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**THE CIVIL TRUST AS A LEGAL
SOLUTION IN LATIN AMERICA**

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OUTLINE FOR THE CIVIL TRUST

- Definition
- Scope
- Enforcement
- Characteristics
- Advantages/Disadvantages
- Procedure
- Jurisprudence and Doctrine
- Conclusions



CIVIL TRUST IN ARGENTINA AND COLOMBIA

DEFINITION

ARGENTINA

Trust is defined under the Argentine Civil and Commercial Code as a contract where a person (Settlor or Trustor) transfers certain assets to another person (Receiver or Trustee) who commits to exercise the rights of ownership of such assets for the benefit of a person designated in the relevant trust agreement as the Beneficiary, and agrees to transfer the assets, on the expiration of the trust term or the fulfillment of a certain condition, to a residual beneficiary.

COLOMBIA

A civil trust is the limitation to the property in which the assets are subject to a lien to pass to another person by the fulfillment of a condition.

SCOPE

ARGENTINA

The purpose of the civil trust is the exercise by the receiver of the rights of ownership of certain assets from the settlor for the benefit of the beneficiary and the transfer of such assets, on the expiration of the trust term or the fulfillment of a certain condition, to a residual beneficiary.

COLOMBIA

The purpose of the civil trust is to provide security and guarantee that the assets that conform the trust are transferred to the beneficiaries once the stipulated condition is met, without having a trust company as a party in the transaction.

ENFORCEMENT

Any asset (tangible or intangible) can be the purpose of the civil trust, for this reason it is used for civil and commercial transactions.

ARGENTINA

In Argentina, there are different types of trusts:

- Real Estate Trust
- Guarantee Trust
- Financial Trust
- Public Trust
- Will Trust

COLOMBIA

In Colombia it is mostly used as an alternative to wills without all the requirements, procedures and costs of a will. Nevertheless, it can also be used in any transaction for example as a securement of a loan agreement.

ENFORCEMENT

- Real Estate Trust in Argentina:
 - The investors are the trustor that provides the funds for the purchase of land and development of the project. Once accomplished, the functional units are transferred to the beneficiaries.
 - This allows the intervening parties, whether developers, financiers or constructors, to isolate the property, the subject matter of the transaction, from other assets and creditors. This guarantees that the project is not jeopardized by extraneous factors.
 - Trust also permits the securitization of the funds flowing from projects, giving access to capital markets for financing.

CHARACTERISTICS

- Any asset can be included in the civil trust
- It has to be established by public deed
- The settlor is the owner of the assets
- The assets must be transferred to the beneficiaries
- The assets can be administrated by the settlor, a third party is not required (only for Colombia)
- It is subject to a condition
- Fast procedure
- Low costs

CHARACTERISTICS

ARGENTINA

Any asset can be included in the civil trust.

The agreement must be in written and registered before the public register of commerce.

Public deed is required when the transfer of the assets requires a public deed (e.g. real estate). If these assets are incorporated after the execution of the agreement it is sufficient to execute a public deed only for the transfer of those assets.

COLOMBIA

Any asset can be included in the civil trust.

It has to be established by public deed.

CHARACTERISTICS

ARGENTINA

Assets held in a civil trust comprise a separate estate from the estate of the receiver, settlor, beneficiary and residual beneficiary.

The assets must be transferred to the residual beneficiary.

The assets must be administered by the receiver taking into account the purpose of the trust.

Generally, trusts cannot last more than 30 years. They may be subject to a condition.

COLOMBIA

The settlor is the owner of the assets. The assets remain in the settlor's patrimony until the condition is met.

The assets must be transferred to the beneficiaries.

The assets can be administered by the settlor, a third party is not required.

It is subject to a condition. The condition must be met within 30 years.

CHARACTERISTICS

ARGENTINA

The agreement must be entered into by the settlor and the receiver.

It is possible to setup a trust with beneficiaries that may not exist at the time of the execution of the trust agreement, but they must be sufficiently individualized therein.

Beneficiaries and residual beneficiaries must expressly accept their appointment.

The assets of the trust are a fiduciary property of the receiver. The residual beneficiaries have the disposal of the assets only when the trust expires or the condition is met, not before.

COLOMBIA

Only the settlor subscribes the public deed.

The beneficiaries have the disposal of the assets only when the condition is met, not before.

The assets remain in the settlor's patrimony until the condition is met.

ADVANTAGES/DISADVANTAGES

- Allows to reliably ensure the transmission of an inheritance or heritage for being a formal and solemn figure.
- It can be established by properties or movable property.
- It's economic compared to other legal figures.
- Avoids having to establish commercial companies for the management of the assets.
- Time of procedures and money is saved with this option.

ADVANTAGES/DISADVANTAGES IN ARGENTINA

- Trust isolates and protects the assets from the creditors of the involved parties.
- Trust for certain developments and investments have a reduced or a 0% rate for income tax purposes.
- Trust allows the securitization of funds flowing from projects, giving access to capital markets.
- In a non-financial trust in which the trustor is also the beneficiary (unless the trustor is a non-resident), the subject of income tax is the trustor/beneficiary. This has been particularly beneficial in real estate trust where individuals/buyers are both trustors (of unds) and beneficiaries (of units).

ADVANTAGES/DISADVANTAGES IN COLOMBIA

- The assets that conform the civil trust are unattachable.
- The transfer of the assets is free since is a donation subject to a condition and this generates savings in the accounting.
- The administration and usufruct of the assets can be reserved, since the settlor and the trustee can be the same person.
- The beneficiaries of the civil trust do not have to be informed of the transaction.
- Since it is a limitation of the domain it has no amount, and it is not considered as a sale or taxable income.

PROCEDURE

ARGENTINA

The agreement must be in writing and registered before the public register of commerce.

Public deed is required when the transfer of the assets requires a public deed (e.g. real estate). If these assets are incorporated after the execution of the agreement it is sufficient to execute a public deed only for the transfer of those assets.

If the assets comprise registrable goods, the corresponding public register must take notice.

COLOMBIA

The civil trust is established by the settlor before a Notary Public through a public deed where all the assets that will conform the trust are discriminated and the beneficiaries are also listed. The condition must be mentioned and in case a third party is administrating the assets it must also be listed.

The public deed is only subscribed by the settlor.

JURISPRUDENCE AND DOCTRINE IN ARGENTINA

- Under the new Civil and Commercial Code, the Trustee can be appointed as beneficiary but not as residual beneficiary. This was prohibited under the original trust law.
- The agreement cannot exempt trustee from his obligation to be accountable, nor negligence or fraud, nor from the prohibition for him to acquire the assets under trust.

JURISPRUDENCE AND DOCTRINE IN ARGENTINA

- The assets of the trust are a fiduciary property of the trustee, with effects against third parties as from the moment of the transfer of the assets.
- Fiduciary property contains certain limitations. it is temporal, the profits generated with the assets must be incorporated to the fiduciary property and the trustee cannot sell or grant liens over the trusted assets, except these are necessary in order to fulfill the purpose of the trust.

JURISPRUDENCE AND DOCTRINE IN ARGENTINA

- Tax authorities have attempted to collect income tax directly from the trust. But courts have referred that it is correct to separate the profits and that the trust must not pay the income tax on behalf of the trustors that are also beneficiaries, when these are Argentine tax residents.
- The trust must pay VAT in all the operations conducted to fulfill its purpose.
- In certain cases, trust act as withholding agent for personal property tax of the trustors/beneficiaries.

JURISPRUDENCE AND DOCTRINE IN COLOMBIA

The Superintendence of Companies of Colombia, responding to a right to petition in the degree of consultation in 2017, explains that the civil trust is a type of domain that limits the property of the settlor, referred to article 794 of the Civil Code that establishes: *“It is called fiduciary property the one that is subject to the lien of passing to another person once the condition is verified”*.

JURISPRUDENCE AND DOCTRINE IN COLOMBIA

Our Constitutional Court defines the civil trust in the following terms: *“The civil trust is a legal institution through which the assets that are owned by a person, natural or legal, become the property of another person, when a condition set by the owner of the assets is met. The civil trust constitutes a limitation to the property, whose main characteristic is that the fiduciary property is subject to a condition as it is subject to the occurrence of a future and uncertain event, which if fulfilled, obliges the transfer of the property to the beneficiary”*. Judgement C-046-17.

JURISPRUDENCE AND DOCTRINE IN COLOMBIA

It is important to understand that the properties that conform the civil trust are subject to a condition, for this reason the assets are unattachable since the property held by the trustee is temporary, not definitive, therefore allowing the seizure of the assets would go against the trustee's right. Accordingly, it is essential to distinguish two stages, first before the fulfillment of the condition and the second when the condition is fulfilled, in the first stage the assets are unattachable but in the second stage they are not. (Lizarralde, 1994)

CONCLUSIONS (ARGENTINA)

- Trust is the perfect vehicle to protect the assets of a project from other creditors of the parties.
- Assets held in a trust comprise a separate estate from the estates of the trustee, trustor, beneficiary and residual beneficiary.
- Trust allows the securitization of funds flowing from projects, giving access to capital markets.
- Trust may enjoy certain tax benefits.

CONCLUSIONS (COLOMBIA)

- Is a low-cost legal vehicle for transactions.
- Tax implications are only caused when the assets are transferred to the beneficiaries.
- No long procedures are involved in the conformation of the civil trust.
- Since the assets are unattachable they are secured.
- No third parties are needed in the transaction.

POP UP QUESTION

- Which assets conform the civil trust?
 - A. Properties
 - B. Tangible assets
 - C. Any assets
 - D. Movable properties

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