institution of "*fiducia"*.

The current provisions of civil Code are proof of this reality and are the natural consequence of the fiduciary specificity. Thus, as reputed authors have shown, as well as those who analysed the new Romanian civil Code, "*fiducia* represents a division of the patrimony"[5], being at the same time an application of the principle of the patrimony split[6] regulated by art. 31 civ.c. However, some Romanian authors have a contrary opinion, which we do not share, regarding the express provisions of art. 31 par. 3 civ.c., in the sense that "according to the current regulation of "fiducia", we could not speak about the creation of a genuine patrimony split but only about the creation of a patrimonial assets.[7]

At the same time, it is worth mentioning that the doctrine is still under debate regarding the qualification and origin of "*fiducia"*. Thus, some authors claim that "*fiducia"* is a simple legal transplant or a hybrid institution[8]. However, as we will try to demonstrate further, we believe that "*fiducia"* goes beyond the limits of such a copied structure, and has become, due to its unique characteristics, another "species" of contract.

Also, taking into account the regulation of *"fiducia"* in the civil Code, we agree with those authors who consider that "*fiducia* is more than just a contract"[9] creating a link between the parties with a complexity that is not specific to another type of contract (maybe similar to a company's articles of association) and with effects just as important as a sale agreement.

The leading financial authorities (NBR[10] and FSA[11]) have quickly recognized the importance of "fiducia" in the Romanian legal system. The National Bank of Romania has even organized dedicated events on the implementation of this legal instrument in its area of competence[12].

---

[5] Flavius Antonius Baias; Eugen Chelaru; Rodica Constantinovici; Ioan Macovei (coord.), *Noul Cod Civil. Comentariu pe articole*. Art. 1-2664, Ed. C.H. Beck, Bucharest, 2012, p. 822.

[6] In Romanian language "patrimoniu de afectațiune".

[7] Mihai David, *Experimentul european al fiduciei - realizări și perspective*, "Caietele juridice ale Băncii Naționale a României", Bucharest, Year II, no. 3, July-September 2012, p. 16. "Patrimonial assets" – in Romanian language: *masa patrimoniala*.

[8] James Koessler, *Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives*, University of Warwick, March 2012, p. 8, article available at the web address: https://ssrn.com/abstract=2132074 (last visited on 24.09.2017).

[9] Daniel Moreanu, *Fiducia și Trust-ul*, Ed. C.H. Beck, Bucharest, 2017, p. 155.

[10] National Bank of Romania.

[11] Romanian Financial Supervision Authority.

[12] Banca Națională a României, Colocviile juridice ale BNR 7th edition, 4 July 2012, *Fiducia - instituție de drept civil cu impact asupra mediului financiar-bancar, without details of publications*, article available at the web address: http://www.bnr.ro/Colocviile-juridice-ale-BNR-8352.aspx (last visited on 24.09.2017).

One of the reasons why "*fiducia"* has not yet been used in the Romanian legal system to its true potential is also the unclear fiscal and accounting regulation accompanying it.

Judging by its novelty, we can state that "*fiducia"* is still in its growth stage in the Romanian legal system and its introduction in the civil Code of 2011 is one of the great innovations of this normative act.

2. Short presentation of "*fiducia"* in the Romanian legal framework

Being a system of continental law, the Romanian legal system allows only limited patrimonial relationships between the parties to a contract. These patrimonial relationships make "*fiducia"* a special contract, different from any other contracts governed by the Code, and its parties "qualified subjects" of this type of operation.

Before we launch in the analysis of the parties of the fiduciary contract in the light of the regulations in force, we consider it necessary to briefly analyse the differences between "*fiducia"* and other similar legal institutions, with emphasis on their contracting parties.

Thus, we consider that the most similarities exist between "*fiducia"* and the administration of other people's assets[13] as it is regulated in art. 792 et seq.civ.c.. This article provides that a person who is empowered, by will or convention, with the administration of one or more assets, or of a patrimonial part or of a patrimony that does not belong to it, has the capacity of administrator of the other people assets. It is also stipulated that these provisions apply to any administration of the other people assets, unless the law, the constitutive act or the specific circumstances requires the application of another legal administration framework.

In addition, unless according to the law, the constitutive act or the subsequent agreement of the parties or of the concrete circumstances, the administration is free of charge, the administrator is entitled to a fee established either by the constitutive act, by subsequent agreement of the parties, by law or, in default, by court order.

On the other hand, as a subtile difference from "*fiducia"*, which does not imply an obligation to do something[14] , in the case of administration of the other people assets, *"a person acting without that right or without being authorized has no right to remuneration, while remaining applicable, if there is the case, the rules from administration of business"*[15].

Another institution that is similar to "fiducia" is the mandate. With or without representation, the mandate is with gratuitous or with onerous title. Although the mandate between two individuals is presumed to be with gratuitous title, the mandate given for acts of pursuit of a professional activity is presumed to be with onerous title, similar to "*fiducia"*. In addition, "*if the mandate is with*

[13] in Romanian language: "administrarea bunurilor altuia".
[14] in Romanian language "obligatia de a face".
[15] Art. 793 par. 2 civil Code.

onerous title and the remuneration of the authorized agent is not determined by the contract, it shall be determined according to the law, the customs, or by default, according to the value of services rendered"[16]. Although, obviously, in case of mandate there is no transfer of the ownership right towards the authorized agent, which is specific to "*fiducia"*, however, in the case of a mandate without representation applies the same principle of interposition of the authorized agent, who appears to be the owner in the relationship with third parties.

Another institution similar to "*fiducia"* is the administration of business.[17] Thus, introduced in the section regarding legal juridical facts, the administration of business "*exists when, without being liable, a person, so-called endorser, voluntary administrates the business of another person, the so-called endorsee, that is not aware about this administration or, knowing it, he cannot appoint a mandatory (authorized agent – a.n[18]) to carry out differently his business"*[19]. However, civil Code states that "*there is no administration of business when a person managing the business of another person acts with the intention to gratify him*"[20]. On the other hand, "*fiducia"* could not be used for indirect donations, so this sentence is not applicable in this case.

Although there are elements of similarity with other institutions regulated by civil Code, for the purpose of this study, which focuses on the parties of the fiduciary contract, we will limit to these.

3. The parties of the fiduciary contract in the Romanian Civil Code

The fiduciary contract is governed by art. 773-791 civ.c. and art. 2659-2662 of the Private International Law Chapter of the same Code. Among the 18 articles regarding the fiduciary contracts, the ones governing the parties of this agreement stand out. Thus, a specific element of this contract is that, unlike other categories of contracts, fiduciary contracts involve three parties: the settlor, the fiduciary and the beneficiary.

In the doctrine, the thesis was stated according to which only the settlor and the fiduciary are parts of the fiduciary contract because art. 776 civ.c. (referred to as the "Parties of the fiduciary contract") refers only to them (without indicating the beneficiary which is separately regulated in art. 777 civ.c.). However, taking into account the rights and obligations that the beneficiary has within the fiduciary contract, we consider that he is also a contractual party. Thus, we notice that each of the three parties of the fiduciary contract benefits from express provisions in the Code which directly concern it.

[16] Art. 2010 par. 2 civil Code.
[17] in Romanian language : "gestiunea de afaceri".
[18] a.n. – author note.
[19] Art. 1330 par. 1 civil Code.
[20] Art. 1330 par. 1 civil Code.

As expected, the fiduciary status has the most restrictive legal framework. This reflects the special attention given by the legislator in order to protect the interests of the settlors and of the beneficiaries.

The settlor. The Civil Code provides in its art. 776 that "*any natural or legal person may be a settlor within the fiduciary contract".* This "generous" provision makes "*fiducia"* to be qualified as a flexible legal operation.

From art. 776 civ.c. it results that both natural and legal persons may be in a settlor position. As the doctrine showed, this formula removes the "French Civil Code limitations that have reduced the practical application of fiduciary operations"[21] which allow "only legal entities subject to corporate tax to have the settlor status"[22]. In addition, the Romanian Civil Code does not seem to have any other restrictions within other provisions governing fiduciary contracts. Thus, in the absence of other provisions governing "*fiducia"*, we turn our attention to the general provisions governing the general framework of persons and obligations. Thus, in order to determine the limits applicable to the settlor under a fiduciary agreement, the common rules on capacity and incapacity, respectively the legal regime of disqualification from certain rights of natural and legal persons, will apply.

Title II, Book I ("About Persons") of civil Code contains provisions regarding the civil capacity of the natural persons respectively their abstract and concrete capacity. Without insisting on these general rules, we only mention that it is possible that the provisions relating to limited concrete capacity and the legal regime of some acts of an underage person (art. 41 and art. 42 civ.c.) can be very relevant in practice since an application of "*fiducia"* is also the administration of a patrimony on behalf of a minor heir (similar to the trust in the states with common law system).

As far as the civil capacity of the legal persons is concerned, the discussion may be much broader. Given the purpose of this study, we will limit to brief considerations on the legal capacity of the legal entities. We consider that we need to distinguish between two situations where a legal person may become a settlor under a fiduciary contract: either, on an occasional basis (e.g. for the management of its own property) or for professional purpose (for example, for managing its clients' assets). Particular attention should also be paid to the activities that a legal person may carry out on the basis of his object of activity included in its articles of association. Thus, art. 207 civ.c. expressly stipulates that "*acts and transactions committed without the authorization provided for by law are hit by absolute nullity and the persons who have concluded them are unlimited and jointly liable for all the damage caused, regardless of the application of other sanctions provided for by law".*

In addition, taking into account the provisions of art. 775 civ.c which prohibits indirect liberties through fiduciary operations, we exclude the risk that a

[21] Flavius Antonius Baias; Eugen Chelaru; Rodica Constantinovici; Ioan Macovei (coord.), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664,* Ed. C.H. Beck, Bucharest, 2012, p. 824.
[22] Idem.

legal entity would carry out such operations for the disadvantage of its creditors. However, the question arises as to what extent a legal person can carry out such operations on a professional basis? We believe that the answer to this question rests with the benefit that the entity obtains from this operation.

Another aspect that stands out from the definition of "*fiducia"* is that several settlors can constitute it. We believe that this aspect is closely related to the object of the fiduciary contract, which also includes rights that are not yet born at the time of its conclusion.

In the same sense, some authors[23] assert that "*fiducia"* also involves an additional non-patrimonial component, because through this contract a person (the settlor) cedes his right to dispose of a good to another person (the fiduciary), reinforcing the idea that "*fiducia"* is a distinct category of contracts and property.
We also believe that, if there are multiple settlors, significant implications may arise in practice regarding the problem of transmission of a multitude of property rights to the fiduciary .

The fiduciary. Further on, due to the extremely interesting listing provided by civil Code, which shows that the fiduciary has the most important role in a fiduciary contract, we will focus on his status.
According to civil Code, "*may have the status of fiduciary in this contract only legally established credit institutions, investment companies and investment management companies, companies for financial investment services, insurance and reinsurance companies "*[24].

In addition, among the specialists who can act as fiduciary, there are public notaries and lawyers, regardless of the form of exercising their profession.

As shown above, the effects of fiduciary operations are the direct consequence of a unique feature of this contract, meaning the separation of assets (within the fiduciary's total patrimony), or as an author state, the placement of the fiduciary contract's object "into a distinct patrimony, affected by the achievement of a goal"[25].

Taking into account those mentioned before a question arises: Why did the legislator has limited the capacity to hold fiduciary status only for the above categories given the protection offered by the very essence of fiduciary operations?

Some authors have argued that this solution to limit this status only to some categories of professionals was created in order to prevent fraud[26], tax

---

[23] Julia M. Evans, *A Kantian perspective on fiduciary relationships*, Master of law thesis, University of Toronto, Library and Archives Canada, 2005, article available at the web address: http://www.collectionscanada.gc.ca/obj/thesescanada/vol2/002/ mr02508.pdf (last visited on 24.09.2017).

[24] Art. 776 par. 2 Civil Code.

[25] Mădălina Viziteu, *Privire comparativă asupra instituţiei trust-ului din common law şi fiduciei din noul Cod civil român*, without details of publications, article available at the web address: http://www.cartidedrept.eu/articole-drept/privire-comparativa-asupra-institutiei-trust-ului-din-common-law-si-fiduciei-din-noul-cod-civil-roman.html (last visited on 22.01.2017).

[26] Mihnea-Dan Radu, Fiducia: From fides to trust and the new Romanian civil Code Regulation, "Valahia University Law Study", Volume XX, Issue 2, 2012, p. 243.

evasion, money laundering, and terrorism or drug trafficking. However, at the same time, the same authors argue that the solution to prevent fraud is not to create a monopoly of a professional body of fiduciaries but rather to monitor them more closely in order to meet the minimum conditions by the fiduciary[27].

In order to answer the above mentioned question, we can look at what is the object of activity regulated for these possible fiduciary categories. First of all, we note that all of the above mentioned categories are carrying on regulated activities and their object of activity allows them to manage the clients' assets (even before the introduction of "*fiducia"* into the civil Code).

Thus, credit institutions regulated inter alia by EGO no. 99/2006[28] have an object of activity limited to the one stipulated by the law. Currently, among the activities that credit institutions can carry out is the administration of assets for their clients, including fiduciary operations. Similar provisions exist for the other categories of professionals.

However, we will insist on the clarification of the categories of persons who can act as fiduciaries. If the reference to credit institutions is quite clear, however, it is worthwhile clarifying the other categories.

Thus, perhaps the most controversial category is the generic one named "investment companies". This generic wording can create confusion among the companies that can hold the fiduciary status[29]. Indeed, we believe that this wording does not refer to companies for financial investment services (**SSIF**) because the law mentions this category separately. Therefore, the only option would be that by "investment companies" the legislator refers to **SIFs**. These are by themselves an "innovation" of the Romanian legislation, which benefits from a special regulation. However, it is hard to imagine how these companies can actually carry out fiduciary operations because, given their recent practice, they are rather institutional investors on the capital market (and not only) than administrate the other persons' assets. Moreover, as it is shown by the official definition of "investment companies", they are not entitled to manage assets for other persons[30].

Another category of entities who can be fiduciaries are the investment management companies (**SAI**). These companies represent indeed the essence of

---

[27] Idem.

[28] Emergency Government Ordinance no. 99/2006 on credit institutions and capital adequacy, published in the Official Gazette Part I, no. 1027 on 27.12.2006, as amended and supplemented.

[29] According to the definition available on the FSA website, "investment companies are a form of UCITS established by constituent act. They may be managed by authorized investment management companies or by a board of directors in accordance with its constituent instruments. Investment companies can only manage their own assets and may not, under any circumstances, be mandated to manage assets in favor of a third party. Further on, according to the same source, "alternative investment companies - FIAs organized as the basis of a constituent act closed-ended investment companies – AOPC that are set up by a constitutive act issue a limited number of shares and are traded on a market".

[30] For more information on the investment companies and managers of alternative/closed funds, as well as a list of these, please see the Electronic Register of FSA available at https://asfromania.ro/supraveghere/registre-electronice/registrul-instrumentelor-si-investitiilor-financiare.

professionals whose main purpose is to administer other people's assets. The SAI benefit from specific regulation through capital market legislation.

Also, potential fiduciaries may be SSIFs or brokers on the capital market. According to the FSA Regulation no. 1/2015[31], SSIF may be fiduciaries, under certain conditions, especially in the case of "*fiducia"* related to shares listed on the capital market.

Taking into account the lack of secondary normative acts governing fiduciary operations at sectorial level, we consider that the FSA Regulation no. 1/2015 contains some very useful provisions for the practice. According to the preamble contained in the aforementioned regulation, this normative act "*establishes rules regarding the application of certain provisions of the capital market legislation in the case of the fiduciary contract, as it is regulated by Law no. 287/2009 regarding the civil Code, republished, as subsequently amended, as well as on the activities that may be performed by financial investment services companies, hereinafter referred to as SSIF, other than investment services and activities, as well as the related services provided by Law no. 297/2004 regarding the capital market, with subsequent amendments and completions"*[32].

Thus, it is provided that in case of a fiduciary contract through which there are transferred into the patrimonial fiduciary assets of the fiduciary rights related to shares, the fiduciary is registered as a shareholder from the date of the transfer of the shares to his securities account affected by the fiduciary operation opened to the Central Depository.

It is also stipulated that the fiduciary has the rights and the obligations related to the shares existing in his securities account affected by the fiduciary operation, which he exercises in compliance with the provisions of the fiduciary contract, as well as with the other incumbent legal provisions. These rights and obligations are, but not limited to, the rights and obligations of the shareholders provided by Law no. 297/2004, as subsequently amended and supplemented, Law no. 24/2017 on issuers of financial instruments and market operations[33] and Regulation no. 1/2006 on issuers and transactions with securities[34].

Another particularly important aspect regulated by the aforementioned normative act is the fact that, in the case of shares listed on the capital market, the voting rights attached to the shares registered in the securities account affected by the fiduciary operation are exercised by the fiduciary or, as the case may be, by the person empowered by the latter.

---

[31] Regulation no. 1/2015 on provision of services by the financial investment services companies and application of provisions of capital market law in case of fiduciary contract, published in the Official Gazette, Part I, no. 142 at 25.02.2015, as amended and supplemented.

[32] Law no. 297/2004 on capital market law, published in the Official Gazette, Part I, no. 571 at 29.06.2004, as amended and supplemented.

[33] Law no. 24/2017 on issuer of financial instruments and market operations, published in the Official Gazette, Part I, no. 213 at 29.03.2017.

[34] Regulation no. 1/2006 on issuers and securities operations approved by Order of the President of CNVM no. 23/2006, published in the Official Gazette, Part I, no. 312 at 06.04.2006, as amended and supplemented.

Another interesting provision of FSA Regulation no. 1/2015 with direct reference to civil Code rules stipulates that, if the fiduciary is also the beneficiary of "*fiducia"*, when calculating the holdings that he has together with the persons with whom he concertedly acts within the meaning of art. 2 par. (1) point 23 of Law no. 297/2004, shall be taken into account both the holdings in the securities accounts which are part of his own property, as well as the holdings in the securities account affected to the fiduciary operation.

On the other hand, with regard to the fiduciary contract, FSA Regulation no. 1/2015 provides that the services and investment services contract concluded between the SSIF (as a fiduciary) and an intermediary may not exceed the fiduciary contract and shall contain clauses on termination of the contract in case the fiduciary is replaced or the fiduciary contract ends. In addition, in the previous case, the person undergoing the analysis of the beneficial owner is the beneficiary of the fiduciary operation.

As far as insurance or reinsurance companies are concerned, we consider that, given their scope of activity, it is natural to list them as potential fiduciaries.

The last two categories mentioned by art. 776 par. 2 civ.c. are the lawyers and the public notaries. Considering that these are professions that have as their object of activity the protection of the clients' interests, they were able to carry out such activities, even before the introduction of fiduciary rules into civil Code, Indeed, according to Law no. 51 of 7 June 1995 regarding the organization and exercise of the profession as a lawyer[35], among the activities allowed to lawyers there are also "fiduciary activities carried out under the conditions of civil Code".

Additionally, in the Statute of the lawyer's profession from 03.12.2011[36] it is stipulated that the lawyer has the right to perform fiduciary activities, on the name and on behalf of the client, in compliance with the provisions of the law and of this statute.

In this respect, according to the Statute, the fiduciary activities exercised by the lawyer may consist of:

a) receiving in deposit, in the name and on behalf of the client, of funds and assets resulting from the valorisation of enforceable titles after the outcome of a dispute, mediation, inheritance proceedings or the liquidation of a patrimony;
b) placing and valorisation, on the name and on behalf of the client, of financial funds and assets entrusted to him;
c) administration, in the name and on behalf of the client, of funds or securities in which they were placed.

Moreover, there are also imposed obligations on how to exercise the fiduciary mandate. According to them, the fiduciary-lawyer shall, inter alia, strictly

[35] Law no. 51/1995 for the organization and exercise of the profession as a lawyer, republished in the published in the Official Gazette, Part I, no. 872 din 28.12.2010, as amended and supplemented.

[36] The statute of the lawyer's profession, adopted by Decision no. 64/2011 of the Council of the National Union of the Romanian Bar Associations, published in the Official Gazette, Part I, no. 898 at 19.12.2011, as amended and supplemented.

observe the limits and duration of the mandate entrusted to him; shall act in good faith, professionalism and with diligence of a good owner, without departing from the specific rules of his professional activity; shall administrate the business entrusted to him only in the exclusive interest of the client.

What it is extremely interesting for the understanding of activities that a fiduciary-lawyer can perform is provided in art. 95 of the Statute. This article states that, in the execution of his mandate, the lawyer may carry out consultancy activities, operations to preserve the substance and the value of the financial funds and of the assets entrusted to him, operations of placing the funds in assets, administration and the capitalization of investments, etc.

Also, the Statute provides the necessary requirements for: opening of fiduciary accounts for depositing fiduciary funds, informing the client about the available balance of the account at least once every three months, withdrawing funds or making payments from the fiduciary account, successful fee for activities (contracts, correspondence, valuation reports, account statements, etc.), keeping a register of fiduciary activities and the registration of operations no later than 3 working days after their completion, archiving of records related to fiduciary activities for at least 10 years, etc.

Beneficiary. As far as the beneficiary is concerned, civil Code shows maximum flexibility in the sense that the beneficiary can be either a settlor, as well as a fiduciary, but also a third person. Although at first glance the most common case would suppose the existence of three different parties, however, in practice, it seems that the scenarios in which the beneficiary is at the same time settlor or fiduciary are so far the most common (according to the AEGRM[37] record).

It is worth noting the emphasis the legislator has put on the need for transparency and publicity of the fiduciary contract. One reason for this concern may be the fact that, in some jurisdictions, the trust, as a similar institution to "*fiducia"*, is used to "conceal" the real beneficiaries (UBO[38]).

At the same time, some authors rightly considered that the obligation to register the fiduciary contract with the state financial administration unit[39] is an "excessive requirement"[40].

In conclusion, we agree with the opinion expressed in the doctrine on cumulation of qualities of contracting parties within the fiduciary contract[41]. In this respect, we also consider that "the three qualities (settlor, fiduciary and beneficiary) could not be cumulated in one person, because there would be no fiduciary relationship in this way"[42].

---

[37] Electronic archive for security interests in movable property.

[38] UBO – in English: ultimate beneficiary owners.

[39] Camelia Florentina Stoica, Silvia Lucia Cristea, *Legea aplicabilă fiduciei, ca element de extraneitate*, "Educație și creativitate pentru o societate bazată pe cunoaștere", November, 2011, p. 4.

[40] *Idem*.

[41] Burian Hunor, *Fiducia în lumina Noului Cod civil*, without details of publications, article available at the web address: http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2011-1/5-burian.pdf (last visited on 24.09.2017), p. 37.

[42] *Idem*.

4. Conclusions

As we have shown before, "*fiducia"* can be constituted for a number of purposes (except for liberalities), the most important being: "*fiducia"* for administration purposes and "*fiducia"* for guarantee purposes. This aspect has a direct consequence on the parties involved in the contract, and especially on the fiduciary, which must have in its object of activity the possibility to provide fiduciary services according to its purpose.

We also mention that, the current regulation of "*fiducia"* in civil Code still has some controversial or unclear aspects regarding the parties of the fiduciary contract, such as: the civil capacity of the settlor, the possibility to provide fiduciary services free of charge, the determination of the size of fiduciary's remuneration, the extent of his liability, the rights and obligations of the parties, the transfer of patrimonial assets to the fiduciary, etc.

Going beyond some theoretical and terminological inconsistencies, including the parallel with the trust, we can state that the parties of a fiduciary contract are distinguishable from any other contractual parties governed by civil Code.

Thus, an element that differentiates "*fiducia"* from other types of contracts and from which derive many of the rights and obligations of the parties to this contract is that there are three contractual parties: the settlor, the fiduciary and the beneficiary.

At the same time, if the beneficiary or the settlor can be any natural or legal person, the fiduciary status (the most important in the economy of this contract) can only be held by certain qualified subjects, especially financial entities.

The regulation of the parties to this contract, as stipulated by civil Code, still recalls the conservative attitude of the Romanian legislator, but also a strong evolution, which is unfortunately only partial (for example, in the case of fiduciary-lawyers and fiduciary-SSIF).

Finally, we believe that although "*fiducia"* is indeed a unique instrument within the Romanian legal system, and the academic world, the authorities and beneficiaries want it to function; however, the way to accomplish this has not yet been found.

Bibliography

1. Bazil Oglindă, *Practical aspects regarding fiduciary operations*, „Perspectives of Business Law" Journal, vol. 5, issue 1, 2016.
2. Burian Hunor, *Fiducia în lumina Noului Cod civil*, without publishing details, article available at the web address: http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2011-1/5-burian.pdf (last visited on 24.09.2017).
3. Camelia Florentina Stoica, Silvia Lucia Cristea, *Legea aplicabilă fiduciei, cu element de extranitate*, Revista "Educație și creativitate pentru o societate bazată pe cunoaștere", November, 2011.

4. Daniel Moreanu, *Fiducia și Trust-ul*, Ed. C.H. Beck, Bucharest, 2017.
5. Flavius Antonius Baias; Eugen Chelaru; Rodica Constantinovici; Ioan Macovei (coord.), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664*, Ed. C.H. Beck, Bucharest, 2012.
6. James Koessler, *Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives*, University of Warwick, March 2012, article available at the web address: https://ssrn.com/abstract=2132074 (last visited on 24.09.2017).
7. Julia M. Evans, *A Kantian perspective on fiduciary relationships*, Master of law thesis, University of Toronto, Library and Archives Canada, 2005, article available at the web address: http://www.collectionsCanada.gc.ca/obj/thesescanada/vol2/002/mr02508.pdf (last visited on 24.09.2017).
8. Mihai David, *Experimentul european al fiduciei – realizări și perspective,* „Caietele juridice ale Băncii Naționale a României", Year II, no. 3, July-September 2012.
9. Mihnea-Dan Radu, *Fiducia: From fides to trust and the new Romanian Civil Code Regulation*, Valahia University Law Study, Volume XX, Issue 2, 2012.
10. Viziteu Mădălina, *Privire comparativă asupra instituției trust-ului din common law și fiduciei din noul Cod Civil român*, without publishing details, article available at the web address: http://www.cartidedrept.eu/ articole-drept/privire-comparativa-asupra-institutiei-trust-ului-din-common-law-si-fiduciei-din-noul-cod-civil-roman.html (last visited on 24.09.2017).
11. National Bank of Romania, *Colocviile juridice ale BNR*, 7th edition, July 4, 2012, *Fiducia – instituție de drept civil cu impact asupra mediului financiar-bancar*, without details of publications, articles available at the web address: http://www.bnr.ro/ Colocviile-juridice-ale-BNR-8352.aspx, (last visited on 24.09.2017).