



THE FIDUCIE REVIVAL

Franck Cera discusses an alternative to the trust that has been making a comeback in Luxembourg



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ased on Roman law, the *fiducie* is the oldest *in rem* contract. Although widely used throughout history – one can think of the Crusaders using the *fiducie* as a way to manage their assets while being at war – it never developed the same usefulness and flexibility as its common-law counterpart, the trust. However, civil-law countries are taking a second look at the *fiducie* as an alternative to the trust and are using this mechanism in a wide range of situations. Luxembourg has been at the forefront of the revival of the *fiducie* since the implementation, in 1983, of a regulation regarding *fiducie* contracts and credit institutions. Since then, Luxembourg has gone one step further by enforcing the *Law of 27 July 2003* approving the *Hague Convention on the Law Applicable to Trusts*

and on their Recognition and setting out *fiducie* arrangements in Luxembourg (the Law).

The Law provides a legal framework for the *fiducie*, offering its potential users the luxury of legal certainty and allowing them to have the clearest idea as to what the notion of *fiducie* entails from a Luxembourg legal standpoint. It is worth mentioning, at this point, that a *fiducie* arrangement may be entered into outside the scope of the Law but that, as such, it will not benefit from its specific asset-protection rules.

Pursuant to the Law, the *fiducie* is a contract by which ‘a person known as the settlor agrees with another person known as the *fiduciaire* that the latter will, within the obligations set out by the parties, become the owner of the assets forming a

fiducie estate’. The main criterion of the *fiducie* is that, as opposed to the trust, it is a binding contract and, as such, cannot be formed unilaterally. This particular characteristic is part of the certainty package offered by the *fiducie* in that it de facto excludes unilateral acts.

In order to offer as much legal certainty as possible, the Law has limited access to the position of *fiduciaire* to the following:

- Luxembourg or foreign credit institutions;
- regulated investment firms (such as a regulated private portfolio manager);
- investment companies with a fixed or variable share capital;
- securitisation vehicles;
- mutual funds or securitisation fund vehicles;
- pension funds; and
- insurance companies or public Luxembourg or international entities active in the financial sector.

Although the Law only refers to two participants in the *fiducie* arrangement, namely the settlor and the *fiduciaire*, more often than not a third party, known as the beneficiary, will also be involved. Like with a trust, the beneficiary is the one who will benefit from the *fiducie* assets held by the *fiduciaire*; the settlor and the beneficiary may, in some cases, be the same person.

Another feature of the *fiducie* is the notion that the *fiduciaire* effectively becomes the owner of the assets forming the *fiducie* estate. Such transfer of ownership to the *fiduciaire* is without consideration and without prejudice to the limits set out by the parties in the *fiducie* agreement. Again this characteristic adds to the legal certainty offered by the *fiducie* and contrasts with the trust in that the scope of the rights of the trustee with regard to the assets settled in trust is not always clearly defined.

The *fiducie* contract can be terminated at any time if it has been entered into for an undetermined duration, or at the end of the *fiducie* contract if it has been entered into for a limited duration.

Legal framework

The *fiducie* contract in Luxembourg offers flexibility with regard to the nature of the assets that may be included in the *fiducie* estate and the geographical situation of the *fiduciaire*.

The *fiducie* estate may include any type of assets, located either in Luxembourg or in any other foreign jurisdiction. Similarly, the *fiduciaire* does not have to be physically located in Luxembourg to be within the scope of the Law but can also be located in any other foreign jurisdiction. A *fiducie* contract could be entered into with a foreign bank, notwithstanding the fact that such bank does not have a physical

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presence in Luxembourg or in the European Union.

The *fiducie* is a written contract and thus allows for easier enforcement against third parties. The *fiducie* contract will be enforceable against any third parties from the moment it is entered into, subject to:

- specific formalities for the transfer of ownership of specific assets (e.g. real estate, aircrafts, ships, IP rights), and
 - the limitations of powers of the *fiduciaire*, as set out in the *fiducie* agreement itself.
- The *fiduciaire* will be liable for its actions regarding the *fiducie* estate under two types of obligations:
- the obligations of the *fiduciaire* set out in the *fiducie* contract, not those arising out of subsequent contracts entered into between the *fiduciaire* and third parties regarding the fiduciary assets. The *fiduciaire* shall abide by the obligations set out in the *fiducie* agreement and will therefore be liable towards the settlor, and
 - with respect to any actions undertaken in relation to the *fiducie* estate, i.e. the contracts it entered into with third parties.

This high level of responsibility ensures protection for the *fiducie* estate and the beneficiary’s rights.

However, protection of the *fiducie* assets goes beyond the potential liability of the *fiduciaire*. The asset protection offered by the *fiducie* contract is threefold and can be described as follows:

1. Each *fiducie* agreement will give rise to a *fiducie* estate, legally segregated from the personal estate of the *fiducie*. This separation of estates and creation of a *fiducie* estate is the main criterion enabling a Luxembourg *fiducie* to be recognised under the *Hague Convention* mentioned earlier.
2. The *fiduciaire* shall register the *fiducie* estate in dedicated accounts excluded from its own assets and accounting records and any operations affecting the estate shall be recorded off balance sheet.

3. The *fiduciaire* shall comply with the instructions of the settlor (unless it has waived its right to instruct). This adds to the security offered to the settlor in as much as he remains actively involved in the management of the *fiducie* estate. This aspect of the *fiducie* contract contrasts with the trust, where the settlor will waive all his rights on the trust estate as soon as it is handed over to the trustee.

Uses for the *fiducie*

The *fiducie* can be used in a number of circumstances to accommodate almost any type of situation, ranging from shareholders’ agreements to complex transactions involving Islamic instruments.

The *fiducie* facilitates the enforcement of shareholders’ agreements with regard to voting rights or restrictions of share transfer. The transfer of shares to the *fiduciaire* will allow for better compliance with the shareholders’ agreement while enabling the settlor to retain its rights on dividends and voting rights by giving instructions to the *fiduciaire*. It will also be useful in creating stable blocks of shareholders by transferring the shares of several minority shareholders to a single *fiduciaire* and thus prevent the risk of fragmentation of influence and potential shareholder conflicts.

Another feature of the *fiducie* is its efficiency in transactions involving secured financing, so as to guarantee an obligation of the settlor towards the *fiduciaire*. It may be used to secure any kind of debt, whether future or already in existence, and there are no restrictions on the type of assets that can be used as security.

The *fiducie* is an ideal way of combining conventional financial instruments and operations with Islamic ones and therefore a Luxembourg entity, if regulated, to issue Islamic instruments such as *sukuks* as *fiducie* assets or hold *fiducie* assets for the benefit of investors.

Finally, the *fiducie* may be used in situations such as inheritance planning, whereby the transfer of the estate to the *fiduciaire* will enable its allocation as per the settlor’s will or secure cash deposits.

Such variety of use clearly indicates that the Luxembourg *fiducie* presents substantial advantages in terms of flexibility and should be regarded as a viable alternative to its common-law counterpart, the trust. ■



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