

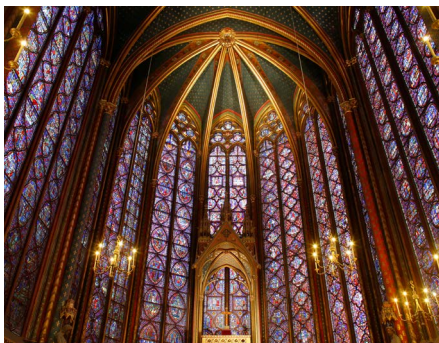
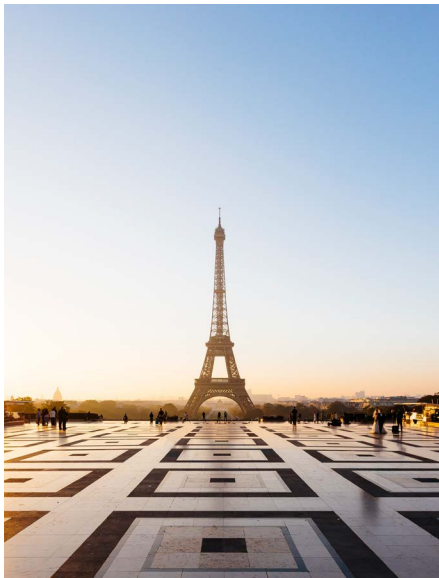
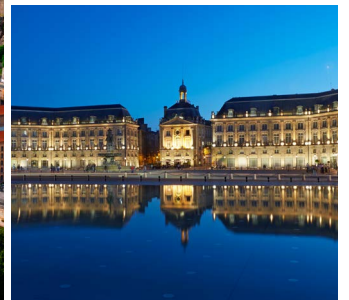


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# IN FRENCH "FIDUCIE" WE TRUST!

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# 1. Introduction

Inspired by the trust system under English law, the French *fiducie* is a tailor-made legal tool that provides a high level of legal comfort to lenders by ring-fencing secured assets through the transfer of assets to a dedicated estate.

Established in law no. 2007-211 of 19 February 2007, a **fiducie is created by an agreement** under which one or more **settlers** transfer assets or rights to the separate estate of a bankruptcy remote entity (the "**Fiducie Estate**"). The Fiducie Estate is managed and administered by a *fiduciaire*, an independent third party, in the interests of the **beneficiary or beneficiaries**, subject to and in accordance with the provisions of the Fiducie Agreement.

Fiducies are governed by articles 2011 to 2030 and 2372-1 to 2372-5 of the French *Code civil*. According to article 2011 of the *Code civil*:

"A fiducie is a transaction by which one or more settlers transfer present or future assets, rights or security interests, or a bundle of assets, rights or security interests, to one or more fiduciaires who, keeping them separate from their own estate, act for a specific purpose for the benefit of one or more beneficiaries.

Fiducies can be categorised into two different types:

- a **management fiducie (*fiducie gestion*)**:<sup>1</sup> its purpose is to entrust the management of an asset or certain rights to a fiduciaire as a trusted third party. The aim is not to guarantee any debt, but to have the fiduciaire perform certain actions on behalf of the settlor (eg, execution and performance of a shareholder's agreement).
- a **security fiducie (*fiducie sûreté*)**:<sup>2</sup> its purpose is to guarantee the performance of an obligation (whether monetary or not). As security for an obligation owed to a beneficiary, the settlor transfers assets or rights to a Fiducie Estate managed by a fiduciaire, whose task is to manage and administer such assets or rights until the secured obligations are repaid in full. Once the secured obligations are repaid, the fiduciaire returns the transferred assets and rights to the settlor; if the obligations are not repaid, the fiduciaire may enforce the fiducie in order to discharge the secured obligations.

This **contractual freedom to adapt a fiducie to** all types of transactions, even the most complex, while remaining highly effective in case of bankruptcy makes the fiducie both an essential tool for financing transactions and an excellent instrument for managing and transferring all kind of assets.

1. The legal framework of a management fiducie is governed by *articles 2011 to 2030 of the French Code civil*. Management fiducies are also treated like "transmission" fiducies because the legal regime is the same.

2. The legal framework of security fiducies is governed by *articles 2011 to 2030 and 2372-1 to 2372-5 of the French Code civil*.



## 2. Legal mechanisms of the fiducie

### Parties to a fiducie agreement (the "Fiducie Agreement"):

- the **settlor** must be the owner of the assets or rights transferred to the Fiducie Estate. Settlers may be companies, public entities or individuals.
- the **fiduciaire** is an independent third party in charge of managing and administering the transferred assets/ rights in accordance with the terms of the Fiducie Agreement. Only regulated entities can act as fiduciaire.<sup>3</sup>
- the **beneficiary** benefits from the fiducie, and may be the settlor's creditors, the settlor itself, and/or the fiduciaire.

### Transferable assets

A large variety of assets can be transferred under a fiducie. They can be existing or future, movable or real estate, tangible or intangible rights (including receivables), dismembered rights and/or securities (financial securities, bonds, etc.) (the "Transferred Assets/Rights").

### Transfer of ownership

When it is set up, a fiducie involves the transfer of ownership of an asset held by the settlor to the Fiducie Estate, a special purpose estate separate from the fiduciaire's own estate. The fiduciaire's rights over the Transferred Assets/Rights are defined in and subject to the Fiducie Agreement.

### Reloading

The Fiducie Agreement may state that the fiducie can be "reloaded" to secure new debts<sup>4</sup>. By law, these new debts will rank behind the existing debts secured by the fiducie, unless the parties agree otherwise.

### Involvement of a French *notaire*

When the Transferred Assets/Rights consist in real estate and/or belong to an individual married under a community property regime (*regime de la communauté de biens*), the Fiducie Agreement must be notarised by a French notary.

### Registration fees:

- **General:**<sup>5</sup> the Fiducie Agreement must be registered within one month of its signing date. The associated costs are €125.
- **Real estate asset:**<sup>6</sup> when the Transferred Assets/Rights are a real estate asset, the transfer of this type of asset into a fiducie involves a number of variable costs (notary's fees, land registration tax and a real estate security contribution). The Fiducie Agreement must be registered with the mortgage office within two months of its signing date.



3. These are the credit institutions mentioned in *article L. 511-1*, the institutions and services listed in *article L. 518-1*, and the investment firms mentioned in *article L. 531-4* of the French Code monétaire et financier, and the insurance companies governed by *article L. 310-1* of the French Code des assurances and avocats.

4. Reloading is governed by *article 2372-5* of the French Code civil, which stipulates in particular that the reloading of the fiducie must be provided for in the initial fiducie agreement pursuant to *article 2372-1* of the French Code civil.

5. *Article 2019* of the French Code civil.

6. *Article 2019* of the French Code civil.



### 3. Pros of the fiducie

The fiducie may be used to secure different kinds of debt and notably to secure an array of debts of different ranks (senior, mezzanine or junior). Beneficiaries' rights may be freely organised by the Fiducie Agreement (for example, mezzanine and junior creditors may be "silent" beneficiaries that follow the lead of senior creditors).

A Fiducie Estate is bankruptcy remote by law:

- The opening of insolvency proceedings against the settlor has no impact on the Fiducie Estate, as the Transferred Assets/Rights are no longer part of the settlor's estate. Consequently, they cannot be sold or otherwise disposed of by an insolvency administrator.
- The opening of insolvency proceedings against the fiduciaire does not affect the Fiducie Estate,<sup>7</sup> as the Fiducie Estate is separate from the fiduciaire's own estate. A creditor of the fiduciaire does not have any rights over the Fiducie Estate. In this situation, settlor and beneficiary can appoint a substitute fiduciaire.

If insolvency proceedings are initiated against the settlor, the beneficiary may, under certain circumstances, still enforce the fiducie and sell the underlying assets if (i) the enforcement event itself does not result from the opening of insolvency proceedings, (ii) the settlor is not able to use the Transferred Assets/Rights. If the

Transferred Assets/Rights consist in real estate or movable assets and the settlor is able to use these under a usage agreement (*convention de mise à disposition*), the judicial administrator in insolvency proceedings against the settlor can continue the usage agreement<sup>8</sup>, thereby blocking enforcement of the fiducie.<sup>9</sup>

#### Tax transparency

The fiducie is neutral and transparent from a tax standpoint. The settlor remains the owner of the Transferred Assets/Rights for the purposes of accounting and tax.

#### Management of the Transferred Assets/Rights

Since the way the Transferred Assets/Rights are managed by the fiduciaire is freely defined in the Fiducie Agreement, management of the Transferred Assets/Rights can be tailored to needs. Despite the transfer of ownership of the Transferred Assets/Rights, the settlor can continue to use the Transferred Assets/Rights under the fiduciaire's supervision (eg, the settlor could rent or sell the Transferred Assets Rights. If the Fiducie Agreement authorises asset disposals, the related proceeds are paid into an account opened in the fiduciaire's name and then distributed to the beneficiary in accordance with the waterfall).

7. Article 2024 of the French Code civil.

8. Continuation by the judicial administrator is on the same terms as the initial agreement, which means that if the settlor's use of the Transferred Assets/Rights is subject to the payment of a fee, the fee remains due. If there is a payment default on that fee, the beneficiary may enforce the fiducie and sell the Transferred Assets/Rights.

9. Article L. 624-10-1 of the French Code de commerce.







## 5. Implementation of a security fiducie in a financing transaction

Given the **contractual freedom of the fiducie**, a Fiducie Agreement may be adapted to fit any kind of financing transaction. The three most common kinds of fiducie are the following:

- **security fiducies over receivables;**
- **security fiducies over real estate and/or moveable assets;**
- **security fiducies over shares/financial securities;**

### 5.1. Fiducies over receivables

One or several **existing or future receivables may be transferred into a fiducie**. The transfer is enforceable against third parties (true sale) on the signing date of the Fiducie Agreement without the need for any further formalities.

The receivables are transferred to the fiducie together with their ancillary rights (including any security securing the receivables).

The debtors may be notified of the transfer of receivables at any time following the occurrence of certain agreed triggers, although notification is not mandatory. Until notification, the transfer will not be enforceable against the debtors.

## 4. Life of the fiducie

### General

Until and unless there is an event of default, the Transferred Assets/Rights continue to be managed by the settlor under the fiduciaire's supervision.

If there is an event of default (or some other defined triggers), the fiduciaire will be able, upon being instructed to do so by the beneficiary, to enforce the fiducie and take control of the Transferred Assets/Rights.

### Usual missions of the fiduciaire

The fiduciaire is a third party whose role is to manage the Transferred Assets/Rights, and/or to supervise the settlor's use of such Transferred Assets/Rights. A certain number of missions are assigned to the fiduciaire:

- **accounting management of the fiducie:** bookkeeping and valuation;
- **performance of a survey of the settlor's actions over the Transferred Assets/Rights;**

- **administrative management of the fiducie:** administering the Transferred Assets/Rights and informing the parties of any event affecting them; and
- **closing and/or enforcing of the fiducie.**

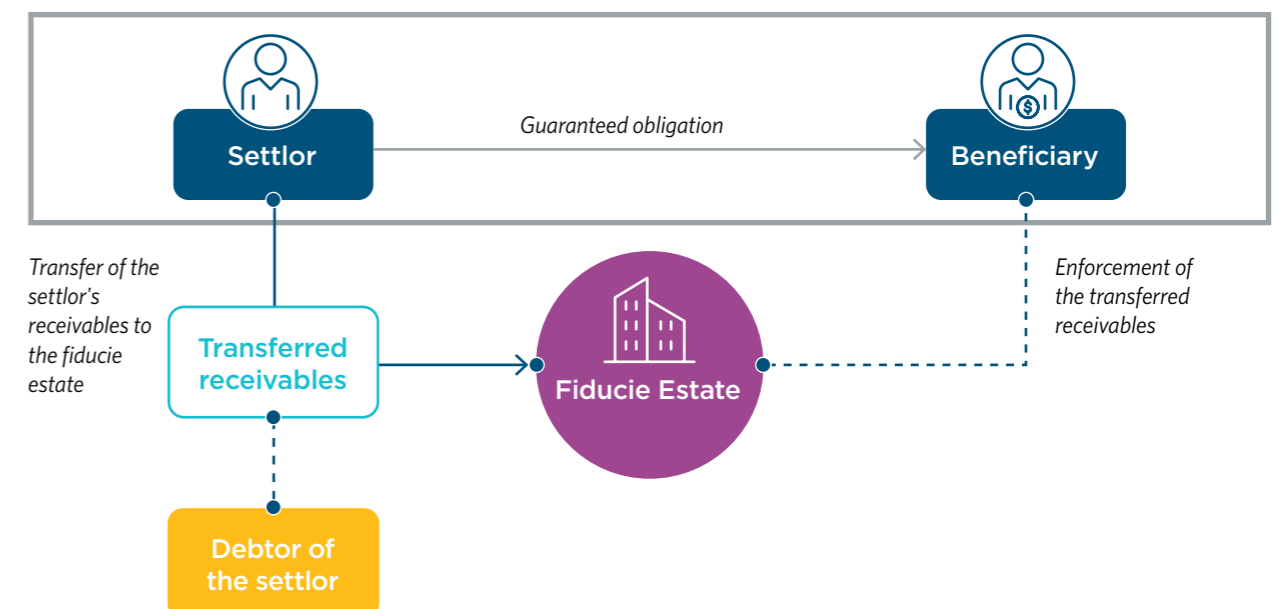
### End of the fiducie

The fiducie is terminated in accordance with the terms of the Fiducie Agreement. Generally, when the secured obligations have been repaid in full, the Transferred Assets/Rights are transferred back to the settlor.

However, the settlor may decide to leave the Transferred Assets/Rights in the fiducie and then use the fiducie in order to secure new financing (notably when the Transferred Assets/Rights are real estate assets).

If the fiducie is enforced, it terminates when all Transferred Assets/Rights have been sold to third parties or attributed to the beneficiaries in order to repay the outstanding secured obligations.

### Scenario 1: fiducie over receivables





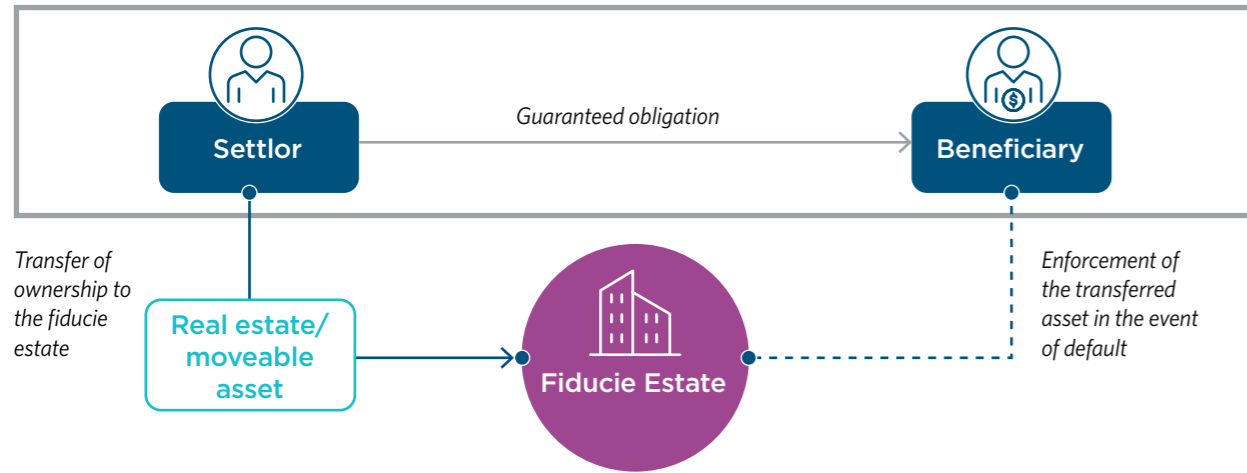
**5.2. Fiducie over real estate and/or moveable assets**

This kind of fiducie may be established with **one or more real estate or moveable assets**.

Generally, settlors are allowed to use the transferred assets.

If the asset is rented to a third party, rent proceeds are paid to the fiducie account and can be used to repay outstanding debt.

Scenario 2: fiducie over real estate and/or moveable assets



**5.3. Fiducie over shares/financial securities**

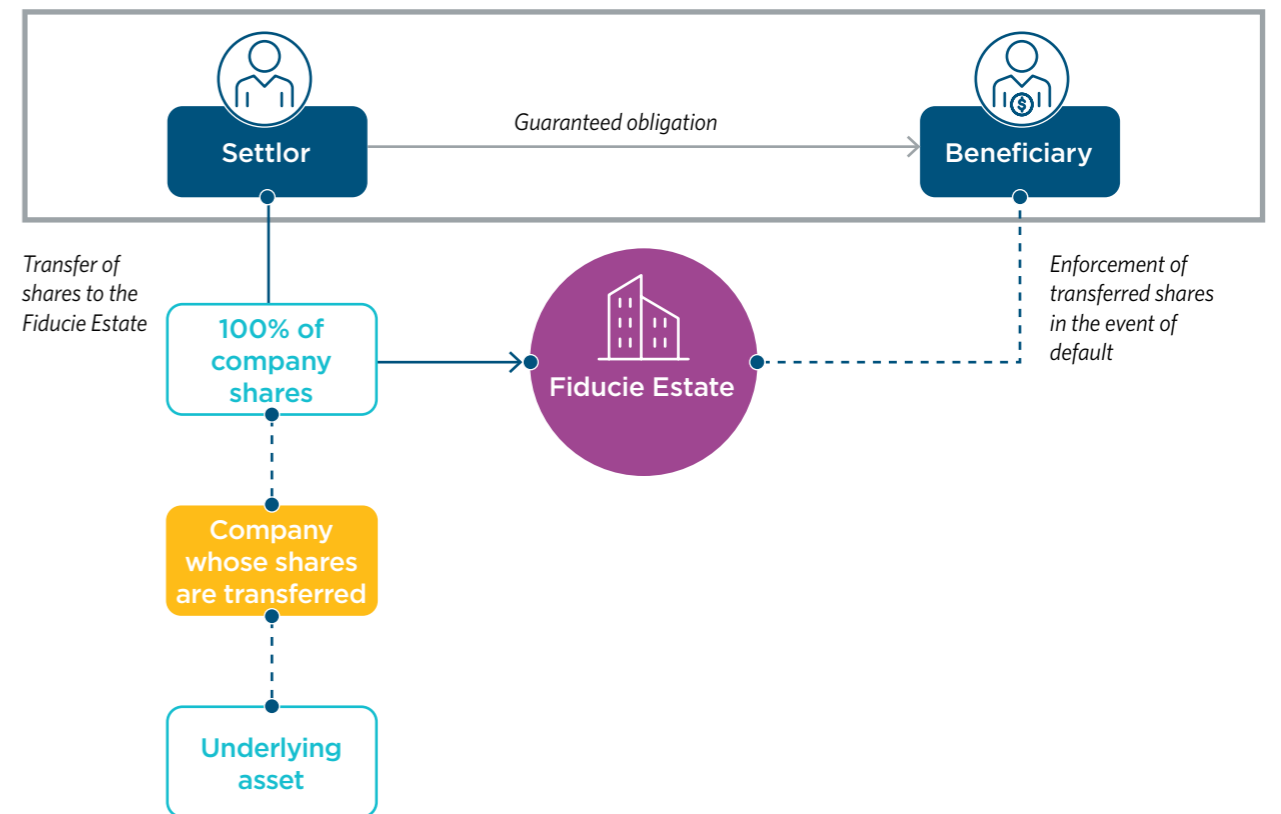
A fiducie may be set up for company shares/financial securities (with associated voting rights), the proceeds of these shares (dividends, interim dividends or distributions of reserves), as well as a shareholders' intragroup loan or current account receivables (existing or future).

In case of enforcement, the powers of the company's legal representatives are generally limited, and certain decisions must be

approved by the company's shareholder (ie subscription of any financial indebtedness, creating securities, initiating insolvency proceedings, etc.). The fiduciaire (as a company shareholder) will consult the beneficiaries on these decisions to seek their consent.

After an event of default (or another trigger defined in the Fiducie Agreement) has occurred, the beneficiaries may ask the fiduciaire to remove the legal representatives/management of the fiducie and appoint new management with the mission of selling the company's underlying assets.

Scenario 3: fiducie over shares





## 6. Enforcement of the fiducie

In the event of non-payment of the secured obligations, the fiduciaire may, on the instructions and at the discretion of the beneficiary, enforce the fiducie in accordance with one of the procedures provided for in the Fiducie Agreement:

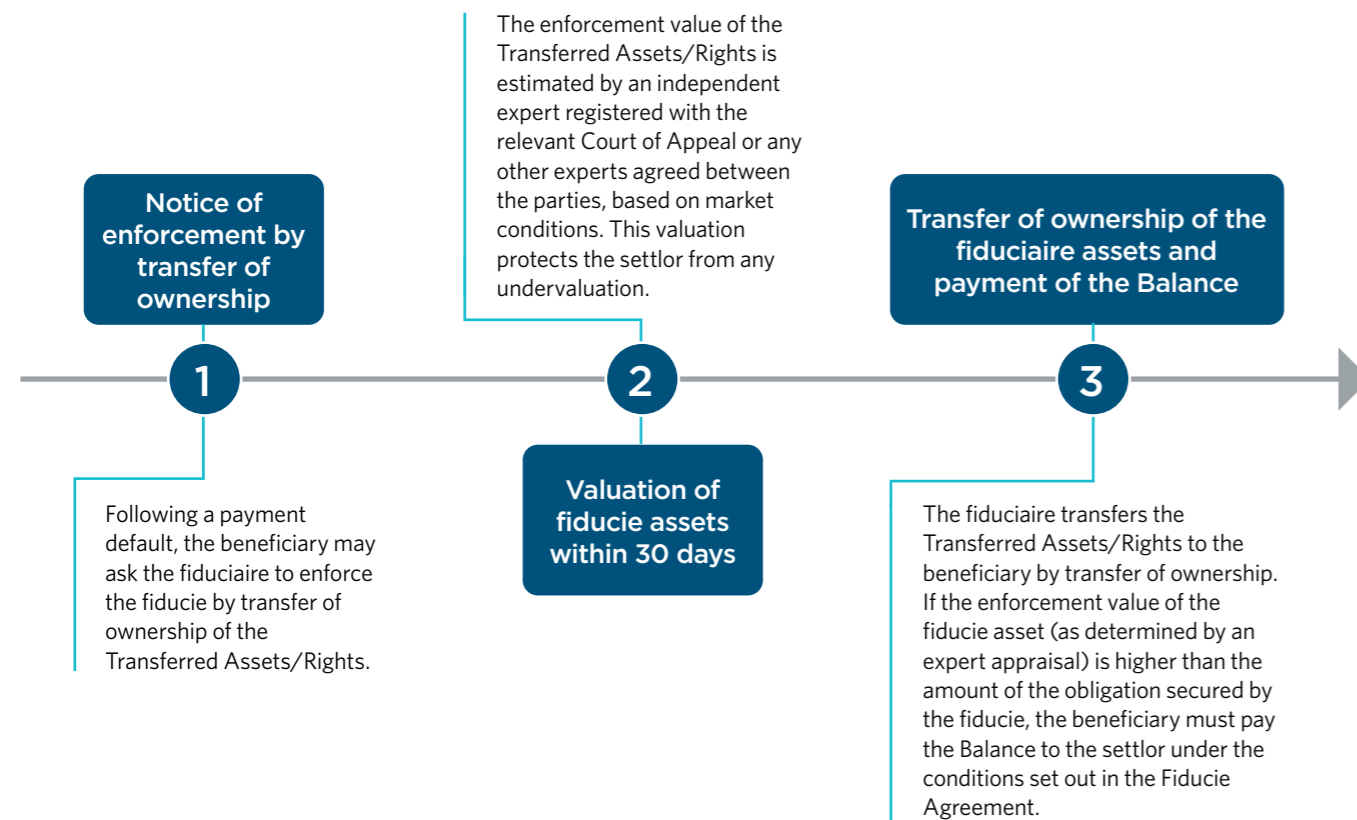
- **transfer of ownership of Transferred Assets/Rights:** the ownership of the Transferred Assets/Rights is transferred to the beneficiary or beneficiaries ("attribution"); or
- **sale of the Transferred Assets/Rights (or underlying assets<sup>10</sup>):** one or more private sales of the Transferred Assets/Rights are concluded in accordance with the procedure set out in the Fiducie Agreement. The proceeds of the sale are paid to the beneficiaries in accordance with the waterfall set out in the Fiducie Agreement.

If enforcement proceeds exceed the amount of the secured obligation, the surplus is paid to the settlor (this surplus is called the "**Balance**").

### 6.1. Enforcement by transfer of ownership of fiducie assets

If the fiducie beneficiary so chooses, **the fiduciaire may enforce the fiducie as instructed by the beneficiaries by way of transfer of ownership of the Transferred Assets/Rights.**

#### Scenario 1: enforcement by transfer of ownership of the Transferred Assets/Rights



10. These are the assets held or incurred by the fiducie assets. For example, if the fiducie assets are the shares of a company, "underlying assets" are the assets held by the company whose shares are transferred to the fiducie (this may be one or more underlying assets or the shares of an underlying company).









Notes

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