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Use of Trusts/Fideicomisos for Succession Planning in a LatAm Jurisdiction

This is the "global family" era. Ease of travel and heightened immigration have created a diverse multicultural world. Today, families with members residing in different jurisdictions are common. The global family has unique legal needs and trusts are increasingly used as the preferred tool in wealth management planning.

There are several reasons to consider the use of a trust. Family members residing in different jurisdictions or relocating to other jurisdictions, changes in local or cross-border legal or tax environment (e.g. introduction of CFC rules, anti-avoidance rules, exchange of information), families with multinational interests (i.e. assets in different jurisdictions) wishing to protect assets in case of unforeseen circumstances arising in their home jurisdiction (i.e. political and economic instability not uncommon in Latin American - "LaTam" countries), transfer of wealth during life during life or following death or to have a professional manager assuring the maintenance and transfer of their assets, to name a few[1].

With an increase in globalization and immigration, it is common to deal with jurisdictions with different legal systems, some that recognize trusts and others that do not, it is key for a client advisor to have at least a basic understanding of the trust laws and related tax implications in the jurisdiction in which it the trust is established, and also in the client's jurisdiction of residence. The scope of this

[1] Robert C. Lawrence III, *International Tax & Estate Planning: A Practical Guide for Multinational Investors* (3d ed. 1995), at 6-5 and 6-16.

article is the definition of the trust concept, followed by its use and possible application in LaTam, and finally some similar concepts used in Brazil.

1 - History

The use of trusts are very well know in Common Law jurisdictions such as in England and the United States. It became an important tool used to transfer property in England between the thirteenth and the fifteenth centuries as the dual system of law and equity was developed initially with the so called "the use".

The use was adopted to solve the problem of the Franciscan friars whose vow of poverty forbade them to own real property and allowed for the testamentary disposition of real property all the while avoiding onerous feudal incidents or taxes payable to the crown. The opportunity for separating unpopular legal principles from practical ownership was the concept underlying the popularity of the use in England[2].

In fact, this tool is the precursor of today´s modern trust, in which the trustee holds legal title to property and has active responsibilities with regards to such trust property. To characterize "what is a trust" might be easier than to define the term, which was created and adapted by historical and social forces[3].

As clearly explained below, the trust may be considered the most flexible tool granting a plethora of estate planning opportunities, due to its unique ability to separate the title of the property (i.e. the trustee holds legal title and the beneficiaries or the settlor enjoy the beneficial ownership) and convey it to the trustee to be managed under its fiduciary duties[4]. It is the separation of title which we must fully understand to analyze it for LaTam purposes.

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[2] Robert C. Lawrence III, *International Tax & Estate Planning: A Practical Guide for Multinational Investors* (3d ed. 1995), at 6-5 and 6-6.

[3] Austin Wakeman Scott, *The Law of Trusts"* (2ed. 1956) at 36.

[4] Robert C. Lawrence III, *International Tax & Estate Planning*: A Practical Guide for Multinational Investors (3d ed. 1995), at 6-4:

> *Trust is a device of great flexibility for holding and disposing of property. The modern form of trust is based on Anglo-Saxon principles of common law and is created when one person, the settlor or*

2 - Trust fundamentals

As a general rule any type of property may be transferred to a trust provided the trustee agrees to receive the property and that it is done by a valid, actual delivery of title to the trust property, transferring from the settlor's control to the trustee.

Trusts are usually created gratuitously and the Settlor may within certain limits impose terms, conditions and restrictions on the trustee's powers and the beneficiary rights and determine the governing law of the trust. From the outset, the Settlor provides the trust's purpose, initial corpus and names or identifies the beneficiaries.

It is important to mention that the Settlor must have legal capacity to establish the trust, the principal must be clearly identifiable and lawful and the beneficiaries or class of beneficiaries identifiable, all in accordance with the governing law of the trust. This is because, as it will be deeper analyzed below, the jurisdictions that do not recognize trusts may observe and respect it as an agreement provided it was established in accordance with the governing law.

Upon the establishment of the trust, the Settlor shall chooses the governing law of the trust. Two main factors might be taken into consideration when determining the country: the recognition of the trust in its legal system, a law where the trust concept has been operated and recognized - for this reason common law jurisdictions based on Anglo-Saxon principles are the most commonly used and the tax treatment of the trust in that country is clear.

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grantor, transfers property to another person, the trustee, who holds legal title to the transferred property, the res or subject matter, for the benefit of another person, the beneficiary or cestui, whose interest is equitable.

Although the distinction between the terms "legal" and "equitable" may seem outdated, the principle that the trustee is recognized as the sole owner of the trust property at law and that the beneficiary's interest is only recognized in equity is so fundamental that it would be difficult to comprehend the trust concept without appreciating this traditional division of property rights. The effect of such division is to allocate to the trustee the burdens of property ownership and to allocate to the beneficiary the benefits arising from the property

The governing law also determines the validity of the trust, whether its purpose is unlawful or contrary to public policy and if the trust corpus was properly transferred by the settlor to the trustee. It is important mentioning that some jurisdictions require a stamp duty or a transfer duty upon the trust's funding. Confidentiality is another relevant aspect, since in many jurisdictions there is no requirement to register the trust agreement or lodge it with a court.

The trustee's powers are governed by the trust deed. The settlor might reserve certain powers of directions. The obligations of the trustee are determined by both the trust deed and the governing law of the trust which will impose fiduciary duties. A Court may also interpret the provisions according to the Settlor's wishes in the wording of the deed of trust.

In light of the above, the trust form has a number of advantages that no other vehicle provides; for instance, (i) it allows the Settlor to choose a specific jurisdiction that has favorable laws, (ii) to dispose of his estate as he wishes, (iii) provides security and preservation of the trust fund, (iv) may work as the receptacle to consolidate property, including tangible or intangible assets, operational businesses or passive assets, and financial investments, (v) operates as a holding vehicle for investments in different jurisdictions, and (v) provides privacy.

3 - Civil Law jurisdictions and the use of Trust in LaTam jurisdictions

The trust is a common law concept, and as has become popular for residents of Civil Law jurisdictions when dealing with international estate planning.

Trusts have become prevalent and popular. Indeed, several Civil Law jurisdictions created or amended their own laws to adopt trusts. They have also been highlighted in international conferences such as the 1985 Hague Convention for Trusts, that provides that it scopes is to specify the law applicable to trusts and governs their recognition[5]. Among the countries where the Hague

[5] Article 01, Hague Convention on trusts.

Convention for trusts has already entered into force, there are few Civil Law jurisdictions and among LaTam jurisdictions - only Panama [6].

Some examples of Civil Law jurisdictions that incorporated the trust concept into their domestic law, are Liechtenstein in 1928 upon the implementation of the trust into Liechtenstein Persons and Companies Act, Mexico, Panama and the province of Quebec in Canada.

Panama, defined the *fideicomiso* as "*a legal act whereby determined property is transferred to a person called the fiduciario, for this person to dispose of them according to the instructions of the fideicomitente, for the benefit of a third party, called fideicomisario*."[7]

Mexican *Fideicomissos* have a similar concept, regulated by the General Law of Negotiable Instruments and Credit Transactions and they are generally considered as contracts as oppose to legal entities. Nevertheless, pursuant to Mexican Law, a true transfer of property is deemed to occur upon the conveyance to the *fiducuario*[8].

Colombian law does not recognize ownership by common law trusts[9]. However, Colombia provides for structures such as civil trust (*Fideicomiso Civil*[10]) and commercial trusts (*Fiducia Mercantil*[11]) that can be used to avoid the probate process and forced heirship rules. Peruvian Law also provides for trusts (*fideicomiso en garantía*) and has an internal legislation that regulates its use and taxation in the country.

Chile does not consider trusts to be one of its traditional legal institutions. The Chilean Civil Code regulates a Roman law institution called "fideicomiso" traditionally used for similar purposes as common law trusts, although with very significant differences.

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[6] The countries where the Hague Convention for trusts has already entered into force are: Australia, Canada, Cyprus, Italy, Luxembourg, Malta, Monaco, Netherlands, Panama, San Marino, Switzerland and the United Kingdom of Great Britain and Northern Ireland. According to visit on https://www.hcch.net/en/instruments/conventions/status-table/?cid=59 on May 20, 2018.

[7] Ley 1 de 5 de enero de 1984 Gaceta Oficial (Free translation).

[8] Trust agreement is also governed in Mexico by several other laws including specific provisions in the Federal Fiscal Code, dealing with taxable and non taxable events that may be carried out by Mexican through *Fideicomissos*. From a Mexican Estate Planning tool the Mexican *Fideicomisso* is also a very flexible legal arrangement.

[9] It is important to mention, however, that foreign trust are recognized for tax porpuses in Colombia.

[10] Provided in Colombian Civil Code.

[11] Provided in Colombian Comercial Code

It is not a simple challenge to analyze the use of trust for Succession Planning in LaTam, however it is relevant and necessary in the current scenario.

Its origins refers to the Latin *fiducia*, which "originally concerned the transfer of property to a creditor or manager by a formal act of sale, yet with an agreement that the creditor would reconvey the property upon payment of a debt"[12]. According to the same scholar "the primary difference between the common law trust and the *fiducia* is that a trust beneficiary has a legal right to property in the trust, while a *fiducia* beneficiary is, in essence, no more than a mere creditor".

In summary, the *fideicomisario*'s rights do not limit the *fiduciario*'s disposal of the property. The *fiduciario*'s only limitation is to transfer the trust corpus to the *fideicomisario* upon the occurrence of a condition, when the return of property purpose is fulfilled either to the original transferor or to a third party nominated by him. While the first *fideicomiso* is pending, the *fideicomisario* does not have any rights over the trust corpus; he will only receive what is left according to the use or disposition the *fiduciario* has made in compliance with the grantor's instructions[13].
According to Dante Figueroa, the main differences between the Latin American *fideicomiso* and the general Anglo-American *inter vivos* trust are:

(i) The Latin American *fiduciario* does not correspond to the trustee in Anglo-American terms, since he does not hold the corpus in his own name. The legal and equitable ownership rights converge fully on the *Fiduciario*, while the Anglo-American trustee essential task is to hold the property for another;

(ii) The beneficiaries are not analogous, as the Anglo-American possess equitable rights to the trust assets that Civil Law one does not have;

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[12] Carly Howard, Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis, 13 U. MIAMI INT'L & COMP. L. REV. 343, 358 (2006).

[13] According to FIGUEROA, Dante. *Civil law trusts in Latin America: is the lack of trusts an impediment for expanding business opportunities in latin america?* In Arizona Journal (2007)

(iii) While the Anglo-American beneficiary obtains the property through the transfer of the legal title over the assets by the trustee, where different events and conditions may trigger such transfer, the *fiduciario* has the obligation to transfer the assets to the *fideicomisario* once the condition happens;

(iv) The Napoleonic Civil Code eliminated the possibility of creating two or more successive *fideicomisos*, as a reaction against the French Old Regime; preventing the perpetuation of property ownership within a family in violation of property succession laws. This concept was incorporate by most Latin American jurisdictions;

(v) The common law trust instrument may provide powers of appointment for the involvement of a third party, with rights to give instructions to the trustees or be required to provide consent for the administration of the trust's corpus. This is unusual in Latin American structures;

(vi) Finally, Latin American Courts do not have sufficient (if any) case law to intervene in the appointment or removal of trustees, while common law courts enjoy equitable powers to appoint and remove a trustee in disputes regarding his appointment[14];

Another situation that does not have a complete correspondence in Civil Law is the Asset-protection trusts, as Spendthrift trusts, that allows the grantor to shield his assets from any creditors' claims by expressly prohibiting their transfer, either voluntarily or by statute. The asset protection benefit is lost when the settlor acts fraudulently against his creditors and, in some jurisdictions, when the creditor is "a bona fide purchaser of a legal security interest for value without notice of the trust"[15].

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[14] Eduardo Salomão Neto explain how difficult it would be in Brazil, for instance:

> *"(...) [S]uch adoption would prepare the judicial body and provide them with a structure that is complex enough to allow intervention in the trusts. This would undoubtedly be costly, and reforming such a magnitude could not have priority over other more pressing yearnings that must be satisfied by the judiciary. The speeding up of justice to meet existing needs, fulfilling its social and political scope of securing fair means for the settlement of disputes between individuals and social groups, as well as ensuring the enjoyment of public freedoms constitutionally foreseen.* (free translation) Id. page 82.

[15] According to FIGUEROA, Dante. *Civil law trusts in Latin America: is the lack of trusts an impediment for expanding business opportunities in latin america?* In Arizona Journal (2007).

5 - Brazil

Trusts are not recognized in Brazil and Brazilian Law does not recognize nor provide for such concept. Therefore, the comments hereinafter represent a general understanding and it is not binding to tax authorities, the Brazilian Central Bank or any other interested party.

Article 7 of the Introductory Law to Brazilian Law[16] states that the law where the party is domiciled shall govern its legal capacity. This means that if a foreign trust is recognized as such in the jurisdiction in which it is situated, then the Brazilian tax authorities should respect its characterization under its governing law. Brazilian law is, however, unclear on the characterization of trusts and it is recommended that legal advice be sought.

From a practical standpoint, it is very uncommon to see a Brazilian commercial bank performing wire transfers directly to a trust. Also, the Official Registration Agency would not allow a trust to be a quotaholder of a Brazilian Company due to the non-recognition of trusts for Brazilian Law purposes. Usually, Brazilian assets are first contributed into an offshore vehicle and the trust later receives the shares or participation in those vehicles.

Brazilian Civil Law Considerations

From the Brazilian Civil Law standpoint, important rules shall be taken into consideration from the Brazilian National that is planning to establish a foreign trust, as forced heirship rules and common property under the couple's marital regime.

Succession Law provides that the children, the spouse and the parents of the deceased are deemed legal heirs entitled to at least 50 percent of the deceased's estate. This right applies to any acts of disposition of property during the life of the Brazilian donor. The creation of a trust by a Brazilian

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Analogous figures would be Argentina's Commerce Fund (*Fondo de comercio*), which protects family businesses by holding family assets as a separate entity that is beyond the reach of third parties and also the Investment Funds in Brazil.

[16] Decree nº 4.657, 4th of September of 1942. with the wording provided by Law 12.376 of 2010.

resident that attempts to disinherit a forced heir could arguably be annulled by national courts on the grounds that it violates the federal law.

Brazilian civil law delineates four different types of marriage regimes. Spouses choose one of the following marital regimes to govern the ownership of their assets: (1) universal property, (2) separate property, (3) partial property, and (4) final participation in common assets. Of relevance here, the universal property regime establishes that all assets and debts of both spouses are treated as a single unit, regardless of whether they acquired property before or during the marriage.[17] The partial property regime implies that property acquired by each spouse before the marriage remains detained separately, while all assets obtained subsequent to the marriage are treated as a single unit, as property acquired during marriage for value even though only owned by one of the spouses, property acquired by any fact (for instance, lottery prizes), property acquired by gift, inheritance, or legacy in favor of both spouses, improvements made in separate property of each spouse, and the fruits of the common assets, or of individual assets of each spouse, realized during marriage or pending at the time communion ceases.[18]

Even in these cases, exceptions may apply. For example, property acquired or received (by way of gift or inheritance) before the marriage remains held separately by each spouse in the partial regime. The same treatment is applicable to compensation received from work performed by a spouse[19].

The Brazilian Settlor must observe the forced heirship rules and its marital regime before contributing the assets to the trust. For example, when assets are considered as jointly held with the spouse due to the couple's marital regime, the other spouse should also be considered a Settlor of the trust.

Brazilian Tax Law Considerations

[17] Article 1,667 of Brazilian Civil Code

[18] Articles 1,658 and 1,660 of Brazilian Civil Code

[19] Article 1,659 of Brazilian Civil Code.

Article 1,668 of Brazilian Civil Code establishes the assets that are excluded from community property under the universal regime, including among them property acquired or received (because of a donation or inheritance procedure) before the marriage with an express provision to this effect on the transfer document

The tax treatment of trusts in Brazil take into consideration the transfer of the assets from the settlor to the trustee and from the trust to its beneficiaries[20].

Although donations are not subject to the income tax levy in Brazil, they are subject to the tax on transfer of assets by donation or *causa-mortis* (ITCMD), which is a state tax, with rates varying according to the corresponding legislation. For example, Sao Paulo charges a 4% transfer tax.

During the amnesty program[21], for the first time, Brazilian IRS provided some guidance on how to report foreign trusts, however this does not mean that trusts are recognized under Brazilian Law. Indeed, there are several discussions on how to treat the trust for tax purposes in Brazil.

The Brazilian individual could opt for a revocable or irrevocable trust. The revocable trust should be treated as an investment of the settlor with the trustee. The settlor should report the value of the assets contributed to the trust as the initial contribution to the Brazilian tax authorities and to the Brazilian Central Bank.

From a tax perspective, in the case of other beneficiaries of a revocable trust that are not settlors of the trust, it may be assumed that the beneficiaries will receive donations or inheritance to the extent of the capital contributions made by the settlor to the trust and earnings to the extent of the difference in between this amount and the benefits received in Brazil. The capital contributions when distributed to the Brazilian beneficiaries could be considered donations or inheritance and will not be subject to income tax in Brazil, but may be subject to ITCMD. The earnings distributed to the settlor or the beneficiaries will be subject to income tax of 27.5%.

[20] As a general rule, Brazilian residents individuals are subject to Brazilian income tax on their worldwide income, at progressive rates from 0% up to 27,5% depending on the specific bracket of their overall taxable income. Capital gains are subject to a progressive rate from 15% up to 22,5%. Brazilian individual income taxation is a system of monthly taxation, also known as current basis taxation. Every year Brazilian individuals must file an income tax return, in which the taxpayer must declare all assets held in Brazil and outside of Brazil.

[21] Laws n. 13.254 of 2016 and 13.428 of 2017 granted tax and criminal amnesty for Brazilians to report their undeclared assets held abroad.

An irrevocable trust could be characterized as a donation or anticipation of inheritance, since the settlor does not have the beneficial ownership of the trust assets, transferring this ownership, under the conditions of the Deed of Trust, to the beneficiaries. This means that the settlor should declare this as a conditioned gift or anticipation of inheritance in its tax returns and will no longer have to declare the trust funds in his own income tax return or to the Brazilian Central Bank anymore. The creation of the irrevocable trust shall be subject to ITCMD tax.

From a Brazilian tax perspective, the beneficiaries of an irrevocable trust will have to report the trust either monthly or annually depending on the circumstances of their rights under the irrevocable trust. At this moment the rights to trust distributions can be reported for income tax purposes as gift or inheritance, depending on the precedent condition triggering the beneficiaries to actually become effectively vested on this position. Their cost basis will be the value of the donation they register in their Brazilian tax returns, which should be the same as the value of the original contribution made to the trust by the settlor.

The settlor may choose to contribute the initial trust fund either by the original cost value or fair market value of the assets upon establishment of the trust. Any difference between the cost value received as donation or inheritance and the amount effectively obtained by the beneficiaries from the trust will be taxable as gains or earnings, depending on the case.

6 - Similar Civil Law concepts in Brazil

There are similar concepts in Brazilian Law that may be used for analogy purposes when dealing with a foreign trust.

6.1 - Fideicomisso

Similar to topic 3 above, the Testator / testatrix - *fideicomitente* - may leave an asset to a determined person, the *fiduciário*, that under determined terms and conditions will transfer the asset to another person - the *fideicomissário*. The *fiduciário* will have full powers over the property while in this

position, and at the time of the establishment of the *fideicomisso*, the *fideicomissário* shall not have already born[22].

Under the Fideicomisso rules, the forced heirship must observed, in other words, only fifty percent of the available estate may be governed by the *fideicomisso* contract. The other fifty percent must go to the heirs under Brazilian law. Thus, a Testator may only freely devise of fifty percent of his property.

The main difference from a trust is that assets are subject to the *fiduciário*'s personal liabilities, even though the *fiduciante* and the beneficiary have no relationship. This risks does not exist in the trust structure, due to the dual system of law and equity and the principle that assets contributed to the trust are not considered to be the individual or personal property of the trustee.

6.2 - Usufruct

A usufruct is a civil law concept, used in many Latam jurisdictions as a mechanism to transfer a residual interest in property during someone's lifetime that will take effect at death. In some ways, similar to a life estate in the United States, or bare legal title. In Brazil the concept of usufruct is provided in the Brazilian Civil Code, as an "in rem" right, which can be established by a free transaction, as a *inter vivos* gift or by will, over all or part of the property - movable or a real estate, under a certain term, where the usufruct right allows the donor to withdraw interests from the property. More specifically, the Brazilian Civil Codes provides that the following rights may be granted to the usufructuary: possession, ownership, management and to benefit from the fruits of the property.

The main common situations that extinguishes the usufruct, among the ones provided by law, are the death of the usufructuary or the final term provided in the usufruct instrument. Upon the termination

[22] Brazilian Civil Code articles 1.951 and 1.952 provide the following:

'The testator may institute heirs or legatees, establishing that, at the time of his death, the inheritance or legacy be transmitted to the fiduciary, resolving his right, by his death, at a certain time or under certain condition, to another , which qualifies as a trustee.

The trustee replacement is only allowed in favor of those not conceived at the time of the testator's death.

If, at the time of the death of the testator, the trustee has already been born, he shall acquire the property of the trustee, converting the trustee's right to usufruct." (free translation)

event, all usufruct rights retained by the usufructuary are transferred to the recipient. The usufruct may not be inherited from the usufructuary heirs, except when expressly provides in this meaning by the person who created the usufruct.

The usufruct is widely used as an estate planning technique in Brazil to anticipate an inheritance proceeding instead of using a will. This technique may avoid discussion and lawsuits between the heirs during the probate and also be an effective manner to respect the decedent's wishes when implemented during his life. Specifically, parents make a gift of the naked title of the property to their children and retain an usufruct interest in the property for life.

The two most common situations are the transfer of (i) real estate property, in which the donor keeps the rights to receive income from rentals, to administer the property, and to use it, and (ii) the shares of a company, in which the donor may keep voting or economic rights (such as dividends).

When making a gift and retaining the usufruct interest over the property, the donor may pay attention to the fact that, different from wills that might be changed at any time, a gift cannot be undone. Forced heirship rules in Brazil must also be observed and special provision on the calculation of Brazilian Transfer Tax shall be applicable.

As a parallel, the use of an usufruct in Louisiana is different from the Brazilian one, as its law creates to the surviving spouse an interest in various types of property known as a usufruct. In other words, it is a right provided by law considered as a life estate.

The United States tax authority (Internal Revenue Service or "IRS") issued Private Letter Ruling ("PLR") 201032021 in August of 2010, stating the Donor's usufruct interest in the holding company shares should be treated as a life tenant in a common law state. Furthermore, as the holding company was organized under the laws of the Donor's country (it was not a United States corporation and was not situated in the United States), the transfer of the legal title of the shares was not subject to Federal gift tax and generation skipping transfer tax with respect to the grandchildren of the Donor. Finally, the IRS clarified that the completed gift of the legal title of the holding company shares should be reported by the recipients.

In summary, the usufructuary is considered the shareholder of the shares, and not the remaindermen, in the usufruct relationship, which in other words means that he is considered as the owner of the property, including for United States federal tax purposes. However, upon the death of the usufructurary or when the usufructurary ends estate tax will apply.

Three differences arise between the Latin American usufruct and the Anglo-American irrevocable trust: (i) the usufructuary retains his right to receive back his property upon the termination of the usufruct, while trust property does not revert back to the grantor, (ii) usufruct is not binding to next generations and cannot last longer than the life of the beneficiary, and (iii) upon death of the beneficiary, the assets become a part of the beneficiary's estate and are acquired by the beneficiary's heirs, regardless if the succession is testate or intestate[23].

6.3 - Sociedades Anonimas

Some scholars take the view that the Brazilian *Sociedade Anonimas* is a similar concept to trusts. The Brazilian legislation for this entity was influenced by certain North American principals, specially with regards to the fiduciary duties of its management, the management structure, initial public offering of shares, etc[24].

The author of this doctrine understand it is possible to conclude that "there are analogous relationships that apply to the administrator of a corporate entity, which also share many of the valid principles applicable to trusts"[25].

Finally, it is possible to find other examples in Brazilian Law that are similar, but do not provide all the features included in the trust structures. For instance, the Foundations[26] and a "*Constituição de renda*"[27].

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[23] According to FIGUEROA, Dante. *Civil law trusts in Latin America: is the lack of trusts an impediment for expanding business opportunities in latin america?* In Arizona Journal (2007)

[24] According to the author, the trust principles that were incorporated by Brazilian Law are:

> *" of release of the administrators of responsibility for breach of duties; the paramters for measuring the duty of diligence of the administrators; the possibility of delegation of functions by managers and the limits to which such delegation is subject; the criteria for investment of funds of the company; the acquisition of control of the company for its managers (management buy-out) and the conditions to which it must be subject; the consequence of receiving benefits parallel to the remuneration of directors and the holding of the position of administrator in competing companies by a single person.*

[25] Id. page 175.

[26] Articles 24 to 30 of Brazilian Civil Code.

[27] According to articles 803 to 813 of Brazilian Civil Code.

7 - Issues

Some issues may arise upon the formation of a trust by a Brazilian resident in a Common Law jurisdiction. The avoidance of law of domicile is the first one as there might be different rules for family and civil law among both countries. For instance, a practical and common issue regarding the establishment of trusts by Brazilians is the forced heirship rules.

Assume a Brazilian settlor wishes to create a trust in another jurisdiction that does not provide for forced heirship rules, and wishes to dispose of the property in avoidance of Brazilian Law and such rules, may face a conflicts of law issue.

In this case, if the trust fund is located in Brazil, the trustee is likely to be subject to Brazilian law and therefore to Brazilian forced heirship rules.

According to the Brazilian conflict of laws rules[28], the applicable law that will govern the probate is the law from the last domicile of the deceased. Therefore, if a person was domiciled in the United States but had assets in Brazil, the Brazilian judge should apply American law to distribute the Brazilian assets, except if the Brazilian law is more favorable to the Brazilian spouse or children, in which case Brazilian law should apply.

Also, according to the Brazilian Code of Civil Procedure[29], the Brazilian judge has exclusive jurisdiction to rule over Brazilian assets; conversely, the Brazilian judge does not have jurisdiction over assets that are located abroad. Consequently, more than one probate proceeding (one in each jurisdiction where the deceased owned assets) should be filed, and the Brazilian judge cannot determine how the foreign assets should be distributed.

Even though the Brazilian judge cannot determine how the foreign assets should be distributed, there is a discussion about whether or not the Brazilian judge could take into consideration the aggregate

[28] Decree nº 4.657, 4th of September of 1942. with the wording provided by Law 12.376 of 2010.

[29] Articles 21 to 25 of Brazilian Civil Procedure Code.

amount of the assets globally when determining the percentages of the Brazilian assets that should be distributed to each heir.

Case law does not provide for an "equalization" of the Brazilian assets versus the foreign assets[30]. There are, however, some divorce cases where the "equalization" was allowed[31].

The majority of the precedents understand that it is not possible to consider the assets as a whole, and that the Brazilian judge should only take into consideration the assets located in Brazil. Therefore, when making the determination of whether any child received the adequate amount of assets under the forced heirship regime, in principle the Brazilian judge would look at the percentage of Brazilian assets received by each child compared to the total amount of Brazilian assets. The percentage of aggregate foreign assets would be irrelevant.

Also according to Brazilian law, a person may dispose and give his assets during life as he wishes and the inheritance rights will only be determined upon the death. However, if some heirs received gifts during the life of the deceased, the other heirs may request that the assets be collated during the probate proceedings in order to equalize the shares of the heirs. Moreover, if the deceased left a will and did not respect the non-disposable party of the estate (50% for forced heirs), this will may be challenged by the forced heirs.

Another common issue arises from the Civil Law concept of "property" as an unique and indivisible right. It is not possible to admit more than one person as the owner of the same property. Even in the Condominium concept, where there are several owners over a property, from Brazilian Law purposes each of the owners are considered, actually, owner of a fraction of the property[32].

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[30] Brazilian Supreme Court's RE nº 99.230-RS, June 1984; Superior Court of Justice's REsp nº 1.362.400-SP, June 2015, REsp nº 37.356-SP, September 1997, REsp nº 397.769-SP, December 2002, REsp nº 510.084-SP, September 2005

[31] Superior Court of Justice's REsp nº 1.410.958-RS, May 2014, REsp nº 275.985-SP, October 2003, REsp nº 1.552.913-RJ, February 2017

[32] WALD, Arnold. Direito das Coisas, page 106.

On the other hand, under Common Law, the beneficiary equitable rights assure to him that the trust shall be managed under his and the Settlor's best interests, otherwise he could compel the trustee's management of the trust, who owns the legal rights over the property.

In Brazil this would not be possible. Once the property is transferred to a person, she has a personal right over the property and any claim is be resolved by payment of damages - and not by compelling her on the management.

8 - Conclusion

Trusts are a unique device to provide flexibility and security when dealing with International Estate Planning. It has centuries of use in Common Law Jurisdictions and has been greatly used by global families, including the LaTam ones.

If properly drafted, implemented and the laws of the relevant jurisdictions considered, (i.e. the law in which the trust is governed, the laws of the home jurisdiction of the settlor and the beneficiaries) the trust should provide valuable benefits. However, keep in mind that the lack of laws regarding trusts in Latin America as most jurisdictions do not recognize the trust concept, there is always a question of its treatment and taxation.

Some countries have already tried to include this concept in their Law, but due to the impossibility to recognize the segregation of property under Civil Law concept of ownership, it is common to see examples that do not perform all the attributes from Anglo-Saxon trusts.

The implementation of the trust concept in Civil Law jurisdiction would be challenging, would demand time and effort from Legislative and Judiciary bodies to properly adopt and execute it, and would face challenges until it became popular - for instance, Courts are not ready to deal with these kind of demands and there is no case law governing trusts.

However, the implementation of trusts would ultimately be beneficial in the long term. Their introduction would promote global legal uniformity and connectivity. In the context of International Estate Planning, this recognition is needed and would ultimately bring more certainty to the field.

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