The Global Guide to Trusts

A SYSTEMATIC ANALYSIS OF THE LEGAL REGIME AND TAX TREATMENT OF TRUSTS IN 28 JURISDICTIONS

Argentina
Australia
Austria
Belgium
Brazil
Canada
China
Cyprus
France
Germany
Hong Kong
India
Indonesia
Israel
Italy
Liechtenstein
Luxembourg
Malta
Mexico
Netherlands
New Zealand
Portugal
Russia
South Africa
Spain
Switzerland
UK
USA

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ACADEMY & FINANCE

Table of Contents

Each chapter is structured around the same following questions 1 to 27.

17. Is the treatment different depending on whether the transfer is made to a revocable or irrevocable trust? To a life interest or to a discretionary trust?

Tax treatment of income and capital gains

18. Is a trust a taxable entity?
19. If not, who is subject to income/capital gains taxes in respect of the trust's income and gains?

Tax treatment of distribution from a trust to its beneficiaries

20. What taxes apply to distributions of trust income to resident/non-resident beneficiaries?
21. What taxes apply to distributions of capital gains from a trust?
22. What taxes apply to distributions of capital from a trust?

Tax implications of settlor's death

23. What are the tax implications for the trust, trustee, settlor's estate and/or beneficiaries of the settlor's death?

Tax implications of the termination of a trust

24. What are the tax implications for the trust, trustee, settlor and/or beneficiary on termination of a trust?

Reporting obligations

25. Are the trust, trustees, settlors and/or beneficiaries subject to reporting obligations in relation to the trust?

Trustees regulation

26. Are trustees regulated in your country? What are the main regulatory requirements?

Registers of trusts

27. Is there in your country a register of trusts and/or of beneficiaries of trusts? Which trusts should be registered? What information should be provided? Who can access the information? What are the consequences of failure to comply?

5. Are there 'similar' or comparable legal structures that can be used in your jurisdiction instead of a trust for estate planning purposes?

Yes, there are comparable legal structures, the *fideicomiso*. In December 1994, Argentina introduced a sui generis (so-called 'Latin-American') version of the Roman *fideicommissum*. This law provided for inter vivos as well as testamentary *fideicomisos*; ring-fenced the trust property from those of the trustee and the settlor; and shielded it from their creditors. Although the *fideicomiso* is not equivalent to the common law trust, its introduction in Argentine law was relevant for the recognition of foreign-law trusts[1]. Indeed, the recourse to analogy with this *fidecomiso* in order to understand foreign-law trusts has become the norm in the Argentine legal community[2].

Although *fideicomisos* have proved to be exceedingly useful tools for a variety of business purposes, they have not made any significant inroads in wealth and succession planning. The fact that Argentines are net capital exporters; have a generalised mistrust of the country's legal and courts systems; mounting tax pressure; and the severity of forced heirship rules have conspired against the *fideicomisos*' ability to compete with even a limited number of local alternatives. Examples of such local alternatives are: unimaginative and fragile shams; outright gifts or transfers, coupled with reservation of a lifetime right to use the gifted property; testamentary provisions within the disposable third, leaving it entirely to the rigidly codified heirship rules; or, ultimately, escaping to sunnier shores when one's life is heading into the final hour.

1 This is not to say that the prejudice against trusts has completely disappeared and they are now free from any and all suspicion. Not long ago Section A of the National Appeals Court in Criminal Economic matters derogatorily remarked in re *Deutsch Gustavo Andres s/ Violation of Law 24,769* (15 May 2009): 'A certain author mentions, precisely, that the historical origin of the "trust" was the intent to evade obligations with the crown and that it is the contractual institution characterised for its misleading and esoteric nature adding, "cum granum salis", that it is the terror of all law students and the motive many of them abandon their studies'.

2 The analogy between the trust and the *fideicomiso* is only that, an analogy. Argentina's legal community is still at the stage of finding and making use of similarities rather than distinctions, which unfortunately has caused serious confusions at the time of counseling potential settlors (examples of such common misunderstandings are that the trust is a contract between the settlor as principal and the trustee as agent; and/or that the trust fund remains the property of the settlor, held through the trustee as a nominee). Argentine continental law background must still come to terms with the idea that the concept of comprehensive ownership and other in rem rights over property are not universal; that it is possible to establish a bundle of independent interests over property that have to do with its control/management and the enjoyment of its fruits; that such interests may be held for the benefit of different parties, to be exercised at the same or different times; and, finally, that a person (ie the trustee) may simultaneously hold separate estates for the benefit of different parties. These ideas form a divide between the trust and the fideicomiso which is still far from being fully comprehended by the country's courts and counsels.

6. What legal constraints should be taken into consideration when transferring assets to a trust?

Settlors' legal relationships with spouses and heirs should be considered when transferring assets to a trust. Argentina's marital property regime (in the absence of an agreed separate property regime) can be branded as 'community property'. The spouses' estates usually comprise personal or own property (for example, assets owned by each spouse prior to marriage or received by way of gift or inheritance during it) and marital property (eg property acquired during marriage and the 'fruit' of personal property; eg interest, but not gains from sales) owned in equal shares. As a result, the income of a trust fund's principal to which one spouse is entitled during marriage becomes part of the marital community property.

While there is no doubt that a spouse can form a post-mortem undivided estate pursuant to Section 51 of Act number 14,394 (and, by extension, settle a *fideicomiso* - a trust by analogy) with his/her own assets, it is debatable whether he/she can do the same with marital property under his/her administration. To our knowledge only one precedent[3] is cited in favour of authorising a spouse to create an undivided estate over marital property. Pursuant to the Civil Code the settlor's spouse should expressly consent to the transfer in trust of marital property (or in the event that the transferred assets include the family home, even if it is the settlor's personal property, while the children are underage or incapacitated).

Trusts involving both spouses are a different case. The Civil Code prevents spouses (under a community property regime) from executing contracts that would modify the marital community property regime and donations between them are expressly prohibited. However, *fideicomisos* between one spouse as settlor and the other as trustee have been deemed admissible since the assets would not form part of the trustee's own estate. Inter vivos *fideicomisos* settled by one spouse for the benefit of the other are, in principle, contrary to the aforementioned prohibitions. Testamentary *fideicomisos* settled by one spouse for the benefit of the other are valid provided they respect forced heirship rules. The same conclusions should apply to trusts.

As to succession, being domiciled in Argentina at death, the succession in the decedent's estate (including the content and validity of wills) will be governed by Argentine law and will proceed before the country's courts. Last-minute changes in domicile may not do the trick, for it has been construed as fraudulent avoidance of the country's mandatory succession laws: 'The seriousness of the deceased's health condition and the particular family circumstances…, in particular what is set forth in the will, lead to presume the testator's intent to avoid the Republic's mandatory rules through a change in citizenship and domicile attempted shortly prior to death'[4].

Under Argentina's succession regime the deceased's issue is entitled to two-thirds of the decedent's estate (comprising his/her assets at death and those that have been

3 Staadt, Herbert or Heriberto or Herbart, succession, Second Division of the First Court of Appeals in Civil and Commercial matters sitting in the city of San Isidro, 23 August 1973.

4 *M, F.A.M.*, Section C of the National Court of Appeals in Civil matters sitting in the city of Buenos Aires, 3 March 1981.

donated or otherwise disposed without consideration while alive). The surviving spouse is entitled to one-half of the marital property (in this case, pursuant to the marital property regime) and a share of the decedent's own assets equal to that of the descendants. While valid and binding during lifetime, after death the deceased's gifts are subject to the laws of succession (including forced heirship-based compensation and clawback claims).

During the last decade Argentine courts have decided at least two cases[5] in which disgruntled heirs have brought compensation claims in respect of trusts governed by foreign laws based on the forced heirship regime. In both cases neither the trusts nor their choice of law was voided, but for succession purposes their effects were judged in accordance with Argentine law and compensation in Argentina to the disfavoured heirs was ordered[6]:

The fact that the *fideicomiso* or trust would be governed by the law of the place of its execution and performance – that is, the law of England pursuant to the locus regit actum principle established in Section 8 of the Civil Code – does not prevent that, for succession purposes, the effects of such transaction be considered under the light of Argentine law[7].

Both court precedents coincide in the characterization of trusts for Argentine succession purposes:

It has been argued that even if the *fideicomiso* is, in this case, a means to receive a donation, it is not in itself a donation, both in the Anglo-Saxon system and in our Latin regime. (…) Without denying such differences it must be pointed out that the establishment of *fideicomisos ut singuli* in favour of forced heirs as beneficiaries for no consideration of the settlor entails a gift…[8]

The compensation solution would only work to the extent that sufficient assets belonging to the decedent's estate would be located in Argentina in order to reassign part or all of them to the disfavoured heirs. Otherwise, the Argentine court may resort to the international cooperation of its foreign peers with jurisdiction over the trustee/trust fund to enforce the compensation order[9] or, failing such assistance,

5 *De Luca Noemi v De Luca Marta Ada Graziella s/ colacion*, 24 June 2003 district court opinion, affirmed on 26 March 2004 by Division M of the National Court of Appeals in Civil Matters sitting in the city of Buenos Aires; *Vogelius, Angelina T. y otros c. Vogelius, Federico y otro*, Division F of the same appellate court, 3 November 2005.

6 A different conclusion had been previously reached in *Gilchrist, Harry B. (suc)* by the Appeals Court sitting in the City of San Nicolas, 6 Nov 1956: the deceased Mr. Gilchrist had made a will in Scotland while domiciled there, creating a trust for the benefit of his brother and other beneficiaries and only reserving a benefit on the income of the trust for his mother during her lifetime. However, at the time of his death Mr. Gilchrist was domiciled in Argentina and the appeals court understood that his will complied neither with the formalities mandatory for such documents under Argentine law, nor with the principle that heirs cannot be stripped of the right to dispose of the inherited assets, nor with forced heirship rights, since the mother had been deprived of her legally-reserved share of the principal of the decedent's estate. Accordingly, the court voided Mr. Gilchrist's will.

7 From Magistrate Zannoni's vote in *Vogelius*.

8 From Magistrate Zannoni's vote in *Vogelius*.

9 The fate of such judicial cooperation requests or of lawsuits brought by disgruntled heirs directly

metamorphose the compensation claim into a clawback claim against those who had received assets that appertained to the trust fund and/or against third parties who had received gifts from the deceased while alive (and, in both cases, have the misfortune of falling under the succession court's or other cooperative courts' jurisdictions).

Finally, settling an Argentine business (or participation interests representing it) in trust raises two issues: companies' law regulations and antitrust clearance. The Business Companies Act sets forth that a company organised abroad, the main purpose of which is to develop its business in Argentina, shall be deemed a local entity. This principle of private international law has been used and abused during the last decade by certain local authorities in charge of companies' supervision in order to carry out witch-hunts (mainly through sweeping reporting requirements and prosecution of exemplary cases) against Argentines investing back in the country through foreign vehicles. At the same time this makes life difficult for foreign investors and shareholders who are required to demonstrate their true origin. While trusts are beyond such agencies' monitoring authority, predictably fiduciary structures have attracted their curiosity, keeping them watchful for avoidance schemes. The excesses of this regulatory impulse have been checked by the courts. In at least two cases[10] the courts have exempted New Zealand trustees under testamentary trusts and their parent companies from the test imposed by the local regulator to determine whether foreign shareholders of Argentine entities qualify (or not) as offshore companies (that is, according to the regulator's own glossary, foreign companies only allowed to perform their business activities outside the jurisdiction of organization).

On the other hand, Argentine antitrust regulation states that '… transfers of assets without consideration made in favour of (…) forced heirs, be it inter vivos or mortis causa', do not require notification for concentrations control purposes. This 'succession exemption' was likely based on US and Canadian regulations with a similar

in the jurisdiction of the trust situs may vary significantly from venue to venue. For instance, while the New York Court of Appeals had previously 'reaffirmed the Wyatt principle in *De Werthein v Gotlib* (188 AD2d 108 [1993], lv denied 81 NY2d 711 [1993]), holding that New York law, rather than the laws of Argentina, governed the ownership and distribution of two New York «Totten trust» bank accounts a deceased Argentine national had established during his lifetime' (from the court's opinion in the *Matter of Meyer* -876 N.Y.S.2d 7 (N.Y. App. Div. 1st Dept 2009)), thereby excluding the application of Argentina's forced heirship rules, the same court resolved not long ago in the *Matter of Meyer* that 'the validity and effect of these transfers, as well as the capacity to effect them, are governed by the law of the state where the property was situated at the time of the transfer'. In this case the testatrix's son had brought an action based on the French forced heirship regime.

10 *Inspeccion General de Justicia v Hartfield Investments Limited*, Section C of the Nacional Court of Appeals in Commercial matters sitting in the City of Buenos Aires, 8 April 2008; and *Inspeccion General de Justicia v Crossfield Investments Limited*, Section D of the same Court of Appeals, 11 November 2008.

purpose[11]. However, the language of the Argentine succession exemption looks much narrower than its probable models and is likely to be interpreted restrictively, for it constitutes an accommodation of the general rule that any alteration of control over a business must be notified for clearance (unless an exemption applies) to the country's own succession regime.

7. Can a trust acquire property in its own name and be registered as such when registration is required? If not, can this be achieved indirectly (for example, through a domestic or foreign corporation)?

Yes, the trust can acquire property in its own name and be registered as such as long as certain requirements are met depending on the assets involved.

8. Under what circumstances might a trust be set aside in your jurisdiction on grounds of sham or for any other reasons (quote leading court cases if any)?

A trust might be set aside in Argentina if it violates the Argentine public policy laws (eg marital property, forced heirship). For example, when a trust was settled for fraudulent purposes and foreign law was used to avoid the natural application of the domestic law.

As mentioned above, during the last decade Argentine courts have decided at least two cases[12] in which heirs have brought compensation claims in respect of trusts governed by foreign laws based on the forced heirship regime. In both cases neither the trusts nor their choice of law was voided, but for succession purposes their effects were judged in accordance with Argentine law and compensation in Argentina to the disfavoured heirs was ordered.

Tax considerations

9. What are the main taxes which are relevant in respect of trusts?

There are two federal taxes in Argentina that are relevant for foreign tax structures: the Income Tax and the Personal Assets Tax. At the provincial level, trusts may

11 US and Canadian applicable regulations exempt: 'acquisitions resulting from a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust shall be exempt from the requirements of the [Hart-Scott-Rodino Antitrust Improvements Act of 1976].' (Section 802.71, Subchapter H, Chapter I – Federal Trade Commission, Title 16 – Commercial Practices, Code of Federal Regulations); 'an acquisition of voting shares, an interest in a combination or assets that would result from a gift, intestate succession or testamentary disposition' (Section 111, paragraph (c) of the Canadian Competition Act – R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19).

12 *De Luca Noemi v De Luca Marta Ada Graziella s/colacion*, 24 June 2003 District Court opinion, affirmed on 26 March 2004 by Division M of the National Court of Appeals in Civil matters sitting in the City of Buenos Aires; *Vogelius, Angelina T y otros c Vogelius, Federico y otro*, Division F of the same appellate court, 3 November 2005.

be affected by the gift tax of the province of Buenos Aires, but only if the beneficiaries are resident in, or the assets distributed are located in, such jurisdiction.

10. Has your jurisdiction developed specific tax rules to deal with trusts? As a general principle, is the trust taxable as such or is it fiscally transparent with all or some taxes due differently according to the nature of the trust?

Comprehensive regulations on foreign trusts were introduced to Argentine tax law in 2018.

Before such date, only a few regulations existed in tax law and referred to the tax treatment of trust distributions. Up until 2018, the tax treatment of foreign trusts – and specially whether they were fiscally transparent or not for Argentine tax purposes – was addressed only by the case law. However, such precedents contained clear and detailed principles in this regard and the federal tax authorities had clear parameters to audit the fiscal transparency of foreign trusts.

In 2018, the Income Tax Act was modified and now includes an express regulation of foreign trusts, which generally follows the principles already established by the precedents. As a general principle, the fiscal transparency of a trust depends on whether the settlor or the beneficiaries have legal or de facto control over the trust, the trust assets or the trust officers or whether the settlor may recover the assets contributed to the trust (either through revocation or by distribution, as a settlor-beneficiary). In this regard, revocable trusts are generally transparent for Argentine tax purposes. Irrevocable discretionary trusts, in which neither the settlor nor the beneficiaries have effective control and the settlor is not a beneficiary, are non-transparent.

Furthermore, in December 2019 a brief reference to foreign trusts was introduced in the Personal Assets Tax Act. It should be noted that the effect of this recent modification on the tax treatment of foreign trusts is uncertain. However, it is generally accepted by practitioners that the 2019 reform did not modify the personal assets tax treatment in a relevant manner.

11. Are domestic and foreign trusts treated differently in relation to tax?

Yes, local *fideicomisos* are generally considered as local taxpayers subject to the same taxes as other Argentine taxpayers (generally they are treated as corporations for tax purposes). Thus, local *fideicomisos* are usually subject to income tax on their worldwide income (generally 30% on net income), value added tax (generally 21%), personal assets tax (0.5% on asset value), and turnover tax (2-7% on gross turnover) among other taxes. Certain local *fideicomisos* have a different tax treatment. Mainly fideicomisos in which the settlor is also a beneficiary are usually considered fiscally transparent and certain specific *fideicomisos* (testamentary and succession *fideicomisos*) may have a beneficial tax treatment under certain circumstances.

Foreign trusts have a different tax treatment. Their tax treatment would depend on whether or not they are fiscally transparent (see question 10 above).

Transparent foreign trusts are disregarded for Argentine tax purposes and the transactions made by the trust are deemed made directly by the settlor – being subject to Argentine income tax under the same rules that would have applied to the settlor. Furthermore, the settlor is subject to personal assets tax on the transparent trust's assets.

Non-transparent foreign trusts are treated as non-Argentine taxpayers. Thus, they are only subject to income tax in Argentina if they obtain Argentine source income. As to personal assets tax, in general, foreign non-transparent trusts are subject to such tax only on their Argentine assets. Please note that, under the 2019 tax reform mentioned in question 10, there is certain doubt as to this 'personal assets tax' treatment.

12. When is a trust considered to be resident for tax purposes in your jurisdiction?

All Argentine *fideicomisos* are deemed Argentine taxpayers.

A foreign trust would be considered an Argentine taxpayer if (i) the trustee is an Argentine tax resident; (ii) the effective place of management of the trust is in Argentina; or (iii) if the trust has a permanent establishment in Argentina under the Income Tax Act rules (which generally follow the OECD for the definition of 'permanent establishment'). Please note that foreign trusts that do not meet the aforementioned criteria are still subject to tax in Argentina for their Argentine source income and the assets located in Argentina, as are non-Argentine resident taxpayers.

13. Are the tax treaties (or some of them) concluded by your jurisdiction applicable to trusts?

In general, treaties to avoid double taxation executed by Argentina are not applicable to trusts. However, this should be analysed on a case-by-case basis as each tax treaty may contain specific rules on trusts.

14. Are there any specific anti-avoidance tax rules applicable to trusts? If the answer is affirmative do they apply to similar or comparable arrangements (eg civil law foundations)? Are there circumstances under which trusts are at risk under GAAR or anti abuse of law measures?

There are no specific anti-avoidance tax rules applicable to foreign trusts, although there are specific rules regarding tax transparency that act as specific anti-avoidance rules for trusts (see question 10 above). Under such rules, foreign trusts become transparent if the settlor or the beneficiaries have control over them.

Argentine tax regulations contain a GAAR (the so-called 'economic reality principle') which could be applicable to foreign trusts if certain conditions are met. This GAAR rule has been applied by the courts and the tax authorities to establish the case law that regulated foreign trusts before the 2018 tax reform (see question 10 above). Even though the 2018 reform included the SAAR mentioned above to deal with foreign trusts, this GAAR could still apply to them.

The same rules apply to foreign trusts, foreign private foundations and any other similar arrangement.

Tax treatment of the creation of a trust

15. What are the tax consequences of the creation of a trust?

There are no taxable events in Argentina triggered by the creation of a foreign trust. However, Argentine taxpayers are required to inform the tax authorities of the creation of a foreign trust under a specific tax-reporting regime.

16. Are any transfer and/or capital gains taxes due upon lifetime or testamentary transfers of assets to trusts?

Since the assets are contributed to the foreign trust without consideration, generally there is no capital gains or transfer tax applicable upon the contribution of assets. This does not vary if the contribution is made during the lifetime of the settlor or through a testamentary contribution.

17. Is the treatment different depending on whether the transfer is made to a revocable or irrevocable trust? To a life interest or to a discretionary trust?

No, the same tax treatment applies to contributions made to any kind of foreign trust.

Tax treatment of income and capital gains

18. Is a trust a taxable entity?

Non-transparent foreign trusts are not considered Argentine taxpayers. However, if they obtain Argentine source income, they are subject to tax as any other non-Argentine resident taxpayer.

Transparent foreign trusts are disregarded for tax purposes. They are not considered taxable entities in and of themselves.

19. If not, who is subject to income/capital gains taxes in respect of the trust's income and gains?

In non-transparent foreign trusts – provided that no Argentine source income is obtained by them – there is no tax on income/capital gains at the time they are accrued. Beneficiaries are subject to tax upon distribution as described below in question 20.

In transparent trusts, any tax applicable to the transactions made by the trust will be reported and paid by the Argentine resident deemed to have control over the trust (generally the settlor).

Tax treatment of distributions from a trust to its beneficiaries

20. What taxes apply to distributions of trust income to resident/non-resident beneficiaries?

Distributions of trust income by a foreign trust (either transparent or non-transparent) to non-resident beneficiaries are not subject to taxes in Argentina, provided that no Argentine source income is obtained by it.

Distributions of trust income by a non-transparent foreign trust to Argentine resident beneficiaries are subject to the following taxes:

a) Income tax: the beneficiaries are subject to income tax on the benefits distributed (as defined by Argentine income tax law). The applicable tax rate ranges from 5% to 35%[13].

b) Personal asset tax: the beneficiaries would be levied with personal asset tax on the assets distributed provided: (i) those assets stay among the beneficiaries' assets at 31 December of each year; (ii) the patrimony of each of the beneficiaries exceeds the amount of AR$ 2,000,000; and (iii) the cash or assets distributed are not destined to obtain assets exempt from the personal asset tax. The applicable tax rate ranges from 0.5% to 1.25% for Argentine assets and from 0.75% to 2.25% for foreign assets.

c) Inheritance and gift tax of the province of Buenos Aires: distributions to each beneficiary would be subject to the inheritance and gift tax of the province of Buenos Aires to the extent they exceed the minimum thresholds set forth by the provincial law (ie AR$ 1,120,000 for direct relatives - transfers to parents, children and spouse - and AR$ 269,000 otherwise) and either the beneficiary is domiciled in the province of Buenos Aires or assets located within the province are distributed directly or indirectly (through holding vehicles incorporated outside the Province, which could be challenged on constitutional grounds). The tax rate ranges from 1.6% to 8.8%.

d) Tax on debits and/or credits on bank accounts: if Argentine bank accounts are used for eventual payments. The general rate is 0.6% on each credit and/or debit on Argentine bank accounts.

In transparent trusts, any tax applicable to the transactions made by the trust will be reported and paid by the Argentine resident deemed to have control over the trust (generally the settlor). Consequently, the distribution of income to the beneficiaries, if Argentine residents, should not trigger any taxes other than the inheritance and gift tax of the province of Buenos Aires, if applicable, and the Tax on Debits and/or Credits on Bank accounts if Argentine bank accounts are used for eventual payments.

13 Certain Argentine practitioners hold a different opinion, that is, that the gross amount distributed by a foreign trust should not be subject to income tax. This position is based on the fact that the beneficiary obtains his/her entitlement under the foreign trust for nil consideration and, so, the distribution could be regarded as a free disposition from the settlor. However, in our view, the settlor's bequest is made at the moment of appointing the beneficiary and, therefore, the income accrued to the settled assets would be taxable income for the beneficiaries when distributed (assuming beneficiaries are Argentine residents).

21. What taxes apply to distributions of capital gains from a trust?

We refer to our comments above in question 20. Taxes applicable to capital gains or income distributions are the same.

22. What taxes apply to distributions of capital from a trust?

Distribution of capital by a foreign trust to Argentine resident beneficiaries is subject to the same tax treatment described in question 20 above except for:

a) Income tax: distributions of capital are not subject to income tax to the extent it can be demonstrated – with adequate back-up documentation – that (i) the foreign trust did not obtain 'benefits' as provided by Argentine tax laws, and (ii) the foreign trust does not have accumulated profits having arisen from previous fiscal periods (ie periods prior to the distribution).

Tax implications of settlor's death

23. What are the tax implications for the trust, trustee, settlor's estate and/or beneficiaries of the settlor's death?

The death of the settlor does not trigger any tax consequences in Argentina[14]. Argentine resident beneficiaries of foreign trusts are only subject to taxes upon distributions from or liquidation of the trust.

Tax implications of the termination of a trust

24. What are the tax implications for the trust, trustee, settlor and/or beneficiary on termination of a trust?

The liquidation of the trust is construed as a final distribution of the trust property. Therefore, from a tax perspective the same rules applicable to distributions would be applicable to the liquidation of the trust.

In this sense, beneficiaries of foreign trusts, if Argentine residents, could be subject to the following taxes upon the liquidation of the trust: (i) income tax, (ii) personal asset tax, (iii) inheritance and gift tax in the province of Buenos Aires, and (iv) tax on debits and/or credits on bank accounts.

14 It should be noted that in one precedent, referred to local *fideicomisos*, the province of Buenos Aires held that the inheritance and gift tax was applicable upon the death of the settlor. In our opinion, this precedent should not apply to foreign trusts.

Reporting obligations

25. Are the trust, trustees, settlors and/or beneficiaries subject to reporting obligations in relation to the trust?

Under the Tax Authority's General Resolution No. 3312 ('Res. 3312'), certain Reporting obligations on trusts were imposed on Argentine tax residents involved in trust structures.

Reporting duties are only imposed on Argentine residents who are: (i) settlors, (ii) trustees (if any) and/or (iii) beneficiaries. Failure to comply with the reporting regimes is subject to economic penalties.

In addition, the Argentine agency in charge of fighting money laundering and financing of terrorism (UIF) issued Resolution No. 140/2012 ('Res. 140') establishing the procedures that should be implemented by certain persons related to *fideicomisos*, trusts and other fiduciary arrangements in order to prevent, detect and report actions or omissions that may constitute money-laundering and financing of terrorism criminal offenses. Unlike Res. 3312, Res. 140 does not bind resident settlors or beneficiaries, or non-resident trustees. It binds resident individuals and entities that act as 'fiduciaries, administrators or anyone who performs functions corresponding to the fiduciary'. From an initial and literal reading, this language seems to include resident officers of trusts who perform functions that would otherwise belong to the trustee office (for example investment advisors/managers with powers to decide and instruct the investment of trust assets; and protectors with functions beyond consenting to trustee's decisions, such as deciding the appointment of beneficiaries and distributions to them).

Trustees regulation

26. Are trustees regulated in your jurisdiction? What are the main regulatory requirements?

Trustees of foreign trusts are not regulated in Argentina.

Registers of trusts

27. Is there in your jurisdiction a register of trusts and/or of beneficiaries of trusts? Which trusts should be registered? What information should be provided? Who can access the information? What are the consequences of failure to comply?

No, there is not a public register of trusts and/or beneficiaries of trusts.

AUSTRALIA

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Legal considerations

1. What is the legal system based on in your jurisdiction?

Australia is a federation comprising six states and two self-governing territories. Each has a legislative, an executive and judicial arm of government.

In Australia, the law is made up of statutes passed by the legislature (both federal and state legislation), the common law (judge-made law) and equity. Common law and equity were brought to Australia at the time of settlement in 1788.

2. Is the concept of a trust part of your domestic law?

Trusts are governed by state and commonwealth jurisdictions. Each state and territory has its own Trustee Act which lists the duties and obligations of trustees. At the commonwealth level, the Corporations Act 2001 governs corporations which are trustees and the Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997 deal with the taxation of trustees and beneficiaries.

3. Has your jurisdiction ratified the Hague Convention on the Law applicable to Trusts and on their Recognition (hereafter 'the Convention')?

Australia is a signatory to the Hague Convention on the Law applicable to Trusts and on their Recognition and has enacted the Trusts (Hague Convention) Act 1991 to give effect to the Convention.

4. When the answer to the above two questions is negative is a trust created under foreign law recognised as such? Alternatively, is the trust (or trustees) analogised to any specific type of domestic person or comparable entity?

N/A.

5. Are there 'similar' or comparable legal structures that can be used in your jurisdiction instead of a trust for estate planning purposes?

No.

6. What legal constraints should be taken into consideration when transferring assets to a trust?

In New South Wales, the trust cannot last more than 80 years from the date of its establishment on the grounds that the legal and beneficial ownership of assets cannot be separated indefinitely. Only superannuation trusts and charitable trusts are exempt from this 'rule against perpetuities'.

Discretionary trusts are used for family planning arrangements and provide significant tax incentives because the beneficiaries typically have no 'present entitlement' until the trustee decides to apply income in their favour.

For asset protection purposes, it is typically recommended that the trustee be a private company, though a natural person(s) may be a trustee(s).

However, in recent years, the Family Court of Australia has looked behind formal trust structures to include assets held in a family discretionary trust as property of the parties to the marriage and made property settlement orders accordingly (*Kennon v Spry*[1]). In addition, the Federal Court of Australia has previously taken a similar approach when assessing receivers' orders (*Australian Securities and Investments Commission; In the matter of Richstar Enterprises Pty Ltd v Carey* (No 6)[2]). However, both these cases concern the content of a statutory reference to 'property' and, in our view, are not amenable to broader application outside their particular statutory context (family law and corporations law respectively).

Further, succession law in Australia attempts to balance Australia's relative testamentary freedom with the doctrine of moral obligation. Eligible persons have the right to apply for a 'family provision order' in respect of a deceased person's estate. This normally arises where a will or a testamentary trust has not left adequate provision for a spouse or child or may have left them out altogether.

7. Can a trust acquire property in its own name and be registered as such when registration is required?

The trustee carries out all transactions of the trust in its own name including, inter alia acquisitions of property. Where registration is required, the trustee will acquire the property in its own name without reference to its trustee capacity.

1 [2008] 238 CLR 366.
2 [2006] FCA 814.

8. Under what circumstances might a trust be set aside in your jurisdiction on grounds of sham or for any other reasons (quote leading court cases if any)?

In the context of a sham trust, the position would be that no trust was ever intended or created. Importantly, a finding of sham will not be supported where it is established that the parties intended to create a trust even in circumstances where that trust was created for an improper purpose. The relevant distinction was articulated by Leeming JA in *Lewis v Condon; Condon v Lewis* as follows:

The proposition that not every transaction entered into for a legally improper motive is a sham must also be correct in principle. There is a clear distinction between a settlement of property in favour of (say) a spouse intended to operate in its terms, but made with the intent of defrauding creditors, and a sham declaration of trust in favour of a spouse never intended to give rise to the ordinary incidents of a trust. Both are entered into for an improper purpose, but the legal meaning of the former accords with the language of the declaration (although it is apt to be set aside pursuant to statute), while the legal meaning of the latter is that there is no trust at all[3].

Properly understood, the doctrine of sham does not entail a court setting aside a trust. Rather, the analysis is that there was never any trust and it is that reality to which the Courts are responding. This is generally the framework in all circumstances where a trust is 'set aside'. For example, an express trust requires the satisfaction of three certainties:

(i) certainty of intention to create a trust;
(ii) certainty of subject matter (ie trust property); and
(iii) certainty of objects (ie beneficiaries).

Thus, where parties intend to create a trust but have not properly defined the property, the subject of the trust, no trust is created. The trust is not set aside but was never properly constituted at the outset.

Tax considerations

9. What are the main taxes which are relevant in respect of trusts?

Income tax in Australia is levied by the Commonwealth Government on taxable income through the Income Tax Assessment Act 1936 and the Income Tax Assessment Act 1997.

The above-mentioned Tax Acts also contain capital gains tax (CGT) provisions, however, CGT does not constitute a separate tax. Rather, a net capital gain will be subject to income tax. Capital gains and losses are generally recognised in respect of capital assets (CGT assets) where a taxable event (CGT event) occurs. A wide definition of 'CGT asset' applies, but capital gains or losses are not recognised for CGT assets acquired before 20 September 1985. There are a number of CGT events which apply only to trusts. Capital losses (current or prior year) are offset against any cap-

3 [2013] NSWCA 204.

ital gains of a particular income year. Net capital losses are carried forward and are taken into account in determining the trust's net capital gain in future income years (but cannot be offset against the trust's assessable income as a whole). In particular, capital losses cannot be allocated to beneficiaries.

Income and gains derived by a trustee retain their character through the trust. Therefore, a beneficiary is liable, under the withholding tax rules in Division 11A of Part III of the Income Tax Assessment Act 1936, for tax on Australian unfranked dividends, interest and royalties to which they are presently entitled while a foreign resident. The withholding tax is collected from the trustee under the pay as you go withholding rules in the Taxation Administration Act 1953.

A specific withholding tax regime applies to 'fund payments' made by 'managed investment trusts' to foreign residents from 1 July 2008. The managed investment trust withholding tax rules are contained in Subdivision 12-H of Schedule 1 to the Tax Administration Act 1953.

10. Has your jurisdiction developed specific tax rules to deal with trusts? As a general principle, is the trust taxable as such or is it fiscally transparent with all or some taxes due differently according to the nature of the trust?

Trusts have a special tax regime in Australia. A trust is required to determine its 'trust income' for an income year (generally calculated according to accounting principles) and its 'net income' for an income year (that is, its taxable income determined in accordance with Australian tax law).

A trust is essentially taxed on a 'flow-through' basis. That is, the trustee is not subject to Australian income tax on the net income of the trust to the extent the trust distributes its trust income to beneficiaries each year or the beneficiaries are otherwise 'presently entitled' to the trust income each year. However, if there is trust income of a trust in a year to which no beneficiary is presently entitled, the trustee will be subject to tax on part or all of the net income of the trust estate at the highest marginal tax rate for individuals (currently 47% for Australian resident individuals, including the Medicare levy).

The above general principles are modified if a beneficiary who is presently entitled to the trust income is a foreign resident at the end of the income year or is under a legal disability (being a minor, insane or bankrupt).

11. Are domestic and foreign trusts treated differently in relation to tax?

A non-resident trust (a trust that does not have an Australian resident trustee and does not have its central management and control in Australia) is broadly taxed in the same way as a resident trust but only in respect of income that is either attributable to Australian sources or attributable to foreign sources during a period in which a beneficiary was an Australian resident. However, there are a number of special provisions relating to non-residents trusts, such as the 'transferor trust' rules and the 'revocable trust' provisions, considered below.

Broadly, the transferor trust provisions in Division 6AAA of the Income Tax Assessment Act 1936 seek to tax Australian residents who have transferred property or services to certain non-resident trust estates, on an accruals basis (irrespective of whether or not that income has been repatriated to Australia), where the transfer is not an arm's length transaction ordinarily carried on by the transferor, or where the transferor is in a position to control the trust estate.

12. When is a trust considered to be resident for tax purposes in your jurisdiction?

A trust estate is taken to be a 'resident trust estate' if, at any time during the income year, a trustee of the trust estate was an Australian resident; or the central management and control of the trust estate was in Australia. A 'non-resident trust estate' is defined as a trust estate that is not a 'resident trust estate' in relation to a year of income

13. Are the tax treaties (or some of them) concluded by your jurisdiction applicable to trusts?

The trust is an entity for Australian income tax purposes and, accordingly, the various bilateral treaties for the avoidance of double taxation would be incomplete if they did not account for trust taxation. We do not propose to examine all the various tax treaties and the provisions within but we would draw attention to the following that illustrate the contemplation of trusts in such tax treaties:

- Article 3 of the income tax treaty concluded with the United States of America provides that: 'the term «person» includes an individual, an estate of a deceased individual, a trust, a partnership, a company and any other body of persons';
- Article 13 of the income tax treaty with the United Kingdom provides that : Income or gains derived by a resident of a Contracting State from the alienation of any shares or other interests in a company, or of an interest of any kind in a partnership, trust or other entity, where the value of the assets of such entity, whether they are held directly or indirectly (including through one or more interposed entities, such as, for example, through a chain of companies), is principally attributable to real property situated in the other Contracting State, may be taxed in that other State.

14. Are there any specific anti-avoidance tax rules applicable to trusts? If the answer is affirmative do they apply to similar or comparable arrangements (eg civil law foundations)? Are there circumstances under which trusts are at risk under GAAR or anti abuse of law measures?

The trust taxing provisions have evolved over time to address risks to revenue. The transferor trust provisions in Division 6AAA referred to above are an example of such an integrity measure where income and property have been transferred to a foreign trust and may not otherwise be brought to tax in Australia.

In terms of specific anti-avoidance provisions applying to trusts, we note those con-