

## Trends and Developments

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In line with what the world was demanding in 2015, Argentina introduced deep but incomplete reform to its legislation regulating the legal relationships of persons, families and their estates, both in the civil and commercial fields. The main goal was to adapt and update domestic legislation in light of the cultural, social, economic and technological advances and changes that Argentine society, in particular, was facing, in keeping with the global trends in different jurisdictions.

At the same time, there was an attempt to reflect, as a governing principle, autonomy of will for matters of private law (civil and contractual), allowing the parties (always in compliance with public order regulations) to enjoy broader freedom, while personal and even contractual relationships were being regulated. Based on these principles (which will surely require revision in the near future), we consider that the current legislation offers much more modern and flexible ways to implement effective estate planning for those persons and families with residence and assets located in different jurisdictions.

The manner in which estate structures are organised, with contact points in different jurisdictions, poses new challenges. It is from this standpoint that we propose the local trust (fideicomiso) as an indispensable tool (although today, it is scarcely used in Argentina) for effective estate planning, when there are contact points within the domestic jurisdiction (mainly characterised by assets located in the country) to the benefit of descendants, placing special emphasis on cases where such persons are minors or show certain incapacity or disability.

It is important to underline that this tool's contribution should be integrated with the rest of the planning to be put in place for private clients at an international level. That is to say, it will require the interaction of different advisers participating in a client's estate, fiduciary and tax planning to finally ensure that all contingencies which may affect such planning have been properly identified. This is the second challenge we face.

### **The Argentine Trust as a Tool within Integral Planning**

For property located in Argentina, the domestic trust is the tool to be considered by clients within their estate planning. Beyond the tax and legal advantages this contract offers, there are practical advantages vis-à-vis an international fiduciary structure, as it accelerates and simplifies the registration processes of the property contributed, avoiding the need to register foreign trustees in Argentina. We must remember that, pursuant to the codification system, all rights created on registrable property (eg, the contribution of real property) must be registered with the corresponding registers to be enforceable against third parties (settlor's creditors, the Argentine tax authority, etc).

In our legislation, the trust is regulated in the form of a contract (as opposed to the trust in common law, which is understood as a unilateral act where the settlor transmits ownership of a property to the trustee and where the beneficiary is the final recipient of the property or its proceeds), the purpose of which is to be used as a legal tool in order to comply with certain goals established by the settlor. Pursuant to Argentine law, there is a contract of trust (fideicomiso) when “a person (settlor), transmits or commits to transmit the ownership of certain assets in favour of another party (trustee) who covenants to exercise it in favour of another party (beneficiary) as appointed in the contract and to transfer it, once a term has elapsed or a condition has been met, to the final beneficiary.”

From the very same definition, the parties to the contract are identified. It is important to note here that the settlor may also be appointed as beneficiary and even final beneficiary, but never as trustee. The role of the trustee may be exercised by any person, even an individual, who should carry out their role with care and perform their duties like a diligent and prudent business person, but who may neither take on the role of final beneficiary nor receive the property held under the fiduciary property.

In summary, it is the purpose or the type of trust which determines who will take on the roles of beneficiaries and final beneficiaries. There are different types of trusts in our legislation, but here we would like to highlight:

### **The administration trust**

The purpose of this is to create, with certain assets, an estate different to that of the settlor, administered by a trustee to the benefit of a beneficiary, to be transferred to the final beneficiaries once some time has elapsed (a maximum of 30 years).

### **The trust to transfer ownership**

The intention of this legal form is to transmit ownership of the property at the end of the trust. Typically the trust is created with property which will be owned by minors, once such minors have reached the age of majority or finished their studies.

### **The testamentary trust**

The settlor in this case is the testator, who establishes as an act of last will, the transmission of part of their estate, or a specific property, in favour of a trustee, with the purpose that upon the testator’s death it is administered (also for a maximum term of 30 years) for the benefit of an appointed heir and transmitted, once the term has elapsed, to that heir or to a third party.

The first two legal forms are designed as tools of estate planning and protection and are developed mainly while the trustor is alive, allowing them to take advantage of the economic benefits of the contributed assets or their administration, including decisions as to how such property should be allocated (among their heirs), after the trustor’s death. It further allows for the release of the property from such structure, for liquidation or replacement, during the life of the trustor.

The purpose of the testamentary trust is mainly linked to family relationships and inheritance planning. It is designed to avoid liquidation or bad administration of property by heirs who are minors or legally incapable or unsuitable to carry out certain business.

### **Advantages and Challenges**

The implementation of the administration trusts (including estate planning) results in certain advantages, as well as certain challenges. The advantage tax-wise is that the contribution or assignment is gratuitous

and, therefore, it does not pay any taxes in Argentina. The only exception being Inheritance Tax, which is a provincial tax only applicable in the Province of Buenos Aires (Argentina has 23 other provinces where it is not applicable). This tax is not levied upon the donor but the recipients or beneficiaries that are domiciled in the Province of Buenos Aires, as well as on property located in the Province of Buenos Aires, by which is meant:

- shares of companies domiciled in the province;
- shares of companies domiciled outside the province where the main assets are property located in the Province of Buenos Aires; or
- real property located in the Province of Buenos Aires.

In all these cases, should the settlor assign any of this type of property to the trust, such assignment would have tax levied on it in the Province of Buenos Aires.

A further advantage to these legal instruments (used only on rare occasions nowadays) is the protection that the property contributed to the trust receives, as the creation of a different estate (if well structured) will mean it is able to resist the onslaught of the trustor's personal creditors, allowing such estate to be safeguarded in favour of the beneficiaries.

The challenge is to design the contract to correctly reflect the purpose intended. Furthermore, it is important that the design of the structure harmoniously combines public order regulations (among them, the system of forced heirships, the system of incapacities to become a successor, the impossibility of imposing taxes or conditions on the forced heirship portions, and the prohibition of beneficiaries in substitution) with the other governing principle: the autonomy of will. It is our conclusion that this might be the biggest challenge of all, as the autonomy of will and domestic public order regulations are almost constantly in a state of friction.

### **Protection of Minors and Legally Incapable Persons**

As a result of this friction, some (positive) modifications were introduced to domestic legislation (as from 2015) that protect, in both administration trusts and testamentary trusts, certain rights of minors and legally incapable persons, when they are appointed as beneficiaries or heirs, depending on the situation.

We would also like to highlight the extension of the maximum term of the trust to 30 years, in the event that the trust has been created to protect an incapable person, enabling an extension of the term for as long as the incapacity lasts or even ends in death. Furthermore, the trustor may establish forced heirships in favour of an heir with a certain disability. The special protection for minors appointed as beneficiaries is the trustor's ability to include clauses legally prohibiting partition of the property contributed to the trust until they reach the age of majority or, otherwise, the distribution of the property or profits therefrom only once they have reached the age of majority.

### **What's Next?**

In light of the current legislation, the advantages and challenges are clear. The trust is a tool that needs to be spread, so that families may opt for these structures when designing an effective estate with points of contact in Argentina. A suitable advisorship and its timely implementation will bring about a favourable safe solution that will have an impact during the life of the person as well as after it, allowing especially for the protection of minors and legally incapable persons. Nevertheless, this will depend on the harmonious combination of public order regulations and the autonomy of will of the client.

Finally, we would like to point out as a ground-breaking proposal of planning, the idea that administration and testamentary types of trust do not mutually exclude each other. We underline the idea of planning for a design that contemplates both the administration trust and the testamentary purpose, with a trigger clause causing testamentary action. This would ensure that, during the life of the settlor, adequate administration of the assets that they wish to be the purpose of the inheritance would be attained which, inclusively, might generate profit and thereby increase such estate, while knowing that once the settlor's death takes place, their will is established within the contract. In this sense, the settlor determines the manner of allocation among beneficiaries and the conditions under which they would receive the assets, according to the will expressed under the contract.

Thus the trust, combining both purposes within the scheme of effective estate planning, reduces the possibility of contingencies like succession proceedings expenditures. It may also protect the rights of minors and legally incapable persons, and prevent third parties from deciding how the property will be administered, while the restrictions of age or legal incapacity last. This ensures the continuity and preservation of the assets that are the source of a family company with a view to future generations, tax benefits and, above all, confidentiality during the entirety of the planning process.

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