Trusts in Latin America

Nicolás Malumian*

Abstract

Trusts as investment vehicles and guarantees were adopted in Latin America up to the point where it became necessary to know how they work in order to do business in the region. Furthermore, trusts as estate planning device have been growing in popularity. This article summarizes the main points in order to understand Latin American trusts, such as (i) adaptation of trusts to Latin American continental law and adoption by the different countries, (ii) types of trusts and actual use in Latin America, and (iii) main aspects of trusts regulation in Argentina, Brazil, Chile, Mexico and Panama.

Key points

- It is necessary to understand Latin American trusts as business vehicles and guarantee schemes to do business in the region.
- It is advisable to know the rules of Latin American trusts to provide advice to Latin American clients as settlors or beneficiaries of trusts abroad.
- During the last century, almost all Latin American countries adopted the trust.
- Latin American Trusts are an adaptation of the US trust.

Introduction

The fact that the antecedents of the trust under the common law system contrast with the relative historical dearth of it in Latin America, and because Latin American laws are based on the civil law tradition, most English-speaking practitioners and scholars are led to think that there is no actual relevance of the trust in the region. Nevertheless, today there is an extensive use of business trusts and guarantee trusts in Latin America.

The first Latin American jurisdiction to adopt the trust, as it is known today, was Mexico in 1932. Based on the Mexican experience, the express trust has made its way from north to south into the laws of most Latin American countries, with the exception of a few, such as Chile.

The most common legislative technique has been the enactment of a trust act or the modification of the civil or commercial code. These rules allow the creation of business trusts, guarantee trusts or trusts with a wide range of purposes. The notable exception to the general trust regulation trend is Brazil. Through the enactment of several specific statutes, Brazil adopted several kinds of guarantee trusts that can only be applied for specific purposes (i.e. a guarantee trust over real estate assets and a guarantee trust over movable assets), and there is no law regulating

*Nicolás Malumian, Malumían & Fossati, 25 de Mayo 445 10th Floor, C1002ABI Buenos Aires, Argentina. Tel: +54 11 5238-5550; Fax: +54 11 5256-8355; Email: nmalumian@estudiomyf.com.ar. Nicolas Malumian is the author of Trusts in Latin America (Oxford University Press, 2009) which was reviewed in Trusts & Trustees, Vol 16, Issue 2.
trusts for purposes other than guarantee or estate planning.

In those countries where there is no legal regulation of the trust at all (as in Chile), or where the trust is not regulated on a general basis but for the specific purpose of serving as a guarantee (as in Brazil), it should not necessarily be understood that administration trusts are forbidden or illegal. Nevertheless, such ‘trusts’ do not enjoy the necessary legal protections and would probably be transactions based exclusively on the confidence that the grantor places on the trustee. In other words, there being no specific trust statutory regulation, there is no separation between the trustee’s own estate and the trust assets.

Although at first glance it could be thought that the Latin American trust was derived directly from the Roman *fiducia* or *fideicomissum*, the Latin American trust as it is known today was actually inspired by the US trust, and it is a relatively ‘new’ creature under continental law (i.e. the system of law prevailing in Latin America). Nevertheless, the differences between common law and continental law have led to an ‘adaptation’ process. In this vein, the following points should be considered:

- Continental law never had a separation such as the one that existed between common law and equity;
- Continental law is based on statutes (codes are an attempt to regulate by statute all the relevant issues on certain matters, such as the civil code, the commercial code, the mining code, etc.); and
- The only form contemplated by the statutes is the express trust (which in several countries must be a written instrument).

The trust is widely used in Latin America today because it has proved to be an excellent legal vehicle for investment, an individual’s wealth protection scheme, and a legal device for securing obligations or securitizing cash flows and other assets. If well-structured from a tax and legal perspective, the trust can be an efficient mechanism for ensuring that certain assets are subject to the accomplishment of a particular purpose.

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**Adoption of trust statutes in Latin American countries**

Above and beyond any debate on the role played by various Latin American jurists who took part in the trust adaptation to the Latin American law, the work of Mexican jurist Pablo Macedo must be stressed. He drafted what would become the first operative trust legislation in Mexico, an undoubted influence on trust legislations in all of Latin America.

Macedo took special interest in the Panamanian jurist Ricardo J. Alfaro and his classic book.1 Alfaro drew up a bill that was adopted as Panamanian law in 1925. This bill considered the trust ‘an irrevocable mandate by virtue of which certain assets are transmitted to a person, called the trustee, for him to dispose of them in accordance to the settlor’s mandate, for the benefit of a third party, called the beneficiary’.2

Although this is a very significant antecedent in the development of trusts in Latin America, this law was not actually used and was abrogated.

In brief, although a first antecedent of the Latin American trust can be found in the writings of the distinguished Dr Alfaro, Latin American legislation broke away from his notion of irrevocable mandate (later, an irrevocable mandate with asset transfer) and adopted the idea of trust property with a particular

2. Section 1, Law Nr. 9 of 1925 on Trust, published in official gazette Nr. 4567, 29 January 1925.
end, property of the trustee (albeit a *sui generis* property limited by the objectives of the trust), which forms a special purpose patrimony.


The rapid growth in the trustees business in Mexico and the benefits of the use of the trust for its domestic economy showed to the remaining Latin American countries the need for trust regulation.

### What is a trust under Latin American law?

The assimilation of the trust by Latin American countries was not an easy task. The main obstacle was the difficulties of transferring to a civil law concept an Anglo–Saxon one based on a law system in which two parallel classes of property coexisted. One of the aspects that made the inclusion of the trust in the jurisdictions of continental or civil law difficult was the principle of *numerus clausus* in the subject of *jus in rem*, which did not allow the creation of new real rights (*jus in rem*) that were not specifically contemplated in the law. Therefore, if there was no statute to create trust property (different from ordinary property), such kind of property could not be created by agreement.

In order to include the trust in continental law, a complete new legal concept was created. Thus, one unique feature of trusts in Latin America is that they implied creating a special-purpose patrimony, with the trust property separated from the trustee’s own property. The trust implied not only unfolding the property into a legal or formal one (in the hands of the trustee) and a substantial or economic benefit (in the hands of the beneficiary), but it also created a special-purpose patrimony, as will be addressed below in detail.

There were many efforts to adapt this concept, proposing different theories to justify it. In the next sections, the main theories that tried to explain the nature of the trust in Latin American continental law are covered.

#### Theory of the irrevocable agency

Ricardo Alfaro, the Panamanian jurist, made the first serious attempt to explain the concept of the trust under Latin American law. He thought that the Anglo–Saxon trust could be explained under Latin American legislation as an agency contract with certain particular characteristics. This agency contract had the particularity of being irrevocable, because as it was well known, the general rule was that the agency was revocable. In this way, the trustee appeared as the administrator of certain assets on behalf of a third one, without real property transmission, with only legal representation of the grantor, which kept that title. That is to say, the trustee was considered a person who only acted on behalf of another.

This theory was criticized arguing that in a trust the trustee acts in relation to a trust property that belongs to him or her. On the contrary, the agent acts in relation to the property of a third person. After this criticism, Alfaro made a statement adding to his definition that the trust was an irrevocable agency that transferred some assets to the trustee and/or agent. As explained before, this theory was very influential in the first Panamanian trust law and in one of the first Mexican trust laws, but does not have current practical application.

#### Theory of the unfolded property

There was also an attempt to view the trust as a legal scheme in which the original property right unfolded
into two new contemporary property rights, invested in different individuals and which had the same object. That is to say, the trustee held the legal property of the assets, and the beneficiary held the economic property of them. When the trust finished, these two rights reunited in the same individual.

Although this theory attempted to explain the nature of the Anglo–Saxon trust, it was not enough to achieve an adaptation of the trust concept to civil law countries. Furthermore, this theory was criticized for considering the personal right owned by the beneficiary of the trust property as a real property right. The main reason to put aside this theory was that it simply did not reflect the legal status of the trust in most Latin American countries.

**Theory of the special-purpose patrimony without owner**

This theory held that trusts are a patrimony ‘without owner’ that should be used to carry out a certain activity or to reach some particular end. The key element of the trust is the application of assets to a particular purpose. Put differently, under this theory a trust is a ‘special-purpose patrimony’ (in Spanish, patrimonio de afectación) that does not require someone to be its owner, but instead it is sufficient if the desired aim is stated by an instrument.

The trustee not being the owner of the properties, not only is he or she unable to use the trust property in his or her own benefit, but also he or she is obliged to use and administer it only for the purpose determined by the grantor. Furthermore, under this theory, the trust patrimony would not be affected by the bankruptcy of the grantor, the trustee, or the beneficiary.

Pierre Lepaulles, who created this theory, explained that ‘if the need of a patrimony and an affectation are essential conditions for the creation and the life of a trust, we cannot escape the conclusion that the trust is an affected patrimony... The trust is a legal institution that consists in a patrimony independent of any person and whose cohesion derives from an affectation freely made within the law and the public policy.’

Although this was a major advancement and the basis for the current explanation of trusts in civil law tradition countries, this theory did not describe the legal status of the trust patrimony that was owned (in trust property) by the trustee. It was not a patrimony without an owner, and this was rejected first by the Mexican and then by the rest of Latin American legislators.

**Theory of the trustee’s special-purpose patrimony**

This theory was the result of the evolution of the theories described above, the one adopted by most scholars to explain the concept of trust, and it best fits trust regulations in Latin America.

The theory of the patrimony ‘without owner’ was criticized because the existence of a patrimony always requires a holder. The existence of several patrimonies was possible, but always with a person as the owner of all of them.

These theorists believed that the trust was a special kind of patrimony, which was the total mass of existing and potential rights that belonged to a person (trustee) and tended to a specific purpose in benefit of a third person (beneficiary). This was not the ‘ordinary’ patrimony of the trustee (the trustee’s own estate) but a ‘trust patrimony’, a separate patrimony that had an objective, a purpose: it is a special-purpose patrimony. The trust instrument created a special-purpose patrimony. Therefore, a trustee could have as many patrimonies as trust agreements he or she held.

A trust patrimony differed from the trustee’s estate because it was under a determined mandate to be used for a special purpose. In other words, the trustee’s ordinary patrimony was not subject to any mandate or assignment, but each trust patrimony was under a special assignment that was different from...
the rest of the patrimonies. This mandate or assignment is the key to identifying and differentiating trust patrimonies.

Likewise, it was affirmed that for this patrimony to be a 'separate estate' it was an essential condition that an Act was passed to establish this kind of patrimonies as the object of a special treatment. Most of the Latin American jurisdictions follow this theory and had special trust acts passed by its parliaments.

It should be noted that as the trust patrimony is separate from the ordinary patrimony of the trustee, any liability arising in relation to one patrimony does not affect the other. This principle was also established in most Latin American laws. Put differently, as the trust property is a separate patrimony, it cannot be executed by the trustee’s or grantor’s creditors.

The existence of a trust property is essential for the existence of a trust. The trust implies a relation between the trustee and the trust property in benefit of a third party (the beneficiary).

**Trust agreement, trust property, and special-purpose patrimony**

In short, under Latin American law, the term ‘trust’ refers to:

- A contract or a will (trust instrument by which property interests are vested in the trustee),
- A special-purpose patrimony (affected to the fulfilment of a special purpose and which has the trustee as the owner) that is constituted by the assets under trust property, and
- The trust property, an *in rem* right.

The interaction of these three concepts is the following: the trust agreement involves the transfer of ownership on certain assets from the grantor to a special-purpose patrimony owned by the trustee, and simultaneously, the creation of a personal right in favour of the beneficiary, whose obligor is the trustee as the owner of the said special-purpose patrimony.

**The trustee in the Latin American trust**

There are wide differences in the regulations on who can act as trustee in Latin American countries:

- In Argentina, any person can be a trustee, with the exception of: (i) financial trusts, i.e. trusts used for securitizations, which require an authorized financial trustee, and (ii) the trustee wanting to make a public offer of his or her services, which requires previous licensing. There is no restriction to be a trustee as long as: (i) the trust does not have securitization as its purpose, or (ii) the trustee does not advertise his or her services.
- In Bolivia, only banks can be trustees.
- In Colombia, only trust companies can be trustees, which have as their sole activity being trustees and are especially authorized by the bank’s superintendence.
- In Costa Rica, any individual or legal entity capable of acquiring rights and contracting obligations may be a trustee.
- In Ecuador, only ‘fund and trust management companies’ are authorized to act as trustees, as well as certain government companies: the State Bank and the National Finance Corporation.
- In El Salvador, only banks or authorized credit institutions may be trustees.
- In Guatemala, only banks established in the country, credit institutions, and ‘private investment companies’ with authorization by the Monetary Committee, may become trustees.
- In Honduras, only authorized banking institutions may act as trustees.
- In Mexico, only credit institutions can be trustees of any kind of trusts. Insurance companies and stock exchange brokers can only be trustees of trusts whose object is related to their activity. Regarding guarantee trusts, there are broader criteria. All of the following can be trustees of...
guarantee trusts: credit institutions; insurance institutions; bail institutions; stock exchange brokers; financial corporations of multiple object included in the General Organizations and Auxiliary Credit Activities Act, section 87-B; general depositaries; and credit unions.

- In Panama, any natural or legal persons may be trustees. However, the relevant license must be secured if the activity is pursued professionally.
- In Paraguay, only specialized departments of banks and corporations with the exclusive purpose of being trustees authorized by the Central Bank of Paraguay may act as trustees.
- In Peru, only the following are authorized to act as trustees: (i) COFIDE, a state-owned financial institution; (ii) banking companies, financial companies, municipal savings and credit banks, municipal people’s credit banks, entities for the development of small- and micro-sized companies, savings and credit cooperatives authorized to raise resources from the public, rural savings and credit banks, exchange services companies and funds transfer companies; (iii) fiduciary services companies (corporations that have as sole object and activity to be trustees); and (iv) insurance and reinsurance companies.
- In Uruguay, any person can be trustee, with the exception of: (i) financial trusts, i.e. trusts used for securitization, which require a duly authorized financial trustee, and (ii) professional trustees (any person who is the trustee of five or more trusts in any calendar year will be considered a professional trustee).
- In Venezuela, only banking institutions and insurance companies may be trustees if they are granted the corresponding authorization.

In short, the general rule in Latin America is that only specialized companies or banks can be trustees.

**Types of Latin American trusts**

Although the general rule in Latin America is that the law presents no special classification of trusts, it permits different forms that lend themselves to classification. A description of the different kinds of trusts in Latin America and their particular characteristics follows.

**Trusts as business vehicles**

Business trusts and guarantee trusts are the most widely used kinds of trusts in Latin America. In the case of business trusts, the basic structure is the one in which several settlors are the beneficiaries of one trust (in the same proportion of the contribution as settlors), which was formed to develop a project. The most common examples are trusts for the development of small- or medium-sized businesses in: (i) commodities production (soybean, berries, cattle, oleic corn, etc.); (ii) real estate (apartments, units in fenced neighbourhoods, hotels, etc.); (iii) forestry; and (iv) vineyards. The trust is usually created by an agreement between the first settlor or beneficiary and the trustee, other settlors or beneficiaries adhering to the trust afterwards.

**Business trusts and guarantee trusts are the most widely used kinds of trusts in Latin America.**

Trusts in which the settlors are also the beneficiaries are an ideal vehicle for investment projects because of their versatility, their tax treatment (in several jurisdictions the trust is not subject to income tax, but the grantors-beneficiaries are), and the existence of a limitation of liability (settlers and beneficiaries are not responsible for the trust debts).

In this kind of trust, the trustee’s essential duty is the management of the trust assets so that they make a profit that will be distributed to the beneficiaries. Put differently, in the investment trust, trust assets should be applied to the development of a project to increase the trust patrimony. It is common to
appoint a manager different from the trustee who provides the administration services and technical know-how that the trustee does not possess. For example, if a bank is appointed as trustee (it must be kept in mind that in several Latin American countries only banks can be trustees), and if the trust is for forestry, it is necessary to appoint a person who provides all the necessary services and know-how to administer the timber owned by the trust.

As in Latin America, the most widely used trust is the business trust; it is common for foreign practitioners to ask when to use a trust and when to use a corporation as a legal vehicle for business. The general answer is that the corporation would be the right vehicle to carry out a long-term activity involving several projects, and that the trust would be the adequate legal vehicle for a particular project.

From a purely formal point of view, the main difference between a trust and a corporation is that the latter is a legal person, whereas the former is a special-purpose patrimony. Other differences are as follows:

- A trust is a flexible plan that allows for the creation of several committees and the distribution of powers among the settlors and beneficiaries. For example, it may be stipulated in the trust instrument that one or several settlors will have a power of veto on certain decisions of the trustee, such as the sale of certain assets, any contract that would imply a payment superior to a certain amount of money, the modification of certain characteristics of the project, the indebtedness of the trust above a certain amount or with a certain purpose, among others. In comparison, a corporation is far less flexible and does not allow for the distribution of specific powers among the shareholders, and the function of the board of directors does not allow modifications.
- In certain countries, corporations can only make dividend distributions if there are liquid earnings, whereas trusts are not subject to this restriction.
- In most Latin American countries, a corporation must have at least two shareholders, whereas trusts can be created by one settlor.
- The constitution and liquidation procedures of corporations could prove too time-consuming, rigid, and costly for a single project.
- Furthermore, in certain jurisdictions trusts are pass-through entities for tax purposes.

**Guarantee trusts**

Guarantee trusts have been used in Latin America with proven versatility and utility. They can be defined as those by which assets are transferred to the trustee to guarantee a debt; the creditor could be the trustee and/or a third party. In the event of non-fulfillment, the creditor would be paid with the proceeds of the trust assets, which should be sold out. The difference between a guarantee trust and other trusts is the nature of the beneficiary’s right, which in the guarantee trust is to secure an obligation and not an actual payment.

The advantages and differences of the guarantee trust as compared to other guarantees (pledges and mortgages) are summarized as follows:

- The trust assets could be foreclosed extra judicially. This situation represents a notable advantage with respect to pledges or mortgages. The creditor has no need to enter a judicial process to recover the invested capital. Avoiding the judicial process by directly selling out the trust assets, the trustee will increase the value of the asset as an object of guarantee because the cost and time of the recovery of the asset in guarantee will be smaller than in a judicial process. Nevertheless, seeking for celerity and economy in the realization of the business, good practices indicating a quite simple and transparent proceeding must be established to allow the trustee, in the event of default of the creditor, to sell out the trust assets in the best possible way, but at the same time, in such a manner as is fair to avoid the debtor’s objections. In short, the guarantee allows for a private selling out of the assets given in trust, whereas in the pledge and the mortgage, judicial participation is required through public
auction. On the other hand, the main downside of a guarantee trust compared to a mortgage or a pledge is that, eventually, the debtor may start legal actions, and the judges of certain jurisdictions may not be as familiar with the guarantee trust as they are with ‘traditional’ guarantees, such as mortgages and pledges. This risk can be reduced in part by an arbitral clause establishing that any conflict be discussed in front of arbitrators who are aware of the characteristics of guarantee trusts.

- The assets that are assumed in the guarantee cannot be affected by third parties (such as other creditors of the debtor) because they are not the property of the debtor. The asset given in guarantee trust comes to be the trustee’s property, i.e. the trust ownership of the assets is transmitted, forming with them a special patrimony separate from those of the trustee, grantor, and beneficiary, whereas in the pledge and the mortgage, the assets remain in the debtor’s patrimony, subject to natural, juridical and economic movements. Trust property is more flexible, as different methods of administration and disposition could be stipulated.
- It allows for the collateralization of several debts—it being far simpler to change the creditor (no registration with a public registry is needed).
- The grantor does not necessarily have to be the debtor, and the trustee does not necessarily have to be the creditor.
- Several assets that, in most Latin American countries, cannot be the object of a pledge or mortgage can be transferred as guarantee (such as a cash flow emerging from services to be provided, such as a freeway toll).
- Businesses that form an economic unit can be combined in a trust as collateral. Therefore, it is the ideal plan for project finance.
- In the case of construction or real estate development projects, the key advantage of the guarantee trust compared to the mortgage is that the creditor is not simply allowed to sell the land with the uncompleted construction (which would probably have a value far inferior to the amount invested), but the creditor can appoint a new construction company or developer, complete the construction, and sell the final units or the finalized project with a higher chance of recovering the funds granted (the trust allows the ‘step in’ of the creditor in the project). There are several successful cases in Latin America in which the trust enabled the continuation of projects that were severely affected by a crisis while it halted projects in which the creditor only had a mortgage.
- One of the most crucial points to be considered when treating the guarantee trust is the criminal responsibility of the participants. If a debtor transfers the trust property of a cash flow and keeps their collecting activity, he or she will become the administrator of a third-party asset (the creditor’s). Therefore, if the collected funds were not delivered in time and form, he or she could have criminal responsibility related to the fraudulent administration. This creates a substantial difference with an ordinary debt default, which is not a criminal offence.

One of the most frequently asked questions is whether it makes any sense to have a guarantee trust plus a mortgage on a construction project. As mentioned before, the guarantee trust would permit the creditor to step into the project if the construction goes bankrupt. And it does make sense to have a mortgage if there is credit to the trust for the construction because the mortgage would allow someone to be a preferred creditor in relation to other creditors of the trust.

**Charitable trusts**

This kind of trust is not very common, but it is growing in popularity in Latin America. They could be compared with a donation which, instead of being fulfilled in a single act transmitting an asset, remains during a period of time for the benefit of a third party. For example, if I donate a building to a school, there is a single act, but if I create a charity trust with that same building as an underlying asset in favour of the same school, the benefit will be received
by the school during the life of the trust. Charity trusts should fulfill the rules related to nonlucrative acts, such as rules concerning the formalities pertaining to donations and substantial rules regarding forced heirship.

In some countries (e.g. Colombia, Costa Rica, El Salvador, Honduras, Mexico and Paraguay), this kind of trust is excluded from the maximum legal term for trusts (which is usually between twenty and thirty years, with Mexico as the country with the longest maximum period of fifty years).

In Latin America, there is a long tradition of using foundations instead of trusts to affect a patrimony for a charitable cause. Nevertheless, as the foundation is subject to many more legal restrictions and is far less flexible than a trust, the latter has been increasingly used in the last years.

The traditional definition of foundations (in Spanish, *Fundaciones*) states that foundations are legal entities established by one or several founders for charitable, educational, religious, scientific, health, poverty relief, political or other benevolent or general social benefit purposes, and not for profit, the recipients being either the community as a whole or an unascertainable and indefinite portion thereof. Foundations usually have income tax and value-added tax exemptions and are allowed to receive donations that are tax deductible for the donors. They usually require the approval of the government to be created.

Foundations are legal entities different from corporations, partnerships, and other commercial vehicles, which have a separate legal regime. The main difference is that foundations have no owners. In other words, there are no shareholders, partners, or members of the foundation. A foundation is managed by a board or council whose initial members are chosen by the founder and then by the same board (or a third party determined by the foundation bylaws). In most Latin American countries, foundations are under the permanent control of the government and, in the event of dissolution, a foundation’s assets cannot be distributed to members of the board, founders, or any other related individual, except for a charitable institution. Otherwise, they become state-owned assets.

Charitable foundations are a legal vehicle widespread in Latin America used by those who want to make a charitable endowment—few Latin American countries have specific rules for charitable trusts, and even fewer have a tradition of setting up such trusts.

Foundations as defined in the preceding section can be called ‘public-interest foundations’ and must be differentiated from ‘family’ or ‘private-interest foundations’. Private-interest foundations are not created to benefit the community as a whole or an unascertainable and indefinite portion of it, but to benefit certain individuals as established by the founder. They do not require express authorization, only the registration of a foundational act.

The sole country in Latin America that has a ‘private-interest foundation regime’ and, therefore, the sole country in which such foundations can be legally created, is Panama. All other countries request for the existence of a foundation that the interest that is served by the foundation is a public one (charitable purpose). Private-interest foundations are analogous to asset-protection trusts with the difference that a foundation is a legal entity, and a trust is but a separate patrimony. The comparison between a Panamanian private-interest foundation and a trust can be summarized as follows:

- Unlike trusts, foundations are legal entities.
- Instead of a trust deed, there is a foundation bylaw that must be registered so that the legal entity is created. Regarding the substantial aspects, both instruments (the trust deed and foundation bylaws) deal with the same issues (mainly the administration and rules for the distribution of assets), and both the trustee and the members of the board are subject to fiduciary duties.
A foundation may not be involved in business activity directly on a permanent basis, but it can be the sole shareholder of a corporation that is permanently involved in such activities.

Trusts are well known in common law tradition countries. The question that arises is whether this constitutes an advantage or a disadvantage. Two points to be considered are: (i) there is a higher degree of uncertainty on the decision of a common law judge on the validity and enforceability of a foundation; and (ii) a common law creditor of the founder would have more difficulties to determine his or her rights against the foundation.

Panamanian private-interest foundation law specifically addresses the issue of the forced heirship rules of the jurisdiction of the founder’s domicile of and states that the Panamanian judge would not consider such rules applicable to the foundation.

**Testamentary trusts**

The testamentary trust can be defined as the last will disposition by which a person (testator-settlor) transfers certain assets to another one (trustee), who obliges himself or herself to administer the trust property in benefit of the party designated in the will (beneficiary).

From a practical point of view, it should be stressed that testamentary trusts are not widely used in Latin America. The main reason is the existence of forced heirships that do not leave much room for estate planning. Forced heirship forms an important part of the succession law of most civil law jurisdictions in Latin America. In essence, it grants the surviving spouse, children and/or other relatives of the deceased person, fixed shares of his or her estate. The consequences of forced heirship violations are not uniform among the countries that have this legislation. In some jurisdictions, the offending transfers of property may be treated as void from the very outset, so that no title passes. In other legal systems, the transfers may be treated as merely voidable. The far more common paradigm, however, is not to invalidate the transfer at all, but rather to ‘claw-back’ into the estate any offending gifts that might have been made by the deceased person during their lifetime, for example, in Argentina, where the law stipulates that the children have the right to a forced heirship of 80 per cent. According to this, a person who has children can only dispose of 20 per cent of his or her patrimony in his or her will because the remaining 80 percent is subject to forced heirship. Uruguay has similar rules. In other countries (such as Panama), either there is no forced portion, or it is much more reduced, giving more possibilities to the application of the concept.

Testamentary trusts are not widely used in Latin America.

Most estate planning in Latin America is done with trusts or private-interest foundations in a different jurisdiction from the testator’s (as the private-interest foundations in Panama described above) and in relation to assets not located in the country of the owner.

As mentioned earlier, irrevocability is the rule of the Latin American trusts, and in order to be revocable a trust instrument must have an express provision. But in the case of testamentary trusts, the essence of the will being the possibility of its revocation, it is not necessary for the testator to have reserved the faculty of doing so in order for the will to be revocable. In short, although the rule for the *inter vivos* trust is its irrevocability, unless it has an express disposition in the trust instrument which expressly states the contrary, the rule with testamentary trusts established by wills is the revocability of the will until the death of the testator. In fact, if the testator revokes a will in which a trust is established for the moment of his death, he is not revoking an existing trust, but just a potential or future one.

**A brief comment of some countries in particular**

**Argentina**

The regulation of the trust in Argentina was established in January 1995, by the Housing and
Construction Financing Act (Law No. 24,441) which, as its name suggests, had as its main objective the creation of the legal instruments to facilitate the financing of housing construction. The Law originally created the financial trust as the vehicle of securitization of mortgages and the ordinary trust as the vehicle for small-to-medium-sized real estate projects. Nevertheless, trust boomed as the perfect legal vehicle for all sort of projects in construction, agriculture, forestry, mining and commodity production in general. The investors were settlors and beneficiaries of the trust, the trustee (or a third party hired by the trustee) was responsible for administering the assets, and the trust deed was the document in which the project was described in detail. Under these conditions, the ordinary trust became a widespread and well-known business vehicle for projects.

In short, Argentina was one of the last countries in Latin America to adopt a trust regulation (the sole country after Argentina that created trust regulations was Uruguay in 2003), but it made an intensive use of it, compensating its short history with a fast, widespread use of the trust, which is used as a business vehicle and guarantee scheme.

**Brazil**

Unlike all other Latin American countries with trust laws, in which a general regulation of trusts allows its application to different purposes including the guarantee of obligations, Brazilian legislation provides separate legal regimes that regulate: (i) guarantee trusts (in its civil code and several acts); (ii) securitization trusts; (iii) real estate trusts; and (iv) a regime similar to an inheritance trust (fideicomisso or substituição fideicomissária). In other words, there is no general regime of trust administration as a business vehicle.

The absence of a legal system to give certainty to the grantor and beneficiary’s rights of an administration trust (particularly in the case of bankruptcy of the trustee) has meant a stumbling block to its development because (i) it does not permit transactions with independent investors since personal confidence placed on the trustee is everything, and (ii) being an unregulated transaction, the trust becomes unfeasible for large-scale or long-term transactions. Therefore, the administration trust is almost unknown as a vehicle for legal businesses in Brazil.

The most remarkable achievement of Brazilian law is that it has been able to respond to the demand for adequate guarantees that permit access to credit to people who otherwise would not enjoy this benefit.

**Chile**

Unlike all the other Latin American countries in this article, Chile has no trust regulations. There is no such legal plan that allows for the creation of a special-purpose patrimony, separate from the property of the grantor, the trustee, and the beneficiary.

Although the Chilean Civil Code regulates ‘trust property’ in book II, title VIII regarding ‘limitations to ownership and primarily trust property,’ encompassing Articles 732 through 763, this trust property does not imply the creation of a special-purpose patrimony. Therefore, there are no clear rules regarding the legal actions for the fulfilment of the grantor’s intent or the beneficiary rights. Furthermore, it is not clear whether the trust assets can be attacked by the trustee’s creditors. Thus, the trust property regulated by the Chilean Civil Code is completely a different concept from the one prevailing in the common law system. Because of the aforementioned reasons, it must be stressed that trust property is almost unused in Chile (a legal plan almost unknown to most lawyers).

With respect to securitization in Chile, the trust is not used because, as explained, it does not provide the necessary security to carry out a securitization process. Nevertheless, since the modification of the Stock Markets Act, Law No. 18045 (Official Gazette, 22 October 1981), there has been a special vehicle (securitization companies) that allows for the creation of special-purpose patrimonies with the purpose of isolating assets and proceeding to their securitization (same legal design as Peru, Bolivia and Brazil).
Mexico

Compared with the rest of Latin America, Mexico has seen a very long tradition of the use of trusts. As mentioned before, the Mexican trust was modelled by Pablo Macedo after the US trust, influenced by the works of Pierre Lepaulle, and has been used for more than 70 years now, providing a model for most Latin American countries.

The following trusts are forbidden:

- Secret trusts
- Those in which the benefit is granted to several persons in succession, who must be substituted for death of the predecessor, unless the substitution is carried out in favour of persons in being or already conceived at the death of the grantor.
- Those whose duration is longer than fifty years, when a legal person is appointed as beneficiary who is not a public person or a charitable institution. However, they may be established for a period above fifty years when the object of the trust is the upkeep of nonprofit science or art museums. Another exception to this rule is trusts created by the federal government and declared of ‘public interest by it.’

Panama

Although Panama boasts Latin American’s first trust law (Law No. 9 of 1925, written by Ricardo J. Alfaro, replaced by Law No. 17 of 1941, which was in turn replaced by current trust Law No. 1 of 1984), it was not until the enactment of the current law in 1984 that the trust began to be actually used.

Trusts in Panama are peculiar in that they serve not only as a local but also as an offshore transaction vehicle. Another particularity of Panama is that the trust coexists with private-interest foundations, which have similar estate-planning functions, as explained before.