Comparative analysis between *fiducia* and other contracts in the Romanian Civil Code

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Abstract

The similarity of fiducia with other law institutions of the Civil Code[2] *can be made to a certain extent. However, fiducia remains a profoundly different contract than other contracts such as the administration of the assets of others, the mandate or the mortgage and a thorough comparative analysis is necessary. Thus, the use of fiducia for certain operations and under certain conditions is perfectly justified. The comparison between fiducia and mandate bears many similarities, however a great difference is that in the case of the mandate there is no transfer of ownership. Also, fiducia can be confused with the administration of the assets of others, from which it also borrows some attributes in the matter of the fiduciary's remuneration. However, in this case, the differences are of substance. There are also many similarities to guarantee agreements as both types of contracts are accessories to a main contract that they guarantee. It is also worth mentioning that the introduction of fiduciary operations into the Civil Code is not only a complement to the already existing contract framework with another similar contract, but a real evolution towards the opening of Romanian civil law to a completely different category of advanced contracts that allow sophisticated business operations.*

Keywords: *fiducia, fiduciary, fiduciary contract, asset management, mandate, mortgage.*

JEL Classification*:* K12, K15, K22

1. Introduction

Fiducia has generated and has the potential to generate many debates both in academia and between practitioners. However, this institution is still not used to its full potential in Romania, or as some French authors have shown in the EU, this institution still has an unexplored potential[3]. We believe that one of the reasons for this is the fact that both law specialists and practitioners make the mistake of considering that instead of the innovative *fiducia* they can used other various contracts without realizing the advantages that can be offered by *fiducia*. Thus, in

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[2] Civil Code of July 17, 2009 (Law no. 287/2009 on the Civil Code) - Published in the Official Gazette of Romania no. 511 of 24 July 2009.

[3] Bouteille Magali, *La fiducie. Un potentiel inexploité,* without details of publications, article available at the web address: http://cnriut09.univ-lille1.fr/articles/Articles/Fulltext/75a.pdf (last visited on 04.11.2018).

case of a collateral, the mortgage agreement is used instead of a fiduciary-guaranty, and case of a management a mandate is used instead of the fiduciary-management.

We believe that choosing not to use *fiducia* in operations that are in fact perfectly suited to such an institution leads to a "waste" of the rights of potential beneficiaries. Thus, as some Romanian authors show, the argument that *fiducia* can be used for illicit activities is not justified, since "the use of fiduciary operations (trust) for illicit purposes, such as money laundering, tax evasion"[4] was avoided, especially considering the substantive and formal conditions to be met for the conclusion of this contract (e.g. authentic form, registration with the Electronic Archive[5], tax registration etc.).

In a comparative European law analysis, it is worth mentioning, as some foreign writers have also noticed, that implementation of trust or *fiducia* in national jurisdictions in the EU has been made with difficulty[6], and Romania is in the same situation as other European countries. This is also due to the fact that *fiducia* is excluded from some European regulations governing the law applicable to contracts, such as Rome I[7], as some well-known authors in Romania confirm[8].

That is why we are trying to show in this study both the similarities between fiduciary relations and other contracts, but also the differences. Moreover, we will also focus on the comparison between the benefits of trust and each of these contracts.

Also, in this study we will try to answer the following questions: Why use *fiducia* instead of other contracts much better known in Romanian civil law? What are the benefits of the *fiducia* that other contracts cannot offer to the parties? What are the differences in substance and form between the fiduciary agreement and other contracts mentioned below?

The importance of this study is also evidenced by some practical differences between fiduciary agreements and other contracts that are not set out in the Civil Code, but which come from practice. In addition, we will try to highlight *de lege ferenda* proposals for both the main and the secondary regulations of *fiducia*, but also for other types of contracts.

We mention from the beginning that we will not analyse in this study the similarities and differences between fiduciary and trust which are the subject of another separate study. Thus, this paper will cover the similarities and differences between the fiduciary agreement and other contracts in the Romanian Civil Code.

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[4] Camelia Florentina Stoica, Silvia Lucia Cristea, *Legea aplicabilă fiduciei, ca element de extraneitate*, Journal "Educație și creativitate pentru o societate bazată pe cunoaștere", November, 2011, p. 3.

[5] Electronic Archive for Movable Guarantees.

[6] Stathis Banakas, *Understanding Trusts: A Comparative View of Property Rights in Europe*, "In Dret – Revista para el analisis del derecho", no. 1/2006, Barcelona, p. 8.

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

[8] Dragos-Alexandru Sitaru, *Drept International Privat – Partea Generală, Partea Specială – Normele conflictuale în diferite ramuri și instituții ale dreptului privat,* C.H. Beck Publishing House, Bucharest, 2013, p. 302.

2. Comparison between *fiducia* and asset management

Between the fiduciary-management and asset management, there is a series of profound resemblances, and sometimes with certain limits, it may seem that they are overlapping.

Thus, art. 792 et seq. of the Civil Code regulates the asset management. It is stated in the above article that "the person who is empowered, by a will or by convention, to the administration of one or more assets, of a patrimonial property or of a patrimony not belonging to it, has the quality of asset manager".

A first resemblance between the fiduciary agreement and the management of another's assets is that both institutions were introduced by the new Civil Code and had not been expressly regulated in the old Civil Code, being "borrowed" from other modern civil codes.

Regarding the similarities of substance, the definition indicates what it is most important. Thus, both the asset manager and the fiduciary are empowered to manage a patrimonial mass for a beneficiary. If, in the case of the administration of the assets of others, this beneficiary is the person who concludes the contract with the manager, in case of fiduciary agreement the beneficiary may be either the settlor or another person.

However, a difference between the two contracts lies in the fact that in case of fiduciary agreement there is a separation of these assets "in a distinct patrimony, affected to the achievement of a purpose"[9] (management, guarantee, etc.), while in the case of the asset management is not the case of such a distinction. Thus, the fiduciary agreement leads to a division of the patrimony for the fiduciary[10].

Another similarity concerns the object of the contract. Both the fiduciary agreement and the asset management contract may have as their object movable and immovable property, patrimony mass or a patrimony. We observe the openness and flexibility of the legislator regarding the object of these contracts (which in fact show a significant evolution from the old Civil Code).

Regarding the instrument used to enter these legal relationships, it can be seen an overlap but also a difference. If in the case of asset management a legal relationship can be conceived by a will or a contract, in case of *fiducia* the legal relationship will be borne by contract or by law. Thus, it remains questionable whether a fiduciary can arise through a will[11].

In addition, also the definition shows a major difference compared to *fiducia*. Thus, if in the fiduciary agreement the manager of the property is also its owner (i.e.

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[9] 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 11.04.2018).

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

[11] For arguments in favor of the constitution of the fiduciary agreement by unilateral act, see Sergiu Golub, *Fiducia. Analiza definiţiei legale. Genul proxim,* "Revista Română de Drept al Afacerilor" no. 11/2016, p. 52.

the fiduciary), under a management contract, the principal actor of that mechanism does not own the property of the property administered.

Another major difference is the number of parties involved in these contracts. Thus, in case of *fiducia*, there are three parties involved (i.e. the settlor, the fiduciary and the beneficiary), while in the case of asset management, there are only two parties involved (i.e. the beneficiary and the administrator). This difference has been identified by some authors and in relation to other types of contracts, as stipulations for another, since the beneficiary is in a similar situation to the beneficial third party under the stipulation for another[12].

The differences between these two contracts are not only of form but leads to substantial changes in the dynamics of rights and obligations between the parties. In the case of asset management there is only one party benefiting from the actions of the administrator, while in the case of fiduciary agreement there is, on one hand, the beneficiary who takes advantage of the actions of the fiduciary and the income generated by it and the fiduciary goods, and, on the other hand, the settlor, which (although not directly benefiting from the revenue generated by the fiduciary assets) is the holder of information rights, can establish limitations, benefits of the transmission of fiduciary mass in certain cases. In case of *fiducia* there are actually two "beneficiaries". As it is often the case in practice, however, the settlor and beneficiary can be the same person. In addition, the fiduciary also has an supplementary obligation of loyalty and care, this being the basis of fiduciary relationships[13].

With regard to differences in capacity limits, it is worth mentioning that in case of *fiducia*, the capacity to hold the fiduciary position is limited to certain types of qualified entities that are strictly regulated by the law and supervised by competent authorities (e.g. credit institutions, investment firms, insurance companies, lawyers, notaries, etc.). On the other hand, we mention that there are no such restrictions in the case of the asset managers. In the Civil Code, it is stipulated that the manager should only have full exercise capacity (this aspect means that any person over the age of 18 may hold this capacity).

A very important aspect lies in the fiduciary's remuneration as compared to the administrator's remuneration. Thus, we have identified a number of similarities between the remuneration of these parties. Firstly, in the framework of the fiduciary regulation, the legislator understood to make a direct reference to the institution of asset management in art. 784 of the Civil Code (the only one of this kind). The rule is, thus, that if the parties do not set otherwise in the contract (i.e. if the parties do not determine the fee or the way this fee is determined), then the fiduciary will be remunerated according to the rules established for asset management contract.

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[12] Bujorel Florea, *Unele observaţii asupra contractului de fiducie astfel cum este reglementat în noul Cod civil*, "Dreptul" no. 7/2013, p. 62.

[13] Julia Evans, *A Kantian perspective on fiduciary relationships*, Master of law thesis, University of Toronto, Library and Archives Canada, 2005, p. 3, without details of publications, article available at the web address: http://www.collectionscanada.gc.ca/obj/ thesescanada/vol2/002/mr02508.pdf (last visited on 04.11.2018).

Therefore, the remuneration rules are common to both the fiduciary agreement and the asset management contract, based on art. 793 of the Civil Code: "Unless, according to the law, the act of constitution or the subsequent understanding of the parties or the specific circumstances, the administration is performed free of charge, the administrator is entitled to a remuneration established by the constitutive act or by the subsequent agreement of the parties, by law or, failing that, by court order. In the latter case, account shall be taken of usages and, in the absence of such a criterion, of the value of the services provided by the manager". It is important to note that for both institutions (both being newly regulated institutions), there is no common practice in general, and there is no common practice in terms of remuneration, in particular. However, we believe that this provision is useful for the future, when both institutions will experience an exponential growth.

Going beyond this direct reference (which is still a proof of the close relations between these two institutions), we also consider that the work done by the manager is very similar to that provided by the fiduciary, and this is still a major resemblance between these contracts.

By reference, between *fiducia* and business management an indirect link is created. Thus, in the matter of remuneration, the Civil Code resembles the fiduciary agreement not only with the asset management contract but also with the business management institution. Article 793 of the Civil Code provides: "A person who does not have this right or is not authorized to do so shall not be entitled to remuneration, and shall, where appropriate, apply the rules of business management". Although not excluded, we believe that these situations are, however, quite unlikely in the case of a fiduciary contract that should contain the limits of the mandate.

In view of the above, we can assume that the similarities between fiduciary-management and the asset management are very strong through the type of relationships that are formed, especially by the way the obligations to manage the patrimony affected by these types of contracts are governed. As stated in the doctrine, the legislator has created "a logical and practically applicable link" between *fiducia* and the asset management[14].

3. Common elements and differences between fiduciary agreement and mortgage agreement

As we analysed above the similarities and differences between the fiduciary-management and the asset management contracts, in order to complete the image of the most commonly used types of *fiducia*, we will now analyse the comparison between the fiduciary-guaranty and the contract with which it resembles most closely, i.e. collateral arrangements.

Given that the "universe" of real guarantee contracts is extremely wide, we will stop in our analysis at the comparison with the mortgage contract, which in practice can often be the closest option to such a situation.

[14] Daniel Moreanu, *Fiducia şi trust-ul. Definiţie, utilizări practice şi deosebiri principale*, "Studii si Cercetări Juridice" no. 2/2014, p. 157.

According to art. 2343 of the Civil Code, "the mortgage is a real right over movable or immovable assets affected by the performance of an obligation". Furthermore, art. 2344 of the Civil Code states the following: "the mortgage is by its nature an accessory and is indivisible. It subsists for as long as there is an obligation that it guarantees and carries on all the burdened goods, each and every part of it, even in cases where the property is divisible or the obligations are divisible". From the above we can draw some conclusions about the similarities between fiduciary-guaranty and mortgage. Both contracts are ancillary because the fiduciary concluded in such cases is valid for as long as the main contract is valid (e.g. credit agreement, commercial contract, etc.).

On the other hand, the first major distinction identified is the fact that the mortgage contract does not transfer ownership of the good, as is the case with the fiduciary contract.

A similarity that we want to signal and which represents a great advantage of both institutions is that both the mortgage lender and the creditor have the right to satisfy their claim, in accordance with the law, before the chirographic creditors, as well as the creditors of lower rank. This is why fiduciary and mortgage agreements are the most secure forms of collateral, with a plus for fiduciary agreements.

Another similarity between the two institutions resides in the field of opposability to third parties. Thus, both mortgage and *fiducia* become opposable to third parties from the date of registration in the public registers. This depends on the nature of the asset (movable or immovable). The provisions applicable to fiduciary contract similarly provide that *fiducia* is registered in the Electronic Archive and, if appropriate, in the Land Book.

There are obvious similarities in the sources of fiduciary and mortgage agreements. Thus, both mortgage and *fiducia* can be established only under the law and in compliance with the formalities prescribed by law, and mortgage and fiduciary agreements can be both conventional and legal.

As regards the form of the agreement it should be noted that an important difference lies between *fiducia* and mortgage. In case of fiduciary agreement, the authentic form is required in any situation (movable or immovable property), while in the case of the mortgage, the law imposes the authentic form only for real estate mortgage, whereas in the case of the movable mortgage it is possible to form the contract under private signature. An explanation for the more restrictive form required in case of fiduciary agreement is the fact that the right to property is transferred by fiduciary agreement. However, *de lege ferenda*, it would be advisable to impose, similar to the mortgage, in the case of *fiducia*, the authentic form only if the fiduciary assets include immovable property.

Similarities between fiduciary and mortgage agreement can also be extended to the object of the contract. Both fiduciary and mortgage agreements can bear on movable or immovable assets, corporeal or incorporeal goods, determined or determinable goods or universality of goods, as well as on receivables. On the other hand, inalienable and un-seizable goods cannot be the subject of a mortgage or a fiduciary contract. The flexibility of these two contracts in terms of the object is a

characteristic "note" that draws them even closer, and in practice makes the choice between the two more difficult.

Another dimension of the comparison between fiduciary-guaranty and mortgage resides in the right to mortgage and in fact in the existence of the settlor's right to form these legal relationships, similar to the case of a fiduciary agreement. Thus, the settlor should have a right of disposal or, more precisely, be the owner of the asset in question.

Regarding the parallel between fiduciary agreement and immovable mortgage in particular, the similarities become even more obvious. Thus, starting from the authentic form imposed upon, the registration in the Land Book and up to the object of these contracts, there are clear links between the two contracts.

However, as far as differences are concerned, the Civil Code clearly states that the creditor is not allowed to use the mortgaged asset (in Romanian "antihreza"). Thus, art. 2385 of the Civil Code expressly stipulates: "the clause by which the mortgagee is authorized to own the mortgaged property or to acquire its fruit or its income until the date of commencement of execution, is considered unwritten". Although we believe that in case of a mortgage-guaranty the asset will not be taken in possession, we still believe that in case of fiduciary agreement, it may be agreed between the parties that until the date of enforcement, the fruits or incomes are due to the beneficiary creditor.

The major difference between fiduciary-guaranty and mortgage (which actually has a significant practical impact) is actually found in how the mortgage is enforced compared to how the fiduciary-guaranty is executed. We believe that this distinction should also be the main reason why, for example, credit institutions or other creditors should choose fiduciary agreement rather than mortgage to guarantee reimbursement of money. Thus, the Civil Code dedicates a whole chapter on the regulation of the enforcement of the mortgage ("Enforcement of the mortgage"), i.e. 50 articles dedicated to the extremely complicated and long lasting rules regarding the enforcement, the taking over of the good, the sale of the mortgaged property, etc. whereas in case of *fiducia* all these procedures are avoided.

As regards the fiduciary contract, the Civil Code states in only two articles (art. 798 and 790) which are these simple rules. Thus, it is stated that "the fiduciary contract ceases by the fulfilment of the term or by the achievement of the intended purpose when it occurs before the fulfilment of the term". Also, when the fiduciary contract ceases, the existing fiduciary property mass at that time is transferred to the beneficiary and, in the absence thereof, to the settlor.

One can observe, therefore, what is the obvious positive difference of fiduciary-guaranty as compared to a mortgage.

4. Similarities and differences between fiduciary and mandate agreement

Another category of similarities and differences that we want to highlight is the one between the fiduciary-management and the mandate agreements. Both

contracts have a component of "empowerment" granted to a third party for the management of a property or for the conclusion of legal acts.

Thus, the mandate is defined in art. 2009 of the Civil Code as being "the contract by which a party, called a principal, undertakes to conclude one or more legal acts on behalf of the other party, called the representative". From this definition there is a similarity but also a major difference. Thus, although the fiduciary contract and mandate agreement both involves the conclusion of legal acts on behalf of the beneficiary (or rather, for his benefit), only in case of *fiducia* the fiduciary actually owns the assets in question and is the legal holder of the fiduciary assets.

A notable difference between the fiduciary agreement and the mandate agreement lies in the fact that the mandate may be for consideration or free of charge, whereas in the case of fiduciary agreement (given the position of the fiduciaries who are professionals) there should be no free-of-charge fiduciary contracts.

We also indicate the specific difference between mandate with and without representation and the fiduciary agreement. In this case, we consider that the most important resemblance exists lies fiduciary agreement and mandate with representation. Thus, according to art. 782 of the Civil Code ("Specification of the fiduciary quality") "when the fiduciary acts on behalf of the fiduciary property, he may make express mention in this respect, except where this is forbidden by the fiduciary contract". It can be noticed that in the case of fiduciary agreement exposing its quality is an option of the parties, however the rule will be to specify the quality of the fiduciary similar to the case of a mandate with representation (especially given that any fiduciary will register with the Electronic Archive and thus this information will become public).

Other similarities between the two contracts refer to the obligations of the fiduciary/representative consisting in the obligation of diligence, obligation to be held accountable, etc. We also find a similar element in the duty of diligence in substitution made by the representative/fiduciary. If in the case of the mandate there is a special regulation in this respect, in art. 2023 of the Civil Code which provides the substitution rules, we believe that similar rules should be imposed in the case of fiduciary agreement. For both institutions, the fiduciary/representative should be held liable for the *culpa in eligendo*.

Further similarities exist in the matter of the obligations of the principal/settlor. The principal and the settlor must, among other things, reward and, if necessary, indemnify the representative or the fiduciary for the work done or for the losses suffered as a result of the legitimate exercise of their management responsibilities. In addition, in the event of debts, both in the case of the mandate and the fiduciary agreement, there is a right of retention to guarantee all its debts arising from the mandate/fiduciary agreement. This right extends to the goods received during the performance of the mandate.

A major difference appears in the moment of termination of these contracts. While the mandate is a contract that is deeply dependent on the will of the principal and may be revoked at any time, or the representative may give up its mandate, however, this cannot be said in the case of a fiduciary agreement where the

replacement of the fiduciary can only be requested in court or the fiduciary's renunciation may require certain conditions. There is also a common point in this situation in the fact that both the mandate and the fiduciary agreement cease in the case of bankruptcy of the fiduciary/representative.

There is also a significant difference in the effects of the termination of the agreement, which consist in the case of the mandate in extinguishing the right to represent the principal without a transfer of rights; in case of fiduciary agreement the effect of the termination of the mandate is much more profound because it requires the transfer of the fiduciary property from the fiduciary to the beneficiary or to the settlor, as the case may be.

5. Differences between *fiducia* and the sale agreement

Although at first glance it may seem that there is not a lot of common points between the fiduciary agreement and the most important and used contract, however, as we shall see below, there are many common points, both of substance and of form, between these institutions of law.

We mention from the start that we do not believe that fiduciary agreement can be an alternative to a classic sales contract, and should be used only to cover certain disadvantages that such a sales contract raises in certain situations.

Unlike the other three contracts mentioned above, which do not directly involve a transfer of ownership, this is the fundamental element in the case of sale, which brings the sale and fiduciary agreements closer together.

Similarities between fiduciary and sale agreement do not stop here and relate to both the rights the fiduciary earns as a result of the conclusion of the contract and the obligations the settlor has in these situations.

Starting from the concept of the sale contract, we mention that art. 1650 of the Civil Code states that "the sale is the contract by which the seller transmits or, as the case may be, undertakes to convey to the buyer the property of a good in exchange for a price which the buyer undertakes to pay". From this definition arises an important difference between the sale and the fiduciary agreement, namely that in the case of the sale it is necessary, even essential, to pay a price, whereas in the case of the fiduciary agreement, this element is totally absent. On the other hand, the object of both contracts may consist of any real right or receivable.

An extremely important legal provision in the context of the comparison between these two contracts is that provided for in art. 1651 of the Civil Code: "the provisions of this chapter concerning the obligations of the seller shall apply accordingly to the obligations of the seller in the case of any other contract giving rise to the transfer of a right if the rules applicable to that contract or to those relating to obligations do not provide otherwise". Any aspect not expressly provided for in the *fiducia* chapter will be complemented by the provisions applicable to the sales contract. This rule generates a major intimacy between these two contracts.

Without insisting on the general elements applicable to sale contact, we will continue to focus on the less obvious elements that actually make the difference between fiduciary and selling relations.

It is important to consider the guarantee against eviction, the guarantee against the vices of the good sold, the guarantee for proper operation, etc. Are these safeguards also applicable to fiduciary agreement? We believe the answer is positive for the following reasons.

According to art. 1695 of the Civil Code, "the seller is legally obliged to guarantee the buyer against the eviction that would totally or partially prevent him from holding the unruffled possession of the good sold". We believe that this guarantee should also be present in the case of a fiduciary agreement in order to allow the fiduciary to honour his obligations and to carry out his mandate. Thus, *per a contrario,* in a scenario in which the fiduciary would not benefit from this guarantee, the ownership of the fiduciary would be voided of content.

For the guarantee against the vices of the good art. 1707 of the Civil Code provides: "the seller guarantees the buyer against any hidden vices that make the good sold as unfit for the intended use or which diminish to such an extent the use or value that, if they knew them, the buyer would not have bought or would be given a lower price". In this regard, it is natural to consider that the fiduciary also needs such a guarantee. Being the full owner of the fiduciary good but also a trustee of the settlor to meet the needs of the beneficiary, it is essential that in case of hidden vices that make the use of fiduciary mass impossible, the fiduciary can react against the settlor. Otherwise, the fiduciary would be bound by the obligations arising from the fiduciary contract without having the "tools" and the necessary rights, thus being exposed to the payment of damages or, even more importantly, to reputational risks (considering that fiduciaries are entities with major exposure to the market – e.g. credit institutions, insurance companies, investment firms, lawyers and notaries).

As far as the guarantee for proper functioning is concerned, we consider that the above applies *mutatis mutandis*. Thus, in art. 1716 of the Civil Code it is stipulated that "in addition to the guarantee against hidden defects, the seller who has guaranteed the proper functioning of the sold goods for a certain period of time is obliged, in case of any defect within the warranty period, to repair the property at its expense". In order to enable the fiduciary to fulfil its obligations, it is necessary for the asset to be functional, and so this guarantee is also perfectly applicable to the fiduciary agreement.

A distinction between *fiducia* and selling agreement is that fiduciary can be concluded for a maximum of 33 years while the sale does not bear such a limitation.

Apart from the similarities and general differences between sale and fiduciary agreements, there is a variety of sales that is more akin to *fiducia*. This variety of sale is the sale with a redemption option (sale-back) provided in art. 1758 of the Civil Code "the sale with a redemption option is a sale affected by a resolving condition by which the seller reserves the right to redeem the asset or the right passed to the buyer". As it can be seen, this type of sale is much similar to *fiducia* given that it is temporary, affected by a resolving condition. As within fiduciary agreement, the

good will not remain the property of the fiduciary, but will be transferred to the beneficiary or the settlor. However, the distinction between these contracts lies in the fact that the redemption option cannot be stipulated for a period longer than 5 years while *fiducia* can be concluded for a maximum of 33 years.

6. Conclusions

As shown above, there are a number of obvious resemblances between the fiduciary and the mandate contract, the sales contract, the asset management and the mortgage contract. On the other hand, the differences are very important. We can conclude that *fiducia* has "borrowed" from the attributes of the above contracts, without becoming a very similar instrument to them, and without being qualified as a mere hybrid institution[15].

Fiducia seems to crystallize, in addition to its strong resemblance to the trust institution in the Anglo-Saxon system, as a contract that elegantly blends the characteristics of a sales contract (through the transfer of ownership) with those of a mandate contract (in view of the trust granted to enter into legal acts for the beneficiary), a contract for asset management (as the fiduciary is remunerated for the administration of the fiduciary property), and the attributes of a collateral/mortgage contract (taking into account the fact that both contracts can be concluded to guarantee a primary obligation).

However, we believe that *fiducia* remains a unique contract in the Romanian legal landscape, possessing many qualities still undiscovered by practitioners.

Another conclusion that we draw from the analysis of the comparison between the above contracts is that *fiducia* should be used in some cases against other types of contracts due to the obvious benefits it offers (for example instead of the mortgage contract).

Also, the comparative exercise above has shown that the fiduciary agreement is not a contract that can be replaced by other types of existing operations, but an innovative tool that is inspired by the institution of the more broad-based trust. Thus, as some foreign authors show, *fiducia* can be used in a wide range of operations, including the capital market in so-called "business trust listings"[16].

If the transfer of ownership by means of a fiduciary contract (as a final purpose) is intended, it would be worth mentioning that the fiduciary agreement is not the best solution, as it is limited to 33 years and the fiduciary cannot be designated as any person having full exercise capacity, as in the case of a sale contract, because only certain regulated and supervised entities may hold this quality.

Fiduciary-management can be used successfully and much more efficiently than asset management or the mandate, given the greater flexibility it offers. Also,

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[15] 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 04.11.2018).

[16] Norman Ho, *A tale of two cities: Business trust listings and capital markets in Singapore and Hong Kong*, "The Journal of International Business & Law", Peking, July 2012.

unlike mandate, where the trustee has limited rights to conclude certain legal acts, in case of fiduciary agreement the fiduciary takes over all the responsibility for the administration of the fiduciary property and as a professional can generate much more consistent income than a mere agent.

As regards the fiduciary-guaranty, we consider this to be a better option than a mortgage in certain situations. Thus, by concluding a fiduciary contract, the rights of the creditor are much better protected than in the case of a mortgage, since all the risks and formalities regarding enforcement are eliminated.

We hope that the above study will bring more clarity to potential beneficiaries of the fiduciary agreement, as this contract has an extremely clear purpose in the civil circuit and may be used in situations that benefit the parties.

By comparing fiduciary agreement and other contracts, the advantages and drawbacks of using one of these instruments in the daily activity of financial entities, for example, are evident.

On the other hand, it will be necessary for a "critical mass" of examples and practical cases to exist, which have already begun to take shape slowly[17], in order to give confidence to other practitioners to use fiduciary agreement to its maximum potential.

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