The fiduciary guarantee[1] in the Romanian and European legal context[2]

Professor **Cornelia LEFTER**[3]
Ph.D. student **Günay DUAGI**[4]

Abstract

The importance of the fiduciary guarantee has not reached its full potential in the Romanian market, nor in the European area. The ongoing "dispute" between the fiduciary operations (familiar to the continental law) and the trust (with its common-law heritage) seems to be won by the latter. However, considering the express provisions on the fiduciary operations in the Romanian Civil Code entered into force in 2011, similar to the introduction of the same legal instrument in the French Civil Code in 2007, could give a boost to this ancient tool, present from the Roman era. Even if the European legal framework do not provide many rules on this institution, however, the Financial Collateral Directive raised many questions on how the fiduciary guarantees can be used in practice, and contributed to the change that followed in this area.

Keywords: *fiduciary guarantee, beneficiary, collateral, trust, legal framework, Financial Collateral Directive, Romanian Civil Cod.*

JEL Classification: K12, K22, K33

1. Introduction

As a new legal institution of the Romanian civil law, the fiduciary guarantee incites the juridical doctrine to analyze it deeply and the practice to verify its potential.

The previous analyses focused on the theoretical aspects of the fiduciary guarantee, or on the historical perspective. Other authors focused on the comparison between fiduciary guarantee and trust.

Considering the above, our study envisages focusing on the following aspects we consider of interest. We will make a brief presentation of the most important and controversial provisions relevant for fiduciary guarantee in the Romanian Civil Code. Also, we will mention the European Union legislation with

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[1] For the purpose of this article, the reference to "fiduciary guarantee" means the fiduciary operation used for guarantee purposes.

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[3] Cornelia Lefter - Department of Law, Bucharest University of Economic Studies, contact@lefter.org

[4] Günay Duagi - Doctoral School of Law, Bucharest University of Economic Studies, gunayduagi@yahoo.com

impact on the fiduciary guarantee, along with an analysis of the conflicts of law from an international law perspective. An important part of this study will focus on the most controversial and unclear aspects in the legislation mentioned above, and on the questions to be raised by the current legal framework on fiduciary guarantee.

Also, we will analyze the Financial Collateral Directive in order to see how its legal text is correlated with the fiduciary guarantee and its impact of this area.

We consider that there are many reasons to discuss about the fiduciary guarantee in general, considering the provisions stipulated in the Romanian Civil Code, and a lot more reasons to analyze it in the European context. In this respect, Romanian legal specialists have considered that besides its role to serve the theory on separation of patrimony "the fiduciary operation is a new form of guarantee"[5].

One of the main questions raised by the legal specialists after the entry into force of the Romanian Civil Code in 2011 referred to the comparison between the fiduciary operations and the trust. In this respect, although the fiduciary operation is a continental legal instrument and the trust is a common-law one, it is acknowledged that the later is more often used in Europe. Based on this reality the questions that arise are: *Why fiduciary guarantee is not used in its full potential? Is it too rigid in order to be implemented in practice? What should be changed to make its implementation more successful: the legislation or the perception of the legal specialists and potential beneficiaries?*

First of all, we consider that, at least for the Romanian market, the main reason why the fiduciary operations have not been used so far is the novelty factor. Potential beneficiaries of this legal instrument seem to be reserved in using this tool, as they do not fully understand its benefits and potential advantages. In this respect, we strongly believe that the role of informing the potential beneficiaries on the current regulation, risks, potential advantages and envisaged usage of this institution must be taken by the legal doctrine.

Throughout the following paragraphs we will refer to one of the most common examples that we envisage to be used in practice, namely the fiduciary guarantee as collateral for a loan.

2. General aspects

The fiduciary guarantee was introduced in the Romanian legislation through the New Romanian Civil Code in 2011. Even if this legal institution was not regulated before, it does not mean it was prohibited. However, currently, the articles of the Romanian Civil Code referring to this new legal institution provide us with some attributes, which help to define it[6]. However, despite its current

[5] Camelia Florentina Stoica, Silvia Lucia Cristea, *Legea aplicabila fiduciei, cu element de extraneitate*, Journal "Educatie si creativitate pentru o societate bazata pe cunoastere", November, 2011, p. 6.

[6] According to art. 773 of the Romanian Civil Code, "Fiducia is the legal operation whereby one or more settlors transfers rights, receivables, instruments, warrants or other rights or an assembly of such rights, present or future, to one or more fiduciaries who exercise them with a specific purpose to the benefit of one or more beneficiaries".

status, is important to mention that the fiduciary operations exist since the Roman Empire, and the transfer "was realized either through *mancipatio* or through *in iure cession,* a simple *traditio* not being enough"[7].

The importance of the fiduciary agreement has been recognized by the most important public institutions in Romania, considering the potential impact of the fiduciary operations in the financial market. In this respect, both the National Bank of Romania[8] and the Financial Supervisory Authority[9] organized dedicated events and/or issued regulations implementing this legal instrument in their legal area of competence.

Out of the many faces of the fiduciary operations the most used seems to be the fiduciary guarantee and fiduciary for management purposes. Thus, although its constitution is different, the exclusive nature of property is found in fiduciary operations in all cases.

As regards the trust, this legal instrument has been widely used and had an accelerated development in its multiple forms. The particularities of the trust in the common-law system resides in the fact that the ownership title is divided between several persons, among which some hold the legal title while others hold the equitable title[10].

The Hague Convention on the law applicable to trusts and on their recognition[11] (1985) acknowledge that trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution. Also, desiring to establish common provisions on the law applicable to trust and to deal with the most important issues concerning the recognition of trusts, the signatory states of the Convention have agreed upon specific provisions applicable to trust. The Convention stipulates unitary rules on the scope of the trust, applicable law, recognition of trust and other relevant clauses.

3. Romanian Civil Code

Art. 773 and the following and art. 2659 and the following of the Romanian Civil Code are dedicated to fiduciary operations, and to the international conflict of laws in case the fiduciary operation has a foreign element.

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7 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. 239.

8 *Colocviile juridice ale BNR* 7th edition, July 4, 2012, *Fiducia - instituţie 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 14.11.2016).

9 For example, the Romanian Supervisory Authority issued Regulation no. 1/2015 on provision of activities by companies of investment services and application of the provisions of capital market legislation for fiduciary contracts.

10 For more details see Flavius Antonius; Eugen Chelaru; Rodica Constantinovici; Ioan Macovei (coordinators), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664,* Ed. C.H> Beck, Bucharest, 2012, p. 822.

11 Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, entered into force in 1992.

From these articles it is understood that, similar to a mortgage agreement, the fiduciary contract must be signed in a genuine form in front of a public notary. Also, it is important to mention that the fiduciary can be only a credit institution, investment firm, investment management firm, insurance company, notary or lawyer. As regards to the purpose of this limitation, we consider that the legislator wanted to ensure that the fiduciary transactions will be operated in a controlled and regulated manner, as these operations are under a strict control from the specialized authorities[12]. Also, some authors consider that the provisions limiting the possibility to hold the position of fiduciary only to the entities mentioned above is excessive[13].

In this respect, we envisage that, at least the credit institutions (meaning, the banks) could hold, at the same time, two qualities (beneficiary and fiduciary). This situation gives rise in our opinion to conflict of interest, even if the law seems to solve this aspect by expressly stipulating that the beneficiary can be the settlor, the fiduciary or a third party.

However, despite the clear provisions in the Romanian Civil Code that the fiduciaries can also be beneficiaries, we consider that appropriate measures should be taken in such cases, in order to prevent the conflict of interest. Thus, in our opinion, there should be a functional and management separation between the persons that are in charge with the management of the assets (fiduciary activities) and the persons that are in charge with the loan. As the law does not provide prevention mechanism, it is the role of the banks (also based in the regulations issued by the National Bank of Romania) to insert them in their internal norms. In addition, we can go further with this reasoning and say that in cases where the conflict of interest is inevitable (meaning whenever such prevention measures could not be applied) the bank should refuse the service as fiduciary or lender, as the case may be.

Another important aspect to analyze is the limitation on the object of the fiduciary agreement. In this respect, considering the new institution of transfer of contracts stipulated by Romanian Civil Code, a situation may be envisaged in which a contract is transferred to the fiduciary (except for those concluded *intuitu personae*).

Even if the Civil Code does not provide further details on the possibility to allocate an entire contract as object of a fiduciary operation, we consider of interest to mention some aspects on this issue. Based on the provision of art. 773 of the Romanian Civil Code, the object of the fiduciary operation could be rights. The question is, if, the liabilities/debts can also be transferred, based on the provisions referring to the autonomous patrimonial estate.

As a contract can incorporate, and it usually does, both rights and obligations we consider that in these cases only the rights born out of this contract

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12 Burian Hunor, *Fiducia in 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 14.11.2016), p. 36.

13 For more details see Camelia Florentina Stoica, Silvia Lucia Cristea, *op. cit.*, p. 7.

can be object of fiduciary operation. For example, based on the relevant provision of the Romanian Civil Code on transfer of contracts it has to be considered that, in principle, the contracts that incorporate obligations for only one party (unilateral contracts - such as the loan or the deposit contracts are) can be object of a fiduciary agreement. Also, even the Civil Code does not expressly provide this, we consider that may be transferred under a fiduciary operation only those rights which are not strictly personal (*intuitu persoane*) and are transferable.

Furthermore, in case that a bank holds both qualities (fiduciary and beneficiary), we wonder how the obligation of being responsible towards the settlor can function, as mentioned under article 783 of the Romanian Civil Code (this can be the case of a loan guaranteed with a fiduciary guarantee). In our opinion, in a relationship between the debtor and the creditor such an obligation seems to be inapplicable, as it can generate conflicts and abuses.

Under an in-depth analysis of the case mentioned above, we can image how this situation may function, as the roles in a normal loan collateral (where the bank is the one who requires proofs that the collateral is still in place, enforceable, registered etc.) are reversed. In these cases, the beneficiary (client of the bank) is the one who has the right to request from the bank proofs that the asset is managed properly etc. Indeed, this obligations mentioned under the Romanian Civil Code would be difficult to be implemented in a fiduciary guarantee for a loan, as this should assume a change of paradigm in the relation bank-client. On the other hand, this may represent an advantage for the clients, in cases where they do not have the resources and expertise to manage an asset or patrimony.

Another aspect that is important in case of fiduciary guarantee is the remuneration of the fiduciary. Thus, in case of a loan where the debtor has brought as collateral a fiduciary guarantee, it is at least burdensome for the debtor to pay the bank for the services as a fiduciary. Of course, this depends on the actual assets. However, considering that the bank required the collateral in its loan application process, to charge a fee also for the administration of the asset may give raise to some issues, at least based on Consumer Protection law provisions.

In principle, we consider that in case of fiduciary guarantee, the remuneration of the banks as fiduciary should not be applicable, as the purpose of this operation is not to manage the asset but to guarantee the loan. However, in cases where the collateralization component is doubled by the management component this discussion can become relevant in practice. Interesting enough, art. 784 of the Romanian Civil Code makes a reference as regard the remuneration to the rules applicable to administration of the property of others, when the parties did not provide otherwise. According to art. 793 of the Romanian Civil Code regulating the remuneration of the asset manager, if the law, constitutive deed or other agreement do not stipulate that the management is made free of charge, then, the remuneration of the manager is set by other means, including a court decision. In this case, the level of the remuneration will be determined according to the practice or the value of the services rendered.

Considering this complicated provision on the fees, even in cases where the fees do not seem applicable, it would be recommendable that the fiduciary agreement expressly stipulates relevant provisions in order to avoid potential risks.

At the same time, comparing with a guarantee, which implies only a right to enforce the asset (in case of default) the fiduciary has also the obligation and can be held responsible as regards the assets held under fiduciary operation. Similar to the obligations mentioned above, in case of fiduciary guarantee this may give raise to various issues in practice. For example, one of the envisaged issues is the relation between the client and the bank, which (in case of a fiduciary guarantee) will be extended beyond the simple loan agreement, to a more complex relation regarding the potential management of the assets (this will require specific agreements containing the rules applicable to this situation). Another example is the specific, highly regulated environment in which the banks operate and the limitations in the object of activity of the banks. This should be analyzed by the banks, on a case by case basis, from a regulatory perspective and, also, in order to assess whether they have the required resources to undertake this activity. In addition, special attention should be paid to the potential obligations and responsibilities (including penalties) of the banks towards their clients, as the banks have strict risk management rules, internal controls, audits, and they are generally risk adverse when it comes to activities outside their core business.

Finally, one aspect that makes this legal instrument very attractive (maybe more than all other attributes of the fiduciary operation) must be the separation of patrimony. In this respect, this may represent a huge advantage for creditors who would like to be protected by the insolvency of their debtor/fiduciary. Indeed, in an insolvency/bankruptcy procedure, even if the banks are usually the largest creditors at the creditors' final estate of creditors it is compulsory to follow all the procedural steps in order to obtain the assets or to sell them and thus to recover the debt or part of it. The fiduciary guarantee offers a solution for this situation, as the insolvency of the fiduciary does not affect the assets held under the fiduciary agreement.

4. Financial Collateral Directive

An important legal text of European legislation that is relevant from the perspective of the fiduciary guarantee is the Financial Collateral Directive (Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements[14]). This directive has been transposed into Romanian legislation by Government Ordinance no. 9/2004[15] on some contracts on collateral guarantee.

[14] Published in the Official Journal of the European Communities, L 168, 27 June 2002.
[15] Published in the Official Journal of Romania no. 78 of 30 January 2004.

The purpose of the Financial Collateral Directive was to create a harmonized EU regime for the receipt and enforcement of financial collateral[16], in order to (i) facilitate the taking of financial collateral by largely abolishing formal requirements (e.g. the need to register the collateral), (ii) to facilitate the enforcement (e.g. if the borrower defaults on its obligation to the lender, the lender can immediately realize the collateral, in or outside insolvency proceedings), and (iii) to enhance legal certainty as to which law applies to book-entry securities collateral in cross-border situations.[17]

More specifically, the Financial Collateral Directive is applicable to cash and financial instruments such as shares and bonds. Among the key points regulated by the Financial Collateral Directive are the following: (i) the collateral taker has a contractually agreed right to use the financial collateral provided as if he were full owner, (ii) EU countries must recognize close-out netting arrangements, even if the collateral taker or provider is subject to insolvency proceedings or reorganization, and also (iii) EU countries are blocked from applying their national insolvency rules to financial collateral arrangements in certain cases[18].

It is important to mention that this directive applies only to certain types of financial institutions and only to the operations between them. Thus, according to the provisions of this directive, it applies to credit institutions, investment firms, insurance companies, undertakings for collective investment in transferable securities (UCITS), management companies.

In this respect, in these cases, even the applicability area of the fiduciary guarantee is not so vast, in terms of importance, the existence of this legal institution is relevant, as the volumes of the trade between financial institutions is significant. In other words, these provisions are relevant to the fiduciary operations carried on by these institutions during their ordinary activity.

A controversial aspect introduced by this directive, relevant to our study is that it introduces the possibility to structure a collateral by title transfer. We mention below the definition of the title transfer arrangement, as stipulated under art. 2 paragraph 1 letter b) of the directive, even if the definition is not very clear: *"title transfer financial collateral arrangement' means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of, or full entitlement to, a financial collateral to a collateral taker for the purpose*

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[16] "Financial collateral" is the property (such as securities) provided by a borrower to a lender to minimize the risk of financial loss to the lender if the borrower fails to meet his financial obligations to the lender (summary of Directive 2002/47/EC - financial collateral arrangements - improving legal clarity, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri (last visited on 14.11.2016).
=URISERV%3Al24401).

[17] http://ec.europa.eu/finance/financial-markets/collateral/index_en.htm (last visited on 14.11.2016).

[18] See n. [16].

of securing or otherwise covering the performance of relevant financial obligation" or "fiducia cum creditore contracta"[19].

As some authors mentioned, it is interesting to see why the European legislator chose to introduce "an old and prohibited for many centuries and many legal systems title transfer in Financial Collateral Directive"[20], considering that this collateral was considered too risky for the debtor, because he transferred full ownership[21]. In our opinion, the explanation is simple. The European and the national legislator as well, faced with the reality that these practices exist anyway, considered that it is better to regulate them rather than leaving them outside. As such, risky practice can be better controlled if it is acknowledged and regulated than when it is ignored. Moreover, as the main European legal systems have already regulated some fiduciary operations, it was a natural move for the European legislator to include provisions regarding the collateral by title transfer in this directive.

In supporting our arguments mentioned above there are the provisions in the recitals of the directive on Financial Collateral which expressly stipulate that it *"seeks to protect the validity of financial collateral arrangements which are based upon the transfer of the full ownership of the financial collateral, such as by eliminating the so-called re-characterization of such financial collateral arrangements (including repurchase agreements) as security interests."*. That is indeed a new approach in the European legislation! Authors analyzing for example the reasonableness principle stipulated in the directive[22] or other aspects arising from it have observed the importance of this regulation.

Considering the above, even the directive does not refer expressly to the fiduciary guarantee, it should be considered that its rules can be implemented only in this matter. Also, considering that this directive regulates principles on this particular type of contract, its provisions and its principles are useful for the practical application of fiduciary guarantee in all cases, without limiting it to operations between financial institutions. In this respect, the directive provides rules on formal requirements of contractual structure, enforcement of financial collateral arrangement, right of use of financial collateral, recognition of title transfer, certain insolvency provision and conflict of law.

On the other hand, we would like to refer to those provisions included in the recitals of this directive according to which, its aim is to improve the legal certainty of financial collateral arrangements and the Member States have the obligation to ensure that certain provisions of insolvency law do not apply to such arrangements. In our opinion, one of the most important purpose of this regulation

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[19] Ivan P. Mangatchev, *Fiducia Cum Creditore Contracta in EU Law,* without details of publications, article available at the web address: http://papers.ssrn.com/sol3/papers.cmf?abstract_id =1474199 (last visited on 14.11.2016), p. 1.

[20] *Ibidem*.

[21] *Ibidem*.

[22] Michele Graziadei, *Financial Collateral Arrangements: Directive 2002/47/EC and the Many Faces of Reasonableness,* without details of publication, article available at the web address: http://109.168.120.21/siti/Unidroit/index/pdf/xvii-3-0497.pdf (last visited on 14.11.2016), p. 499.

is represented by the rules on separation of patrimony which are essential in implementing a fiduciary guarantee. Consequently, the regulation regulates these kind of operations, falling under the legal regime of fiduciary guarantee, making these operations as strong as a collateral can be. As mentioned above, art. 785 of the Romanian Civil Code on fiduciary operations has similar provisions. Thus, this regulation incorporates the main principles applicable to fiduciary guarantee and can be used as a reference to such operations within EU and for future regulations in this area.

Another relevant aspect from an international law perspective is the *lex rei sitae* rule, according to which the applicable law for determining whether a financial collateral arrangement is properly perfected and therefore good against third parties is the law of the country where the financial collateral is located.

In addition, the directive regulates the conflict of laws under art. 9. For example, the law of the country in which the relevant account[23] is maintained shall govern any question with respect to any of the matters specified in relation the book entry securities collateral (which means financial collateral provided under a financial collateral arrangement which consist of financial instruments, which are evidenced by entries in a register or account maintained by an intermediary – for example shares). We consider that by law of a country in which the relevant account is maintained it should be understood the domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country.

In this respect, the goal of this article is clearly stated in the recitals mentioning the principle that *"whereby the law applicable to book entry securities provided as collateral is the law of the jurisdiction where the relevant register, account or centralized deposit system is located, should be extended in order to create legal certainty regarding the use of such securities held in a cross-border context and used as financial collateral under the scope of this Directive.*

5. Use of fiduciary guarantee in practice

Banks and other financial institutions are among the main potential beneficiaries of the fiduciary guarantee. Through this legal tool, the creditors can ensure that part of the patrimony of the debtor is assigned as collateral. By this instrument, additional procedures in order to take over the goods are not necessary. In this respect, the creditor has an additional security on the loan while the debtor has assigned its property and could benefit of this tool without any further legal procedures.

Whatever the assumptions above, the advantage of the fiduciary operation is that if the debtor does not pay the debt, the transfer of ownership over the asset is no longer temporary but become permanent.

[23] "Relevant account" means the register or account in which the entries are made and by which that book entry collateral is provided to the collateral taker – for example Shareholders Registry;

However, from the public available information (AEGRM) it appears that the number of registered fiduciary operations is not very high, and is even smaller in case of the fiduciary guarantee.

An interesting example is represented by the case when the shares (listed or not on a capital market) are object of a fiduciary guarantee. These cases involve the transfer of shares ownership under the regulations of the capital market or, at least under the general rules (such as registration shareholder registry, publicity, reports, etc). From our perspective, the Romanian legislation is, in this respect, not aligned in order to facilitate this types of fiduciary guarantee, and *de lege feranda* express provisions should be included in Law no. 31/1990 on companies (republished in the Official Gazette of Romania no. 1066 of 17.11.2004), as supplemented and amended in this respect.

Another aspect that must be mentioned is also the potential innovation regarding the fiduciary guarantee. Thus, this legal tool offers unlimited possibilities as regards the assets that can be object of the fiduciary operation. From receivables and intellectual property rights to shares and real estate, we consider that the possibility to develop the fiduciary operation is very vast.

The importance of the fiduciary guarantee operations resides mainly in the fact that it offers to the beneficiary more certainty in comparison to another forms of collateral. This certainty may arise either from the fact that a temporary ownership transfer is made or from the fact that a separation from the rest of the patrimony of the fiduciary intervenes (which could not be affected by insolvency and avoids the claims of the other creditors).

Another advantage of the fiduciary guarantee, from a practical perspective, resides in its flexibility, meaning that there are no limits on the rights which can be included in its scope, as it is mentioned above. Also, another dimension of its flexibility rests in the fact that the fiduciary operations can be used for many purposes and under various forms (for guarantee, crediting, asset management or donation purposes - except for the beneficiary etc.).

As a conclusion, from a practical point of view we consider that in Romania the application of the rules regarding the fiduciary guarantee are at their beginning, while in other European states the fiduciary or trust operations have a track record. In this respect, the French doctrine considers that the fiduciary guarantee is the most effective security interest, referring to the *fiducie-surete*[24] under French Civil Code.

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[24] Anker Sorensen, Brice Mathieu, *The fiducie-sûreté: the most effective French security interest?,* ”Journal of International Banking Law & Regulation” (Volume 30, Issue 11), 2015, article available at the web address: http://documents.jdsupra.com/d6e0ac09-b053-456b-956b-234851afa6e2.pdf (last visited on 14.11.2016), p. 8.

6. Conflicts of law on fiduciary operations

According to the Civil Code, the fiduciary agreement is governed by the law chosen by the settlor. This means that the contract shall stipulate the governing law.

Also, based to the general provision of art. 2565 paragraph 1 and 2 of the Romanian Civil Code[25], the settlor's option on the law governing the fiduciary agreement could not be ousted based on exceptional reasons.

Generally, in the contracts with a foreign element, the "added value" of the international conflict of law rules arises when the parties do not expressly stipulate the law applicable to their agreement. The case of fiduciary guarantee is not an exemption from this "rule". In these cases, the law with which the contract has the strongest relations (such as the place of the management of the assets, the place of the assets, the residence of the fiduciary, the scope of the fiduciary operations and the place where it will be realized) will govern the fiduciary contract.

In addition, mention should be made that, in order to be valid, the fiduciary agreement must be in line with the provisions of the governing law, chosen by the parties. In this respect, all the other aspects regarding *lex voluntatis* in the governing law shall be interpreted as such also in case of the fiduciary agreement[26].

The governing law determines in particular: designation, waiver and replacement of the fiduciary, special conditions that a person must meet to be designated fiduciary and fiduciary transmission powers; the rights and obligations of fiduciaries; fiduciary's right to delegate all or part performance of its obligations or exercise of the powers; fiduciary powers to administer and dispose of assets in fiduciary patrimony, to provide guarantees and to acquire other assets; the fiduciary's powers to make investments; the relationship between fiduciary and beneficiary, including personal responsibility of the fiduciary to the beneficiary; modification or termination of the fiduciary operation; distribution of goods that make up the fiduciary patrimony; etc.

The elements above are very important for a fiduciary guarantee in cases where the settlor is in a Member State and the fiduciary or the beneficiary is in another Member State.

Another important aspect that must be mentioned in relation to the fiduciary guarantee in the European context is the applicability of Roma I[27], Roma

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[25] Dragos-Alexandru Sitaru, *Drept International Privat – Partea Generala, Partea Speciala – Normele conflictuale in diferite ramuri si institutii ale dreptului privat,* Ed. C.H. Beck, Bucharest, 2013, p. 302.

[26] Claudiu-Paul Buglea, *Dreptul International privat roman – din perspectiva reglementarilor europene aplicabile in domeniu si a noului Cod Civil Roman*, Ed. Universul Juridic, Bucharest, 2013, p. 137.

[27] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, published in the Official Journal of the European Union L 177, 04 July 2008.

II[28] and Roma III[29] EU regulations on this operation. Prestigious Romanian authors, have acknowledged that these regulations do not apply to fiduciary operations[30]. In this respect, they mention that art. 1 paragraph 2, letter h) expressly exclude the trust operations from the object of this regulation. Similar provisions are stipulated in art. 1 paragraph 2, letter e) of Regulation Roma II, in the sense that the trust operations do not fall under the scope of the regulation. Roma III Regulation contains similar provisions in art. 1 paragraph 2 letter h).

We wonder if, in this case there is any conflict of law due to the fact that the EU Regulation expressly provide they do not apply to fiduciary guarantee. On the other hand, why the EU legislator has excluded the fiduciary operations/trust form the object of these regulations?

Without any references in the recitals, Roma I Regulation simply excludes from its scope the fiduciary operations more specifically *"the constitution of trusts and the relationship between settlors, trustees and beneficiaries"*. The same applies to Rome II Regulation expressly stipulating that shall be excluded from the scope of this regulation *"non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily".* In addition, Rome III Regulation provides that is shall not apply to the trusts or successions, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings. Questions remain to which neither the legal doctrine, nor other specialists do not seems to have an answer yet.

7. Conclusions

From the Romanian law perspective, there are many controversial aspects that must be settled. However, a lot more could be discovered as the fiduciary guarantee will develop and be used in practice. Besides the questions already mentioned above, there may be many others raised regarding the fiduciary guarantee considering the swift regulatory framework.

Thus, we consider that the fiduciary guarantee is not used at its full potential in Romania because the fiduciary operations in general and, respectively, the fiduciary guarantee are not quite known by its possible beneficiaries.

On the contrary, at the European level the fiduciary guarantee and the trust are more often used and implemented in the practice of the relevant players although the European legislation does not contain extensive rules on these legal institutions. In this respect, it can be considered that the EU legislator has adopted a more *laissez-faire* attitude towards the fiduciary operations, in order to provide the necessary flexibility to players to take advantage of this instrument (the fiduciary

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[28] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, published in the Official Journal of the European Union L 199, 31 July 2007.

[29] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, published in the Official Journal of the European Union L 343, 29 December 2010.

[30] Dragos-Alexandru Sitaru, *op. cit.,* p. 301.

operations/trust is not over regulated in comparison to other aspects in the EU *acquis*).

Another conclusion that can be driven from the above is that the potential beneficiaries of the fiduciary guarantee can develop a wide range of means when using this legal instrument (shares, intellectual property rights, receivables and contracts, etc).

Maybe one of the reasons why the fiduciary operations have not been used more often in practice derives from the fact that it is not clear if this instrument has only terminology differences with the trust or has other substantial differences. Considering the important effect of this operation (transfer of ownership) it is understandable why the practice has been so reluctant in using the fiduciary operations, and fiduciary guarantee especially. This idea was already mentioned by the French doctrine stating that *"although the fiduciary operations appear to be a very effective type of security interest for creditors, it has not met the expected success since its introduction into French law"*[31]. Also, in France, this potential efficiency has led prominent academics to present the fiduciary guarantee as *"la reine des sûretés"*[32].

In our opinion, in line with other authors, we consider that, the potential of the fiduciary guarantee both in Romanian and European legal framework is not yet fully explored[33] and we envisage that its potential beneficiaries and legal specialists will contribute to its future development.

In conclusion, only the time will tell if the fiduciary guarantee is compatible with the Romanian juridical framework and if this legal instrument will be developed within its European context.

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[32] *Ibidem*, p. 8.

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