

**THE CONCEPT OF THE TRUST IN ROMANIAN LAW**Luminița Tulească<sup>1</sup>**Abstract:**

*The trust, a unique institution, specific for the English-Saxon legal system - common-law- has been constantly rejected by the European continental legal systems (civil law).*

*As a trend imposed by the requirements for strengthening the Single European Market, the well known segregation of the law in common law and continental civil law, has been diminished in time thus, during the last decade, the transformations occurred in the two legal systems, in the context of Europeanization and globalisation of businesses and implicitly of law, have managed to lead to the expected mixture, modification and acceptance of ideas, theories and fundamental legal institutions of these legal systems.*

*By the New Civil Code, the Trust is also regulated in Romania under the name of "Fiducie", and it shall be further used and developed in both the relations between the individuals as well as in the business environment.*

*This paper, first of this series, intends to analyze the meaning of Trust in the light of the Romanian law, but also from the view of its traditional meanings as established in England and the United States of America and, last but not least, from the perspective of the regulatory trends in this direction, existing at the level of the European Union.*

**Keywords:** Trust, Fiducia, Internal Market, New Romanian Civil Code, Common Law, Civil Law, Equity.

**JEL Classification:** K10, K22, K33

**I. Globalizing the Trust**

The trust, institution characterizing the English-American law (part of the property law), occurred in response to the need to find solutions and to protect promises which had no binding effect, but which should have been complied with according to the equity principles: good-faith and respecting one's word.<sup>2</sup>

In its original form, the trust is unfamiliar for most of the legal systems of Roman-Germanic tradition, in the so called continental legal system or civil law.

The economic and legal advantages offered by the trust and the need to unify the substantive law of the EU member states have started the assimilation process of this special institution of the English-American law into the continental law countries, including in Romania.

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<sup>2</sup> See: Donovan Waters, Q.C., F.R.S.C., "The distinctive characteristics of the Anglo-Saxon trust", STEP France Conference, June 13<sup>th</sup> -14<sup>th</sup>, 2007, unpublished;

The first major step in "globalizing" the Trust institution has been achieved by adopting the Draft of the Hague Convention applicable to Trust and its acceptance on 20<sup>th</sup> of October 1984, within the International Private Law Conference in The Hague.

Under these conditions, in 1985, the first three countries: Italy, Luxembourg and The Netherlands, have officially signed the Convention on the Trust Applicable Law and its recognition (further referred to as the Hague Convention)<sup>3</sup>.

The Convention entered into force on January the 1<sup>st</sup>, 1992<sup>4</sup> and, even if 12 contracting states apply it<sup>5</sup>, it is not considered to be substantive law, lacking the power to indirectly regulate the trust in those states that have no applicable law for this institution.

However, the Hague Convention has been a milestone in accepting the "international" trust and its traditional significance also in jurisdictions belonging to the continental legal system<sup>6</sup>, in states such as: Italy, France, Switzerland, Luxembourg.

In practice, the Hague Convention has been considered as a perfectly sustainable substitute of the internal regulations of the Trust, obviously, in lack of such regulations.

In this sense, in Italy, by starting from the controversy generated by the contents of the article 6 of the Hague Convention: "*The trust shall be governed by the law chosen by the settlor*", under the aspect of recognition or non-recognition of the trust in the countries not regulating this institution, the Professor Maurizio Lupoi had successfully reasoned the fact that, there is no need to regulate the Trust by means of internal laws in Italy as long as the Trust concluded under the Hague Convention is recognized, applying the relevant applicable law, which is, in most of the cases, the English law<sup>7</sup>. This opinion has been constantly confirmed by the Italian courts.

This approach has been adopted in Switzerland<sup>8</sup> as well as in Luxembourg, until the legal regulation of the trust in this later state, achieved under the Law on July 27<sup>th</sup>, 2003 on Trust and fiduciary contracts.

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<sup>3</sup> International Commercial Law, Source Materials, Selected by Willem J.H. Wiggers, Kluwer Law International, Hague, 2001;

<sup>4</sup> Hiroyuki Watanabe, "Trust without Equity" and Prospects for the Introduction of Trusts into European Civil Law System", available at: <http://www.globalcoe-waseda-law-commerce.org/activity/pdf/23/20.pdf> (last visited on May 30th 2011);

<sup>5</sup> Until March 2011, according to the Hague Conference regarding the International Private Law, there were already signatory states of the Hague Convention on the trust applicable law and recognition, such as: Italy, Luxembourg, The Netherlands, (European area), Malta, Monaco, United Kingdom of Great Britain and Northern Ireland, France, Luxembourg, Cyprus, Canada, Australia, United States of America; statute available at: <<[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=59](http://www.hcch.net/index_en.php?act=conventions.status&cid=59)>> (last visited on May 29<sup>th</sup>, 2011);

<sup>6</sup> Adair Dyer, "International Recognition and Adaptation of Trusts: The Influence of the Hague Convention", Vanderbilt Journal of Transnational Law, Vol. 32, 1999;

<sup>7</sup> Maurizio Lupoi, "Il Trust quale legittimo strumento di Tutela del Patrimonio" - Stutturazione dei Trust di protezione patrimoniale- Convegno, 13 marzo 2003, palazzo di Giustizia di Torino, aula Fulvio Croce, available at: << [www.associazioneavvocati.it/biblioteca/lupoi.doc](http://www.associazioneavvocati.it/biblioteca/lupoi.doc) >>;

<sup>8</sup> See: Luc Thevenoz, "Trusts in Switzerland. Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers", Centre d'etudes juridiques europeennes, Geneve, Ed.Schulthess,

Even in France, the state with the highest doctrinaire resistance against the regulation of Trust, influenced by the mighty European trend, adopted the Law no. 2007-211 /February 2007 on the introduction of Trust, by which the institution of trust has been introduced in the French Civil Code<sup>9</sup>.

The requirements of the business environment have brought into discussion the need to regulate the trust by means of an European law achieving both a amalgamation of the trust significance as provided by the existing laws and a uniform law in the matter of trust, the result of such being materialized by the Principles of European Trust Law<sup>10</sup>.

By these Principles the international group of experts reunited under the Centre for Business and Law Research of the University in Nijmegen have established 8 principles of the trust law meant to facilitate the transactions between the various jurisdictions in Europe<sup>11</sup>, allowing the states to acknowledge the potential to develop of the new legal concept and to offer support for developing these ideas depending on the different social, economic and legal contexts.

Few years later, in 2004, the Centre for Business and Law Research of the Nijmegen University has remade and expended the group of international experts that worked on the drafting of the Principles of European Trust Law, for preparing the way for a new law of "protecting the funds " in the European Union, based on various National Reports, explaining the legal provisions and the consideration of transposing the directive on funds protection in the national laws<sup>12</sup>.

At its turn, the European Parliament has adopted resolutions on the possibility to harmonize the substantive private law, first in certain areas of the private law, as an essential condition for strengthening the Internal Market.

In the sense of the two main aspects of these issues related to the legal nature of the European instrument and its contents, the European Commission has set up a group of experts<sup>13</sup> for studying the sustainability of an instrument of European contracts law and for assisting the Commission in the activity of selecting the parts of

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Zurich, 2001, available at: < [http://cms2.unige.ch/droit/cdbf/IMG/Trusts\\_in\\_Switzerland\\_EN\\_.pdf](http://cms2.unige.ch/droit/cdbf/IMG/Trusts_in_Switzerland_EN_.pdf)>; last visited on May 27<sup>th</sup> 2011;

<sup>9</sup> French civil code [C.civ.fr.] Title XIV "De la fiducie" (Fr.), available at [http://www.legifrance.gouv.fr/affichCode.do;sessionId=FBC68F48F6A9BEB85B0C96661DCE886.tpdjo13v\\_3?idSectionTA=LEGISCTA000006118476&cidTexte=LEGITEXT000006070721&dateTexte=20101009](http://www.legifrance.gouv.fr/affichCode.do;sessionId=FBC68F48F6A9BEB85B0C96661DCE886.tpdjo13v_3?idSectionTA=LEGISCTA000006118476&cidTexte=LEGITEXT000006070721&dateTexte=20101009); last visited on May 29<sup>th</sup>, 2011;

<sup>10</sup> David J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen, , Principles of European Trust Law, Law of Business and Finance, Vol.I, Ed.Kluwer Law International, 1999;

<sup>11</sup> For drafting the Principles of the European Trust Law there have been used the reports of the project's members in: Scotland, Germany, Switzerland, Italy, France, Spain, Denmark, and The Netherlands - see: Hiroyuki Watanabe, op.cit., p.189;

<sup>12</sup> Hiroyuki Watanabe, p.cit., p.192;

<sup>13</sup> The decision of the Commission on April 26<sup>th</sup> 2010 for setting up the Group of Experts for a common frame of reference in the field of European contracts law, published in JO L 105, 27.4.2010, p.109, available also at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0109:0111:RO:PDF>> (last visited on January 23<sup>rd</sup> 2011);

the Principles, Definitions and Model Rules of European Private Law<sup>14</sup> that are directly or indirectly applicable to the contracts law as well as in restructuring, reviewing and completing the contents selected from the common reference frame project, having, also, in mind other research papers in this area of expertise, as well as the EU acquis. The CoPECL Network - Common Principles of European Contract Law, has finished and presented the European Commission the Draft of the Common Frame of Reference (hereinafter referred to as DCFR).

DCFR dedicates the entire X Chart – to the detailed regulation of the Trust, after rethinking and conceiving institutions such as patrimony and property thus as to be adequate for allowing the trust reception, in previous charts.

Due to the evolution of the Trust regulation at the European level during the last 20 years and due to the obvious tendencies of including it in the national laws of the member states of the European Union, Romania had to take the necessary steps for modernizing its law and, by the adoption of the new Romanian Civil Code, the trust can be used under the name of “Fiducia”.

## II. The essential conceptual premises in approaching the Trust

Seen as a vehicle for property mastering or managing we consider that the most adequate significance of the trust, by its conciseness and its proximity to the content of the English-Saxon trust, is the one achieved by the art. 2 of the Hague Convention, according to which, the trust *"is the understanding created inter vivos or for mortis causa – by an appointed person, settlor, who transfers assets to the control of a another person called trustee, for the benefit of a beneficiary or for an indicated purpose"*.

Therefore, the trust involved three parts: the "settlor" – the one transferring the property to a "trustee", entrusted with the obligation of property administration for the benefit of a "beneficiary". Any of these positions can be held by more than one person.

From this perspective the characteristics of the trust are born from the fact that: a) the assets forming the object of the trust represent a separate fund and are not part of the estate, patrimony of the trustee; b) the holder of trust's assets is the trustee or a different person, acting in the name of the trustee; c) The trustee has the power and duty that he is held responsible to comply with it, to manage, to hire, and to dispose of the estate according to the provisions of the trust and to the special obligations provided for the trustee under the law.

It is interesting to notice the fact that, from the point of view of its cause, in the English-American system, the trust is regarded more like: "essentially a gift, projected

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<sup>14</sup> Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), outline edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll, 2009, Sellier. European law publishers GmbH, Munich., available at: <[http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf)>, (last view: 30th May 2011);

on the plane of time and so subjected to a management regime"<sup>15</sup>. This conception of the trust as "gratuitous transfer" is contradicted by the reality, considering that, most of the estate under trusts is subjected to the business deals and have nothing to do with gratuitous transfers.

An essential aspect of the English-Saxon Trust consists in the fact that, in the English common law (but not in the Scottish law, too) there is a distinction between the legal property (*de jure*) and the equitable one, differentiation standing at the base of the Trust institution: The trustee becomes owner at law and the beneficiary owner in equity<sup>16</sup>.

In its original form, the Trust represents a major form of dividing the property right between the trustee and the beneficiary, such segregation being not among the enumerated forms of division permitted under the civil law<sup>17</sup>.

The possibility that an estate is the property of two persons in the same time and the essential distinction between the owner at law and the owner in equity of an asset or an estate owned under a Trust, have determined the rejection of this concept in the civil law, as the fundamental principles of the same where inconsistent with this perception.

The main obstacle consisted in the fact that in the continental law-governed countries there has been embraced a certain theory of the ownership right unity, based on which all the rights related to the ownership right over an asset, must remain with only one person and not divided in partial rights split between two or several persons. Only a limited number of exceptions are permitted<sup>18</sup> from this principle (*numerus clausus*). The partial ownership rights, that are not included in the limited exceptions, are not recognized. In other words, the parties are not allowed to establish other forms of rights over the property.

Therefore, the existence of the principle *numerus clausus* (specific to the Romanian law, too) has been considered to be an obstacle in accepting the almost infinite varieties of the Trust provided by the English-American legal systems<sup>19</sup>.

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<sup>15</sup> Bernard Rudden, John P. Dawson's Gifts and Promises, 44 MOD L.REV. 610, 610 (1981), quoted by de John H. Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" (1997), Yale Law School, Faculty Scholarship Series, Paper 503, available at: < [http://www.law.yale.edu/documents/pdf/Faculty/Langbein\\_Secret\\_Life\\_of\\_Trust.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Langbein_Secret_Life_of_Trust.pdf)>, last visited at 26th May 2011;

<sup>16</sup> For further details on the forms of property in the law of land, please see: Real Property Law and Procedure in The European Union, General Report, European University Institute (EUI) Florence/European Private Law Forum, Deutsches Notarinstitute (DNotI) Wurszburg, 31.05.2005, p.13, available at: <<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf>>, last visited on May 28<sup>th</sup>, 2011;

<sup>17</sup> Henry Hansmann, Reinier Kraakman, "Property, Contract, and Verification: The Numerus Clausus Problem and The Divisibility of Rights", p.373, Journal of Legal Studies, vol.XXXI (June 2002), The University of Chicago, available at:< [http://www.law.yale.edu/documents/pdf/Faculty/Hansmann\\_Contract.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Hansmann_Contract.pdf)>, last visited 29 May 2011;

<sup>18</sup> Rights of way, mortgages, a.s.o. represent exceptions from the principle of "ownership right unity"

<sup>19</sup> Stathis Banakas, "Understanding Trust: A Comparative View of Property Rights in Europe", Revista Para El Analisis Del Diritcho, vol.323, No.1/2006, p.3, available at:< [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1400130](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400130)>, last visited May 28th 2011;

### III. The significance of Trust in Romania

The main obstacles in accepting the Trust in the countries using the continental law have been raised by: a) the lack of concept of property division in ownership by law (right enjoyed by the trustee) and ownership in equity (right enjoyed by the beneficiary) and, therefore, by the existence of the principle according to which there must be only one owner at the time; and b) by the seeming impenetrability of the theory of singleness of one person's patrimony. For a good understanding of this last obstacle, we mention that, the theory of patrimony singleness, has been laid with Charles Aubry and Frederic C. Rau, can be presented by its three main ideas: 1) each person has a patrimony; 2) each patrimony belongs to someone; and 3) one person has only one patrimony. By reference to trust, its trustee has two patrimonies: his own and the one formed of the assets composing the trust<sup>20</sup>.

The introduction of trust in our country has not been influenced by the legal meaning of the ownership right whose content remained unchanged.

Thus, in the Old Romanian Civil Code, "*the ownership is the right of a person to enjoy and dispose of one asset, exclusively and absolutely, but within the limits established by law*" - (art. 480 of the Old Civil Code) and, by the New Civil Code the private property is defined as: "*the holder's right to possess, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by law*" (art. 555 of the New Civil Code).

Considering this concept of property, regarded as an exclusive right, of one single person, it is impossible to accept the original idea of trust.

However, we are certain that, with the future legislative amendments to occur at the European and domestic level, the idea of trust, in its original sense, considering also the meaning established in the specialized literature according to which, "when we say that the beneficiary of the Trust in the English law has an "interest"<sup>21</sup> in property ("proprietary interest"), in the estate forming the object of the trust, we only say that it has an ownership right according to the English notion of the term. We do not say he/it has an ownership right according to the notions of the civil law"<sup>22</sup>.

The experts working on the New Civil Code project have not been concerned with the introduction of the English-Saxon concept of trust but with the perceiving

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<sup>20</sup> Valerio Forti, "*Comparing American Trust and French Fiducie*", The Columbia Journal of European Law Online, vol.17, 28 (2011), p.32, available at: < [http://www.cjel.net/online/17\\_2-forti/](http://www.cjel.net/online/17_2-forti/)>, last visited 26th May 2011;

<sup>21</sup> "The term of interest is a term largely used in the English – Saxon is a widely generic term describing a right, a claim, a title, or a fraction of a right acknowledged by the law. In particular, in the sphere of proprietary relations, it has the significance of a right to accrue, to harvest, an advantage from any legal report or any asset; any right deriving from the property nature, except for the ownership title " - Catalin Tripon, "*Trust / Fiducia, the result of the interference of two great legal systems: the Continental civil law and the English – Saxon law. The concept, the ranking, the evolution and the validity conditions of the trust (in Romanian fiducia)*", in the Romanian Magazine of Private Law no. 2/2010, p.167 and the quoted source: Henry Campbell Black, Joseph R. Nolan, Jacquelin M.Nolan-Haley, Black's Law Dictionary, sixth edition, West Publishing Co., USA, 1990, p.812;

<sup>22</sup> Hiroyuki Watanabe, op.cit., p.196; Paul Matthews, "*La collocazione del trust nel sistema legale: contratto o proprietà?*", in Trusts Trimestale di apprendimento scientifico professionale, n.4-2004, Milano, p.531-532;

of that idea of trust already known in the legal system of many European states, trust involving only the acceptance to modify the concept of patrimony, without the idea of dividing the ownership right between two persons.

Even if, for a long period of time, the theory of the patrimony singleness of an individual or a legal entity had also characterized the Romanian law, this incompatibility with the regulation of the trust institution, has been eliminated prior to the adoption of the New Civil Code, by the significant and final amendment of the substance of the singleness patrimony theory, by the G.E.O. no. 44/2008<sup>23</sup> that legally establishes the notion of „the special-purpose patrimony” a special-purpose patrimony (in Romanian *patrimoniu de afectatiune* - affected to the fulfilment of a special purpose and which has the trustee as the owner).

We find this notion in the specialized literature, under the theory of special-purpose patrimony encountered when establishing the legal nature of the goodwill, not retained as incidental with the theory of legal universality<sup>24</sup> which, in its turn, did not impose either, due to the fact that the legal universality had no legal support<sup>25</sup>.

According to the legal definition, the special-purpose patrimony represents the “*totality of assets, rights and obligations of the authorized individual, of the holder of the individual undertaking, or of the members of the family undertaking, affected for the purpose of exercising an economic activity, set up as a distinct fraction of the patrimony of the authorized individual, of the holder of the individual undertaking, or of the members of the family undertaking, separate from the general pledge of his/their personal lenders*” – art.2 let. j) of the G.E.O. no. 44/2008.

The authorized individual, member /members of the individual undertaking and of the family undertaking can decide the set up of a special-purpose patrimony that will have the *advantage of protecting their commercial undertaking of the personal lenders - civilians, who will not be entitled to claim and pursuit the assets and rights assigned by their debtor for carrying out of the commercial activity. If the legal regulation of the special-purpose patrimony would not be understood as such, the logics of such an institution would fail to exist*<sup>26</sup>.

As a justified continuity, the New Civil Code establishes the fact that, any individual or legal entity is the holder of a patrimony that can form the object of a division or special purpose, in the cases and under the conditions provided by law,

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<sup>23</sup> G.E.O. no. 44/16.04.2008 on the undertaking of the economic activity by the authorized individual persons, individual undertakings and family undertakings, Published in the Of. M., Part I no. 328 on 25.04.2008;

<sup>24</sup> By which it is established the existence of an independent patrimony, with rights and obligations distinct from the civil rights and obligations;

<sup>25</sup> For further details see: Stanciu D.Carpenaru, Dreptul comercial roman, Ed.a VIII a, revazuta si adaugita (Romanian commercial law, revised and updated), Ed. Universul Juridic, Bucharest, 2008, p.120-121; I.L.Georgescu, Drept Comercial Roman, Vol.I (Romanian commercial law, Volume I), Ed. All Beck, 2002, p. 468-471; C.Hamangiu, I.Rosetti-Balanescu, Al.Baicoianu, Tratat de Drept Civil Roman, Vol.I (Treatise of Romanian Civil Law, Volume I), Ed. All, Bucharest, 1996, p.523-525;

<sup>26</sup> For a detailed and updated presentation of the characteristics and principles governing the patrimony, please see: I.Turcu, Tratat teoretic si practic de drept comercial, Vol.I (Theoretical and Practical Treatise of Commercial Law, Volume I), Ed. C.H.Beck, Bucharest, 2008, p.277-303;

the fiduciary patrimony (in Romanian *masele patrimoniale fiduciare*) being established under the law, as special-purpose patrimonies.

Based on these grounds, the introduction of trust in the Romanian law – as the first breach of the institutions specific to common-law in the Romanian civil law – has been achieved by the New Civil Code, under a moderate and common form: *Fiducia*.

Thus, according to article 773 of the New Civil Code, *the fiducia is the legal operation whereby one or more grantors (in Romanian constitutori) transfer(s) various patrimonial rights or a group of such patrimonial rights, present or future, to one or more trustees (in Romanian fiduciari), who administer those with a given purpose, to the benefit of one or more beneficiaries (in Romanian beneficiari). These rights constitute an autonomous patrimony, separate from the other rights and obligations in the fiduciary's own patrimony.*

Having thus defined the *fiducia*, the Romanian law places itself among in line with the modern regulations existing at the level of the European Union and with the main European state.

Thus, in the text of the Book X - Trusts, from the Common Principles of European Contract Law, the Draft of the Common Frame of Reference, *the trust is considered as being an understanding, by which a trustee must administer or dispose of one or several assets (trust fund) for the benefit of a beneficiary or for the advantage of advance public benefit purposes.*

In the Principles of European Trust Law, the trust is defined in a less usual manner, but having the same meaning, from the point of view of its main characteristics. Thus, *in a trust, a person called "trustee" owns assets segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose.*

The French Civil Code, the obvious source of inspiration of the Romanian legislator, regulated the *fiducia as the operation by which one or several grantors transfer the assets, rights and guarantees, or a group of rights and guarantees, present or future, to one or several trustees who, holding it separately of their own patrimony, shall administer it for a determined purpose or for the benefit of one or several beneficiaries (art. 2011 Fr. civil code).*

No doubt, the *fiducia* from the Romanian law is a complex contract which, by its structure, involves two or several expressions of contracting parties' will (in the *negotium* sense): the grantor, the trustee and the beneficiary, agreement connected among them by a common economic purpose, resulting from a distinct legal entity, with its own legal regime: *fiducia*.

A major effect of the trust, which, in fact, represents its characteristics, encountered in all the regulations considered in this paper, consists in the fact that the trust fund is and must be regarded as a distinct patrimony of the trustee own patrimony and of any other patrimony belonging to or managed by the trustee.

The trust fund continues to represent the ownership of the grantor, being a distinct part of his patrimony but, in the relations with the third parties, it is



considered that the trustee has full powers over the fiduciary patrimony, acting as a true and sole holder of the rights in question (art. 784 para.1 of the New Civil Code).

And last, but not least, the *fiducia* (trust) can be established by contract and by law, under the interdiction of alienating it as an indirect gift (*animus donandi*) for the benefit of the beneficiary, under the sanction of the trust nullity.

Considering that, the New Civil Code requires the execution of the gifts solely by means of donation or legacy comprised in the will, we consider that, the above-mentioned interdiction refers to both the *fiducia* occurred *inter vivos* as well as to the *fiducia* set up for the *mortis causa*, thus establishing a damaging and unjustified limitation of its meaning, role and functions.

From this point of view, the Romanian law eliminates essential characteristics of the trust as an instrument for achieving gifts for the interest of the beneficiary in disagreement with the traditional purposes of the trust, with the provisions of the Hague Convention, of the Principles of the Trust European Law and, especially, with those of the Common Principles of European Contract Law – Draft of Common Frame of Reference, that will stay on the foundations of the European contracts law, most probably by means of an optional but binding instrument, such as the Regulation.

None of the above-mentioned examples prevents the use of trust or *fiducia* for making a direct or indirect gift in the favour of the beneficiary.

For these reasons, it is highly probable that the Romanian law shall suffer some amendments imposed not only by the pressure of the specialized doctrine and business environment, but also by the need to harmonize the European contracts law.

#### **IV. Conclusions**

The analysis of the Trust significance in the light of the Romanian law, but also from the perspective of its traditional meanings established under the law in England and in the United States of America, and last but not least, from the perspective of the regulatory trends existing in this direction at the level of the European Union, shows the importance trust or *fiducia* has, as essential legal and economic instruments.

Stepping further away from the meaning of the English-Saxon trust but, in agreement with the main current trends from the civil law, the *fiducia* represents a contract by which a trustee (*fiduciar*) is forced to administer or to dispose of one or several assets of one grantor, for the benefit of a beneficiary or for the furtherance of a purpose.

In this conceptual framework, the *fiducia*, just like the trust in the form adopted by the continental law states, is a special modality of assets management and not a means of transfer and acquisition of ownership over certain assets.

Undoubtedly, beyond its inconsistencies, the regulation of the trust institution under the name of *fiducia*, shall generate the modernization and significant development of the law and of the economic activity, thanks to the obvious

advantages of using this institution, advantages that will be further analyzed in a different paper.

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