

A case for trusts in Latin America

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The COVID-19 pandemic has brought much uncertainty into all our lives and high-net-worth individuals (HNWIs) have not escaped unscathed. Beyond the disruption in doing business, the pandemic brought many of us face-to-face with reality of dealing with the deeply personal issues of unexpected loss of life or incapacitation. Further, it highlighted and possible discord among family members with respect to smooth, uninterrupted and conflict-free management, protection and transfer of assets.

Although trusts have historically been a foreign concept in the Latin America (LatAm) region, in conversations with HNWIs and families from these countries, there is a growing appreciation and acceptance that trusts are providing solutions to any difficulties and unease caused by ownership of assets transferring to a regulated trustee whose owners, directors and managers can change at any time.

The advantages of settling assets into a Bahamian trust are known to individuals from many parts of the world, including those who are looking for a stable environment to protect their wealth from political instability, arbitrary legal and fiscal surroundings or other forms of coercion.

Of importance to owners of wealth is the trust deed: the private and confidential contract. Trustees are managed by the governance outlined in the deed setting out how they should carry out their fiduciary duties to the beneficiaries.

A significant benefit of transferring assets into a trust is that the settlor will cease to have legal ownership of those assets: ownership has been transferred to the trustee. A trust may be used to the settlor's advantage as a confidential vehicle for protecting assets for future generations and for making specific provisions for others, at the same time as benefiting from stability of management and continuity of asset management following the settlor's death. In essence, this is the power and benefit of a trust.

An alternative for an individual from a civil-law country is a private trust company (PTC): a solution with benefits including control, influence, privacy, continuity, flexibility, cost efficiency, education and empowerment.

Finally, in all planning, the Bahamas executive entity (BEE) is being used and considered more actively. The BEE is a perpetual entity for the sole purpose of carrying out executive functions, acting as a shareholder of a PTC or as a protector, enforcer, advisory board or corporate director. The advantage of the BEE lies in its ability to remove unnecessary layers of ownership at the top level of wealth structures, concentrating control in the right people who have the assurance of limited liability. It also facilitates proper governance within the structure, to avoid the risk of family conflict damaging the family wealth.

Case law support for trusts

As civil-law jurisdictions consider ownership as absolute and indivisible, this brings challenges in fitting common-law systems with the concept of trusts. These challenges include creating laws sufficiently wide in their scope to enable civil-law jurisdictions to become attractive alternatives to international clients looking for diverse and in-depth laws, tested in many cases by generations of case law.

Three areas in particular can be held up as features of trust legislation that meet the challenges of case law scrutiny: discretionary and fiduciary powers, privacy and no-contest clauses.

Discretionary and fiduciary powers

Trustees in common-law jurisdictions tend to have wide discretionary fiduciary powers, many of which are laid out in the individual trust deeds. If not, trustees can rely on the trust jurisdiction's law or benefit from legislative decisions. Trustees in using such discretion and powers need to be careful in their deliberations of the facts presented, demonstrated in the judgment of the UK Supreme Court (UKSC) in *Pitt v Holt*. This decision tells us that the duty of trustees in exercising their fiduciary powers is to take only relevant matters into account. Their failure to do so in making decisions in the scope of their powers will permit such decisions to be revisited only if the inadequate deliberation in question is sufficiently serious to amount to a breach of fiduciary duty. Errors of inadequate deliberation by trustees are to be contrasted with errors of 'excessive execution'. An error of excessive execution is one that goes beyond the scope of the trustees' relevant power and is absolutely void.

The decision in *Hastings-Bass* and *The Trustee (Amendment) Act, 2016* (the 2016 Act) led to the development of a trust law principle that allowed certain decisions by trustees to be unscrambled on the basis that they had unintended (often tax) consequences.

The 2016 Act incorporates the rule in *Hastings-Bass* into Bahamian legislation. This is crucial from a tax perspective where decisions are taken by the trustee in breach of fiduciary duty that cause the trust to suffer adverse fiscal consequences. This renders the Bahamas' trust law more certain and more flexible from a tax-planning standpoint.

The legislation further provides that the application to invoke the rule may be made by a trustee, protector or any person exercising the power. It is noteworthy that it is immaterial under the amendment whether the person acted in breach of trust or duty. No order may be made under this provision that would prejudice a *bona fide* purchaser for value without notice of any trust property without knowledge of the matters that allow the court to set aside the exercise of fiduciary power.

The rule in *Hastings-Bass* was recently analysed in great depth in the leading case from the UKSC of *Futter & Anor v HMRC*, which would be considered highly persuasive to the courts in the Bahamas. This case involved two consolidated appeals that involved applications of the rule against the backdrop of different decisions made by trustees that resulted in adverse tax consequences, resulting in HMRC being joined as a party to the proceedings to challenge the very existence of

the rule.

The judgment in this case said that the correct statement of the law is: 'If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact the information turns out to be partial or incorrect'.

The Bahamian legislation expands the scope of the rule by removing the need for the applicant to demonstrate that a breach of duty even took place. This is a very significant development in Bahamian trust law. It shows that this added flexibility makes Bahamian trusts much more protected, in the event of decisions giving rise to any adverse fiscal consequences arising from the offshore trustee's failure to take into account any relevant information prior to making decisions affecting the trust. This would arguably include situations where the trustee received the appropriate advice but this was later found to be negligent or inaccurate.

Privacy

To-date, common-law jurisdictions have valued the importance of privacy of the trust instrument and existence of the trust, carefully navigating and complying with the various tax transparency reporting and changes that have been implemented globally over recent years. Some jurisdictions continue to look at implementing trust registers, under pressure from global and international bodies.

An example of this is the UK Trust Registration Service where, from September 2022, all UK trusts and non-UK trusts with UK tax liabilities must be registered. In addition to this, non-UK trusts are required to register if at least one of the trustees is UK-resident and where the trustees enter a business relationship with a UK service provider (for example lawyers, accountants and investment managers) or acquire an interest in land in the UK.

What is clear is that privacy will continue to play a critical role in a trust's creation, although it remains to be seen if jurisdictions that haven't implemented trust registers can avoid the move towards them.

In the Bahamas, the *Trustee Act* requires trustees to take reasonable steps to inform a beneficiary with a vested interest under the trust of its existence and general

nature of their interest. However, the trustees, in their absolute discretion, may choose not to notify beneficiaries if it is deemed not to be in the beneficiaries' best interest. Bahamian law goes further under Subsection (5) of the Act by laying out what documents could be included in the disclosure. These include the trust instrument, financial statements of the trust and all financial statements of companies wholly owned by the trustee of the trust.

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