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**IL CONTRATTO FIDUCIARIO OGGI:
PROFILI PROBLEMATICI E RICOSTRUTTIVI**

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Abstract

Purpose of present work is to examine the fiduciary agreement (negozio fiduciario) in Italian contract law. The fiduciary agreement is the contract in force of which the trustee is entrusted by the settlor with one or more assets and shall manage these in its interest. Traditionally, because of this agreement has not been governed by specific law, there were numerous problems concerning: if the agreement produces enforceable rights, the eligibility of a temporary ownership, which judicial and contractual remedies are enforceable.

Most of Italian studies published about fiduciary agreement as well as Courts' decisions, distinguish between two different structures called "fiducia romanistica" and "fiducia germanistica": those are differentiated by the fact that in the first case the trustee would purchase a mere formal ownership of the goods covered by the fiduciary agreement, goods that basically do not enter into his patrimony; in the second case the trustee acquires effective property rights, but the exercise of the right shall comply with the provisions of the *pactum fiduciae*. The breach of this *pactum fiduciae* agreement does not give to the settlor the right to have back from a third part his goods, but only remedies of compensatory nature.

The need to protect the assets by possible foreclosures prosecuted by the creditors of the trustee, conducted doctrine and Courts to research in the discipline of the agency contract, the cause of which is attributed to the *pactum fiduciae*, ad hoc remedies. However, art. 1707 c.c. fails to adequately protect the settler. therefore is necessary to look to the techniques that the legislator draws up for similar case characterized by third party assets management. Emblematic is the case of

mutual funds and financial intermediaries regulated by d.lgs. 384/1993 (t.u.b.). Those rules provide for the protection of the assets invested by customers with analytical, management rules, accompanied by a projected separation of assets. This technique allows to separate the values pertaining to customers from operator's assets so that his creditors can exercise only executive actions on his patrimony.

A similar technique was provided by the legislator for Fiduciary companies (società fiduciarie), which are characterized by specific rules concerning public controls and company organization. An analysis of case law has shown that the subjective qualification of the contracting party, in the case of professional fiduciary manager, allows to affirm the principle that the assets managed are not owned by the operator, which therefore cannot effectively dispose of it: this is a typed contract, regulated by a specific discipline, partly different from that of the agency contract, with specific regard to rules of diligence and liability.

In the last, by means of the technique called "collegamento negoziale" which create reciprocal links between contracts, settlor can entrust some goods for a specific purpose with a fiduciary contract linked to a destination act that has to be published and is enforceable against all third parties who have acquired rights for purposes unrelated to the destination: the attachment prosecuted by those creditors will have no effect on the assets if their date is following to the publication of destination act.