THE MANDATE AND THE TRUST

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Abstract: *The imperatives of legislative uniformity within the European Union have led states with a tradition of continental civil law to adopt regulations inspired by English legal institutions. Among them, the Anglo-Saxon "trust" was taken over in the form of the so-called "fiducia". This represents a modern technique of patrimony administration, which was widely developed in the Common-Law legal system, and afterwards it spread among the countries which used the European continental law (Italy, the Netherlands, Luxembourg, Spain, France, Russia etc.), in the Middle East (Lebanon), South Africa, Latin America (Colombia) or Japan. In the Romanian civil law, the institution finds its own regulation in art. 773-791 of the new Civil Code, these provisions being elaborated under the obvious influence of the corresponding regulations of the Civil Code of Quebec (art. 1260-1370), respectively the French Civil Code (art. 2011-2030). However, the regulation of the trust by the provisions of the new Civil Code does not stand for an absolute novelty of our legal system, as it had been previously mentioned in the Law no. 51/1995 regarding the organization and exercising of the legal profession, which, in art. 3, mentioned among the attributions of lawyers the accomplishment of "trust activities, developed under the conditions of the Civil Code".The regulation of the trust aligns the Romanian Civil Law with a necessary modernization tendency, the utility of this institution being undeniable especially in the business environment, as well as in the family relations. In order to achieve the necessary dissociation between trust and mandate, one must try to understand the purpose of these legal institutions and the mechanism by which one is sought to achieve it. Thus, the trust, as it was enshrined by the Common Law system, has the following specificity: apparently, there are two holders of the ownership of the same good simultaneously, without being a co-ownership. The trustee holds the "legal title" (he appears as the owner in relation to third parties), whereas the beneficiary holds the "equity title", that is the right of ownership in relation to the trustee. Therefore, the trustee has the status of an "owner for another party's benefit".The problem generated by the specifics of the trust consists in doubling the ownership, which contradicts the principle of indivisibility of the real rights in the civil law. Therefore, the trust was inapplicable as such in the continental legal system, so an attempt was made to adjust this institution in order to be able to integrate it into the civil law system, the result being the trust. Continental law also has a specific character that makes it impossible for the trust to be implemented as such, namely the formalism of the real rights advertising system. In the Anglo-Saxon law, the trust does not need to be disclosed to third parties, in some cases this is even prohibited. In the continental system, especially in France, which was adopted by the Romanian legislator as well, the publicity of the fiduciary relationship is mandatory.*

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The comparison of the trust to the mandate has been made repeatedly, even by legislative provisions. Even the new Romanian Civil Code makes an association of the status of the trustee with that of the agent. For example, 782 paragraph (1) establishes the obligation of the trustee to communicate in relation to third parties the position from which they act, in the same way as the agent usually works on behalf of the principal. Also, to the relations between the trustee and the constitutor, the rules of the administration of the goods of another one are being applied, according to art. 794 of the Civil Code, which operates according to principles close to the mandate (as it results from the interpretation of the art. 802 and 814 of the new Civil Code). Some authors (Howard, 2006: 356-357) have even stated that the mandate is a way of dividing ownership according to the trust model, but with less efficiency and certainty.

We consider that the feature that characterizes these institutions equally is the intuitu personae character: the relations between the parties are based essentialy on trust. However, although they present some common features, there are also obvious differences between the trust and the mandate, which set apart the two legal institutions.

Art. 773 of the Civil Code defines the trust as “the legal operation by which one or more constituents transfer real rights, rights of claim, guarantees or other patrimonial rights or a set of such rights, present or future, to one or more trustees who administrate them for a specific purpose, for the benefit of one or more beneficiaries.”

The trust is a way of administrating a mass of goods (“the fiduciary mass”) for the benefit of the constituent, of the trustee or of a third beneficiary of the trust. Therefore, the trust is a way of organizing the patrimony, by the effect of which a distinct fiduciary patrimonial mass is being created within the fiduciary patrimony, which the trustee manages in order to achieve the purpose determined by the trust contract. Thus, the trustee will perform the acts of conservation, administration and disposition of the fiduciary mass in the interest of another, within the limits and for the duration established in the trust contract.

The object of the trust is the transfer of certain rights. Therefore, we can distinguish a clear distinction between the mandate and the trust: the mandate gives to the agent a simple power of representation of the principal at the conclusion of the entrusted legal operations, whereas the trustee acquires his own right over the assets of the trust. The trustee is not an agent of either the constituent or the beneficiary, he has his own rights over the assets of the trust. The mandate does not have a translational effect of rights, it does not confer the agent his own rights over the goods that he manages, but on the contrary, he is obliged to give to the principal the goods received under his power of attorney, and, until the moment of remission, to conserve them (art. 2019 of the Civil Code). The trust, as it gives the effect of the transfer of rights to a distinct patrimonial mass, thus presents, in relation

to the mandate, the disadvantage that it implies the assumption by the constituent of some risks related to the abusive exercise of the prerogatives by the trustee.
In order to approximate the effects of the trust, the mandate should be doubled by a stipulation for another, in order to have the interest of a third party. The trust has the specific character of benefiting a third party, and not the trustee, therefore it resembles the mandate concluded in the interest of a third party. Thus, the role of the principal would be ensured by the constituent, that of the agent by the trustee and the third party would be the beneficiary.
Professional trustees often use the services of specialized agents, with whom they conclude mandate contracts, so that the trust and mandate will coexist within the same complex legal operation (the trustee has his own right, which allows him to give the trustee the power to represent him in the exercise of that right).
The purpose of the trust and the extent of the administrative and dispositional powers of the trustee must be explicitly mentioned in the provisions of the trust contract, under the sanction of its absolute nullity (art. 779 of the Civil Code). From the interpretation of the art. 779 of the Civil Code, which regulates the minimum mandatory content of the trust contract, we understand that the parties enjoy great contractual freedom, which is precisely the attraction of this legal institution. Thus, the purpose of the trust may be freely determined by the contracting parties, and may be used for the management of an asset or patrimony, for the guarantee of a debt or for the transfer of rights.
The legislator however imposes a single limitation on the purpose of the trust, namely that the trust will not achieve an indirect gratification in favour of the beneficiary. This prohibition even represents a condition of validity which is specific to the trust contract, art. 775 of the Civil Code sanctioning its violation with absolute nullity. From the interpretation of this legal regulation, which requires that the trust be onerous not only between the parties, but also in relation to the beneficiary, we deduce that the purpose of this operation can only be to extinguish a present or future debt of the constituent towards the beneficiary, or to create an obligation of the beneficiary, whose creditor will be the constituent. The doctrine (Nemes, 2011:520) expressed the opinion, which we find correct, that future legislation should allow the exploitation of the trust for the benefit of the beneficiary free of charge, especially given that the trust is entrusted, with the exception of notaries and lawyers, to trade professionals, who will exploit it for speculative purposes, thus achieving an administration as efficient and profitable as possible for the beneficiary.
In order to protect the rights of succession, the cited author proposes the solution of the reduction of liberalities, which is preferable to the absolute nullity of the trust contract, especially since the beneficiary collects only the fruits produced by the trust mass, without becoming the holder of the rights that form it.
Regarding the source of this operation, it can be the law or a contract concluded in authentic form (art. 774 paragraph 1 of the Civil Code). Therefore, the trust can be either conventional, deriving from the trust agreement concluded by the constituent and the trustee, or legal; in the latter case, the special provisions of the law establishing the trust will be supplemented by the general regulations of the Civil Code, which is the common law in the matter.

The incidental regulations regarding the trust are: the trust contract or the special legal provisions from which this operations derives, the general provisions contained in the Civil Code regarding this legal institution (art. 773-791), and, according to art. 794 of the Civil Code, the provisions regarding the administration of another person's property also apply, which represent the common law applicable in all cases of administration of another's property, insofar as the special legal provisions do not contradict.
Trust is a three-party operation, in which the constituent, the trustee (parties of the trust contract) and the beneficiary participate; the latter may not only be one of the contracting parties, but also a third party, in which care they will acquire the due rights as an effect of the stipulation for another that the trust contains.
Any individual or legal person may have the status of constituent of the trust; the trustee, on the other hand, must be a qualified subject for this purpose, namely a credit institution, an investment management company, a financial investment company, an insurance company, a public notary or a lawyer (according to paragraphs 2-3 of the article 776 of the Civil Code).
The trust contract has an onerous character, the trustee being remunerated according to the agreement made with the constituent, or in its absence, according to the rules that govern the administration of another's assets (art. 784 paragraph 2 of the Civil Code).
From a formal point of view, the trust agreement is a solemn contract, the authentic and express form being mandatory. We consider that this solemnity imposed on trust operations represent an important impediment to its practical use, as it involves significant costs, through notary fees whose amount is related to the value of the assets included in the trust patrimony. The legislator also establishes a mandatory content of the trust contract, under the sanction of nullity.
The trust is burdened by an excessive formalism, all the more unnecessary in commercial life, which is meant to remove the possibility of its use for tax evasion purposes. Thus, the contract must be registered (under the sanction of absolute nullity) with the competent fiscal institution (art. 780 paragraph 1 of the Civil Code) and it must be also registered (under the sanction of non-enforceability) in a special register and in the real estate advertising registers for cases when the patrimonial mass contains real estate rights (art. 781 of the Civil Code).
With regard to the effects of the trust, it accomplishes a transfer of rights from the patrimony of the constituent to that of the trustee. Thus, according to art. 773 of the Civil Code, the constituent transfers “real rights, rights of claim, guarantees or other patrimonial rights or a set of such rights, present or future, to one or more trustees.”
The main question raised by the trust is related to the nature of the right transferred to the trustee: is this a right of ownership or not?
Art. 773 of the Civil Code provides that the trust transfers the right from the constituent to the trustee, whereas art. 779 stipulates that the parties will determine the extent of the trustee's powers; therefore, the trustee would become owner only within the limits of the prerogatives of administration and disposition established by the constituent and in addition only for a definite period of time. More so, the trustee administrates the fiduciary mass not for his own benefit, but for the accomplishment

of a purpose which was set by the trust agreement, so he is obliged to give account to the constituent or the beneficiary about the way in which he fulfills his attributions, and these being entitled to request the court the replacement of the trustee, should he not comply with the achievement of the contractual purpose. Therefore, the trustee does not appear as a true owner, as defined by art. 555 paragraph 1 of the Civil Code: " Private property is the right of the holder to own, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by the law." However, paragraphs 2-3 of art. 556 of the Civil Code show that the exercise of the attributes of the property right may be limited by law or by convention. We consider that the possibility of replacing the trustee cannot in any case be compatible with the quality of owner of the trustee over the goods that are objects of the trust.

The legal doctrine (Rizoiu, 2009: 180-234) even raises the question if the trust does not somehow create a new legal right with a specific legal regime, since the right of the trustee cannot be qualified as a property right in the sense in which it is defined by the Civil Code. As far as we are concerned, we do not consider that a new right arises in the person of the trustee, but that the constituent transfers his own right to him, together with a series of specific obligations, which the cited author describes as "exorbitant".

Correlatively, the question arises as to the legal nature of the beneficiary's right over the goods of the trust mass. The legislator does not establish explicit provisions in this regard. From the interpretation of those regulations concerning the obligations of the trustee, we can deduce that, in relation to the latter, the beneficiary is the holder of correlative rights of claim: he will be able to request the trustee to give an account of the manner in which he fulfills his duties (art. 783 of the Civil Code) and, at the moment of termination of the trust contract, he has the right to acquire the net asset resulting, after the payment of debts, from the patrimonial mass that was the object of the trust (art. 791 paragraph 1 of the Civil Code).

Like an agent, the trustee is obliged to perform the duties entrusted to him by the constituent; he is also required to give an account to the constituent regarding the manner of execution of the trust. The conditions under which the trustee will perform this obligation are provided by the trust agreement. Furthermore, he may also be held accountable periodically to the beneficiary and to the representative of the constituent, at their request. The legislator does not specify exactly what this report will consist of, but it is mainly aimed at informing the entitled persons about the management of the fiduciary patrimony. Therefore, we find that in correlation with the obligation to transfer the rights and to remunerate the trustee, the constituent, as well as the beneficiary, will have the right to verify the way in which the trustee manages the fiduciary patrimony. As a consequence, art. 788 paragraph 1 of the Civil Code states that "if the trustee does not fulfill his obligations or he jeopardizes the interests entrusted to him, the constituent, his representative or the beneficiary may request in court for the replacement of the trustee and the appointment of a temporary administrator of the trust."

The trustee is empowered to manage the trust fund and for the accomplishment of this purpose, he will conclude operations of conservation, administration and the act

of disposition that are expressly named by the law or the trust contract. He will also carry out material operations which are necessary for the fulfillment of the purpose of the trust.In fulfilling his duties, the trustee, like the remunerated agent, must demonstrate the diligence of a good owner, as he is a paid professional in the performance of his duties.

As to the possibility of the trustee to choose another person to replace him in performing his duties, even though the law does not expressly provides in this matter, we consider that such a possibility exists only if it is expressly conferred by the trust contract, as it is, like the mandate, an intuitu personae agreement.

The trustee will be liable for any damage he may cause in the performance of his duties. Thus, art. 787 of the Civil Code stipulates that " for the damages caused by acts of conservation or administration of the fiduciary patrimonial mass, the trustee is liable only with his other patrimonial rights." Therefore, the fiduciary mass does not identify as the trustee's own patrimony, the legislator explicitly stipulating this distinction in art. 773 of the Civil Code, namely that the rights transferred to the trustee by the constituent "constitute an autonomous patrimonial mass, distinct from the other rights and obligations of the trustees' patrimonies." From this, we can deduce that the trustee has the obligation to keep the goods thet are objects of the trust separately from his own personal assets or from those which are objects of other trust contracts; such an obligation also falls on the agent under the art. 2019 of the Civil Code, as he must take care not to confuse his property or that of other principals' with that of his principal. However, unlike the agent, the trustee exercises his own right over the assets of the trust fund, which is distinct from the right of the beneficiary. The separation of the patrimonial masses only has the purpose of facilitating the transfer of goods to the beneficiary, in case of termination of the trust.

In carrying out the acts required by the trust, the trustee is obliged, like the agent working on behalf of his principal, to denounce to third parties the quality in which he acts, as he does not acquire the quality of rightful owner of the trust fund, but is obliged to work in the interest of the beneficiaries indicated in the trust agreement.

However, according to art. 784 paragraph 1 of the Civil Code, in relations with third parties, the trustee is considered to have full rights over the fiduciary mass, he acting as the sole holder of the rights that were transferred to him by the constituent, except for those cases in which it can be proven that the third parties were aware of the limitation of these powers. This means that the legal acts concluded by the trustee in the management of the trust fund produce legal effects exclusively between the trustee and the contracting third parties. The provisions regarding the trust do not admit a direct legal complaint of the constituent against the contracting third party, nor of the third party against the constituent. However, art. 786 of the Civil Code provides that the assets of the trust fund may be claimed by the holders of the rights of claim arising in connection with those assets or by the creditors of the constituent who have a real guarantee over his assets, which had been made opposable prior to the establishment of the trust.

The transfer of real rights and rights of claim to the trustee is not final, the duration of the trust being a maximum of 33 years, and at the expiration of its term or when the trustee is replaced, he will be obliged to return the fiduciary patrimonial mass to

the beneficiary or, in his absence, to the constituent or to the new trustee, in the case of his replacement. The refund of the fiduciary mass is conditioned by the payment of all fiduciary debts. Therefore, the trustee will first have to liquidate the fiduciary liability from the resources lying in the assets and only afterwards he will transfer the remaining assets to the beneficiary or, in his absence, to the constituent. In order to achieve this purpose, he will also have to pursue the claims belonging to the trust fund towards third party debtors.

According to art. 789 of the Civil Code, the trust contract can be terminated unilaterally by the constituent only as long as it has not yet been accepted by the beneficiary. After it has been accepted by the beneficiary, the constituent may terminate the contract only with the consent of the beneficiary or with the authorization of the court. The beneficiary, in turn can renounce the trust, and if all the beneficiaries renounce, the contract will be terminated, if it does not mention the way to continue the trust relations. Therefore, the trust contract being irrevocable from the moment of its acceptance by the beneficiary, according to art. 789 paragraph 2 of the Civil Code, it could take the place of a mandate declared irrevocable by the parties. This function could be performed more successfully by the trust contract, as long as this type of contract is essentially revocable, the insertion of an express irrevocability clause not having the effect of depriving the principal of his right to terminate the contract at any time, as enshrined in art. 2031 paragraph 1 of the Civil Code. Moreover, since the trust may involve not only two, but even three participants in the operation, it could take the place not only of a mandate in common interest, but also that of a mandate in the interest of a third party. An author (Rizoiu, 2009) even states that once the trust has been established, it is no longer necessary to use the mandate in common interest, or the mandate in the interest of a third party, and the whole discussion about its revocability is no longer needed, since the trust is irrevocable and more flexible than the mandate. The main shortcoming of the mandate in relation to the trust is that the mandate, even when declared by the parties “irrevocable”, does not transfer to the agent the power to conclude the legal acts for which he was appointed, but only doubles this power, the principal being entitled to conclude these acts himself. The constituent will not be able to do the same, as he has transferred the ownership of the right to the trustee, together with the prerogatives of the right; the constituent allows the trustee to act as the rightful owner of the transferred right (including the conclusion of disposition acts), without having the need of a special mandate for that.

In order for the legal institution of the trust to be successfully applied, we believe that a clearer regulation of the rights of the trustee is needed, since his legal status is uncertain, as it is to some extent dependant on the mandate: he must declare the quality in which he acts towards third party contractors, its managing activity being at the same time regulated as the typical mandate (art. 792 and seq. Of the Civil Code). At the same time, we believe that this institution will truly become useful for the commercial life when, freed from the formalism that characterizes it presently, it will be able to align with the desideratum of efficiency and speed of the business relations. For this purpose, a harmonization of the provisions governing it with other normative acts in force is required, such as the Law no. 31/1990 regarding the

commercial companies, Law no. 297/2004 of the capital market and Law 85/2014 regarding the procedures to prevent insolvency and of the insolvency.

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