
Peru

International Estate Planning Guide

Individual Tax and Private Client Committee

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I. Wills and disability planning documents

A. Will formalities and enforceability of foreign wills

According to the Peruvian Civil Code, wills can be granted as: (1) ordinary wills; and (2) special wills. Within ordinary wills, they can be made as a public deed, a closed will or a holographic will. On the other hand, special wills are military wills and maritime wills.

All the aforementioned wills must fulfil the following basic requirements: (1) be granted unilaterally; (2) be the consequence of the personal or individual manifestation of the testator; (3) be in writing; and (4) comply with testamentary Peruvian regulations, which impose a minimum forced heirship of two-thirds of the estate and a maximum of one-third of free disposal; otherwise, the document will not have testamentary validity.

Additionally, each type of will must comply with its own special formalities, which are detailed below:

- *Will by writing*: The testator dictates the testamentary dispositions to the notary public, who takes note of them in handwriting. After the drafting of the will is complete, the notary reads the will aloud and, if the testator agrees with the wording, he or she proceeds to sign the document. In this testament, the testator must present two witnesses.
- *Closed will*: The testator makes his or her will in private and delivers it in a sealed envelope to the notary; the latter then seals the envelope before the testator and the witnesses, and proceeds to the safekeeping of it. To open the will upon the passing away of the testator, a judicial process must be followed.
- *Holographic will*: The will is drafted and signed in full in writing by the testator, without the presence of a notary or witnesses. The will remains in the testator's custody or in the custody of a third party designated by the testator. After the testator's death, the will must be subject to judicial verification.
- *Military will*: This will is granted by members of the Peruvian Armed Forces or the National Police in time of war, whenever they are participating in war operations or quartered. It may also be granted by persons supporting the aforementioned members or by prisoners of war.
- *Maritime will*: This will is granted by the crew members of a Peruvian warship or a Peruvian flag vessel that is sailing. It is granted before whoever is in command of the vessel or ship, and the presence of witnesses is required.

On the other hand, the Peruvian Civil Code allows a will granted under foreign law to be valid in Peru providing it complies with the following requirements:

- it is issued before a competent official in the country where it is granted;
- it complies with the formalities of the law of the country where it is granted;
- a will issued abroad is formally incompatible with Peruvian law if it is not granted unilaterally, individually and in writing. Thus, for example, verbal wills, wills issued jointly or jointly by two or more persons, or those of a contractual nature are incompatible with Peruvian law;
- the beneficiaries of the testator can only be individuals or legal entities; and
- its provisions shall not oppose the rules of public order or good customs established by the Peruvian legal system.

In any of the testamentary forms, one or more executors may be appointed who will be in charge of executing the will.

Peruvian law imposes on the testator the duty to respect 'forced heirship', which is the part of the estate of the decedent that should be reserved for forced heirs (children and other descendants, parents and other ascendants, and the spouse). When the testator has descendants and/or a spouse, two-thirds of the assets must be reserved in the will for them. If the testator only has ascendants, half of the assets must be reserved for the benefit of those relatives. Finally, if the testator has no ascendants, descendants and/or spouse, the assets may be used for the benefit of the testator.

Thus, the part of the estate that does not correspond to 'forced heirship' is of free disposition.

Finally, Law No 26702 (hereinafter the 'Peruvian Banking Law') allows the testator to constitute – via a will – a trust (*fideicomiso*) estate, which will be administered by the trust company designated in said document.

B. Will substitutes (revocable trusts or entities)

If the purpose is to dispose of certain assets free of charge, there are two alternatives to a will – par excellence: a donation or legitimate advancement. Although both are contracts by which ownership of an asset can be transferred free of charge, the advanced portion will always be included as part of the forced heirship estate.

In the case of real estate, both must be recorded in a public deed, indicating the value of the property, and the transfer of ownership must be registered in the Peruvian Public Registry.

In the case of personal property, it suffices that the contract has legalised signatures; however, a public deed may also be used.

It is worth mentioning that the transferor – by means of donation or legitimate advancement – can establish that the transfer will take place at a certain time as a consequence of the occurrence of a particular event. In the same way, it can be agreed that, upon the occurrence of a certain event, the donation or advance payment will be without effect and the property will revert to the transferor.

A more sophisticated alternative is the constitution of a life trust, which is regulated by the Peruvian Banking Law. Under this type of contract, the settlor constitutes an autonomous estate that will be administered by a trust company for the benefit of certain persons until the time of their death.

Finally, another option is the trust commission regulated by the Peruvian Banking Law, a contract that allows a person to entrust the administration of his or her assets to a company of the local financial system until a certain event or term is fulfilled.

C. Powers of attorney, directives and similar disability documents

According to the Peruvian Civil Code, persons of legal age with discernment capacity may grant a power of attorney to any another person to execute certain legal acts and/or contracts in the name and on behalf of the principal; however, if the power of attorney is to dispose of or encumber an asset, it must be recorded in a public deed. It should be noted that the power of attorney may be granted unilaterally.

Similarly, the delegation of powers may also be made by means of a power of attorney contract, in which case the signature of the principal and the principal's representative will be required.

On the other hand, any elderly person with discernment capacity may appoint a guardian, guardians or substitute guardians by public deed in the presence of two witnesses, in anticipation of being judicially declared in the future due to a mental impairment. The appointment of this type of guardian must be registered in the Peruvian Public Registry.

Additionally, the Peruvian legal system contemplates the institution of 'support and safeguards', which consists of the assistance received by a person of legal age to facilitate the exercise of his or her rights, including support in communication, in the understanding of legal acts and the consequences thereof, and the manifestation and interpretation of the will of the person requiring the support; for this purpose the interested party may appoint his or her supports in a notarial or judicial venue. Likewise, this figure allows a person of legal age – with capacity of discernment – to appoint before a notary one or more persons to help him or her to perform certain legal acts in case the grantor suffers any disability in the future that may prevent him or her from exercising his or her rights normally in the future.

II. Estate administration

A. Overview of administration procedures

In Peru, the institution of the executor is reserved for the will; the executor being the person in charge of enforcing the testamentary dispositions.

Thus, according to the form of their appointment, the Peruvian Civil Code establishes that the executors can be testamentary, legal or executors of a will. Testamentary executors are those who have been

appointed by the testator in his or her will (more than one executor may be appointed). In the absence of testamentary executors, their functions are assumed by the heirs, who assume the status of legal executors. In the absence of testamentary executors and in the absence of an agreement among the heirs (legal executors), any of the heirs may request the judge to appoint an executor dative, which is nothing more than a judicial administrator of the estate.

The executor will be mainly in charge of: (1) inventorying the assets and liabilities that make up the estate; (2) paying the debts of said estate; and (3) adjudicating the assets among the estate. For his or her work, the executor is entitled to remuneration that shall not exceed four per cent of the liquid assets, and at the end of his or her term of office, he or she is obliged to render a written report of his or her performance.

If there is a delay in the execution of the testamentary dispositions, any of the heirs may request a judge to remove the executor.

Likewise, the work of the executor terminates in the following cases:

- after two years from his or her acceptance, unless a longer term is indicated by the testator, or granted by the judge with the agreement of the majority of the heirs;
- for having concluded his or her functions;
- by resignation with judicial approval;
- due to legal or physical incapacity that prevents the performance of the duties of the office;
- by judicial removal, at the request of a duly substantiated party; and
- by death, disappearance or declaration of absence.

Finally, it should be noted that the executor may be a natural person or a legal entity, which must be authorised by law or by its bylaws. It is important to point out that, according to the Peruvian Banking Law, a company of the financial system may act as an executor.

B. Intestate succession and forced heirship

Peruvian law provides that, in the following cases, it will be necessary for a judge or notary to declare who are the successors of a certain deceased person:

- when the deceased dies without leaving a will;
- when some, or all, of the provisions of the will have been declared invalid by a judge;
- when the beneficiary of the will dies before the testator, renounces the inheritance or loses it due to indignity or disinheritance and has no descendants or substitutes to replace him or her; as the case may be; and
- when the testator has no heirs declared in the will and has not disposed of all his or her assets in bequests, in which case, intestate succession only operates with respect to the unassigned assets.

For purposes of intestate succession (also known as 'legal succession'), Peruvian law establishes inheritance orders. Thus, the heirs of the first order are the children and other descendants; of the second order, the parents and other ascendants; of the third order, the spouse or, if applicable, the surviving member of a common-law union; of the fourth order, the siblings; of the fifth order, the uncles and nephews; and of the sixth order, the first cousins.

The spouse or, as the case may be, the surviving member of a common-law union inherits in equal part to each of the descendants or ascendants, as the case may be.

The relatives of the descending straight line exclude those of the ascending line. The closest relatives in degree exclude the most remote ones.

When the deceased has no heirs and has no testamentary successors, the Peruvian State will inherit the assets of the deceased.

The successors who inherit by intestate succession do so on a universal basis; that is, they acquire all the assets and obligations of the deceased. If there is no consensus among the heirs regarding the administration of the assets, any of the successors may request a judge to appoint an administrator.

Finally, the heirs may divide the estate by means of a written agreement, which may be recorded in a public deed (in the case of assets registered in the Public Records, eg, real estate) or in a document with a notarised signature (for non-registrable assets, eg, money). In the absence of an agreement, the distribution of the assets may be requested before a judge.

C. Marital property

In Peru, married couples can choose between two property regimes; the first, called 'community properties', is characterised – broadly speaking – as being a regime in which there are assets and obligations owned by both spouses (called 'social assets' and 'social obligations', respectively) and individual assets of each spouse ('individual assets'); on the other hand, the second regime is known as 'division of assets' and is characterised as each of the spouses keeping his or her debts and assets separately.

In the case of community property, when one of the spouses dies, the community property must first be liquidated and this consists of: (1) paying the 'social obligations' out of the 'social assets'; and (2) if there is a remainder (*gananciales*), distributing it in two equal parts between the surviving spouse and the forced heirs of the deceased spouse (in the latter group, the surviving spouse must also be included). Thus, in Peru – only in cases of community property – the spouse has the right to receive the community property and that is in the portion of the legitimate.

On the contrary, when one of the spouses married under the 'separation of estate' regime dies, there are no community profits and the surviving spouse only participates in the distribution of the deceased's assets.

Finally, in Peru there is an institution known as a 'de facto union', which consists of the stable cohabitation of a man and a woman for a period of not less than two years. In matters of inheritance, the de facto union is subject to the same rules as community property.

D. Tenancies, survivorship accounts and payable on death accounts

Under Peruvian law, lease agreements do not terminate upon the death of one of the parties, unless otherwise agreed by the parties. In fact, the rule is that upon the death of the lessor or lessee, the successors of the lessor or lessee occupy their contractual position.

In Peru, the operation of bank accounts is mainly regulated by the terms of the respective contracts. Thus, if the type of bank account contracted does not have a stipulation as to what will happen to its funds after the death of the holder, then such flows will pass to the estate and will be subject to the general rules of Peruvian inheritance law. Notwithstanding the latter, if a beneficiary of the funds in the account has been agreed upon, the total or partial reimbursement of the money may be requested from this person in case it is determined that such a disposition affects the legitimate rights of the forced heirs.

III. Trusts, foundations and other planning structures

A. Common techniques

In Peru, a trust is regulated by Law No 26702 (General Law of the Financial System and the Insurance System and Organic Law of the Superintendence of Banking and Insurance) and it is defined as a contract by which a person (settlor) transfers in favour of another (trustee) one or several assets so that these and their fruits constitute the trust patrimony, and so that said patrimony is destined to a specific purpose for the benefit of the settlor or a third party (beneficiaries). The essential requirement of validity for the constitution of the trust is that the settlor has the power to dispose of the assets and rights to be transferred.

The trust generates an autonomous patrimony different from that of the settlor, the trustee and the beneficiaries. The trustee, without being the owner of the trust property, is in charge of the administration, use, disposition and claim of its components.

In Peru, the testamentary trust is expressly regulated, which is originated by the unilateral will of the settlor, expressed in his or her will, where this trust is constituted from the opening of the succession of the deceased; and does not require the acceptance of the beneficiary or the trustee. On the other hand, recently, the so-called 'family wealth management trust' has been developing in practice, establishing certain rules for the management of family wealth, and concentrating decision-making regarding its administration and destination. This last type of trust has been especially used by family businesses.

The family wealth management trust and the testamentary trust provide specific and safe solutions in generational transition, establishing family wealth management that avoids conflicts in the decision-making process regarding the administration and destination of assets. Despite these advantages, neither of these two types of trusts are frequently used in Peru, possibly because of the high costs involved in hiring a trustee, and because, by legal provision, the function of trustee can only be entrusted to certain regulated companies and not to any natural or legal entity.

However, in Peru, two of the three legal entities whose purpose is to engage in non-profit activities are an association and foundation: an association develops an activity to achieve its purpose and a foundation affects one or more assets to a religious, cultural, welfare or social interest purpose. Both entities must be formed by two or more individuals or legal entities; a foundation can be constituted through a will. After the liquidation process of an association, its remaining assets go to the purpose established in the bylaws, but due to legal prohibition, they are not distributed among its members; while in the case of a foundation, the remaining assets are destined to another foundation with a similar purpose or to a public charity, in its absence. Neither of these entities is usually used for the administration of family assets in Peru.

B. Fiduciary duties (trustees, board members, directors, etc)

The trustee is a professional manager whose main obligation is to manage the trust patrimony without deviating from the purpose for which the trust was constituted in accordance with the provisions of the contract; for this purpose, the trustee is empowered to execute and enter into acts, contracts, operations, investments or businesses. Among the main obligations of the trustee are the following:

- to care for and administer the patrimony with the diligence and dedication of an orderly businessperson and loyal administrator;
- to defend the patrimony from all types of damages;
- to keep the inventory and respective accounting, and prepare the financial statements biannually and an annual report;
- to comply with tax obligations;
- to keep the information of the trust confidential, with the same scope as bank secrecy;
- to notify the beneficiaries of the existence of goods and services available in their favour; and return to the settlor the remainder of the trust patrimony, unless in accordance with the contract, this corresponds in favour of the beneficiaries or third parties;
- it is not authorised to guarantee in any way before the settlor or the beneficiaries the results of the trust;
- to be accountable to the settlors and the state regulatory body; and
- as already mentioned in the present section, by legal prohibition, no individual may assume the position of trustee, but only certain duly authorised legal entities may do so.

On the other hand, the administrators in foundations and the members of the board of directors of associations may be natural or juridical persons; they must conduct themselves in compliance with the functions indicated in the bylaws and are responsible for any damage they cause both before third parties and before the foundation or association itself.

C. Treatment of foreign trusts and foundations

A Peruvian individual may create trusts abroad over assets located in Peru or abroad.

Peru has not ratified the Hague Convention regarding the Law Applicable to the Trust and its recognition; the same situation occurs with the main Latin American countries. Therefore, governance in this matter is by the rules of private international law of the Peruvian Civil Code, unless there are specific treaties on the matter with the foreign country.

Therefore, as a general rule, it should be mentioned that the trust contract is governed by the law chosen by the parties. If the parties have not agreed on the applicable law, the place of performance of the contract governs; and if there are different countries where the contract is to be performed, it is governed by the law where the principal obligation is performed. If the place of performance is not determined or does not unequivocally result from the nature of the obligation, the law of the place of execution of the trust agreement governs.

However, with respect to foundations and associations incorporated abroad, they are governed by the law of the country where they were incorporated and are recognised in Peru and are entitled to exercise their actions and rights in Peru. It must be considered that because they are both foreign legal entities, they are not recognised as having a more extensive capacity than one granted by Peruvian law to national legal entities.

IV. Taxation

A. Tax residency

As provided in Articles 7 and 8 of the Income Tax Law, individuals, both national and foreign, who are not deemed to be fiscal residents in the country, are only subject to income tax on income or capital gains of a Peruvian source.

Peruvian tax residents are subject to taxes on global source income, so Peruvian residents must report earnings and assets on a worldwide basis. Foreigners residing in Peru are only subject to taxation on their domestic and foreign income after 183 days of continuous or discontinuous permanence in Peru, including the days of arrival and departure during any period of 365 consecutive calendar days.

B. Inheritance and donations in favour to individuals

Peruvian law establishes that unsettled successions are subject to income tax, and therefore income and capital gains belonging to the deceased and which are part of the succession, must be declared using the tax identification number of the deceased person until the moment of designation of the beneficiaries (declaration of heirs). Likewise, unsettled successions of deceased persons who were not resident in the country at the time of their death, who do not qualify as Peruvian tax residents, are only subject to income tax on income and capital gains of national source and with respect to the assets held in the country.

The property alienation of assets in favour to beneficiaries as a consequence of inheritances and legacies, will not be levied with income tax; nonetheless, income and capital gains related to the exploitation or sale of assets owned by the unsettled succession will be declared directly by the individuals (beneficiaries) from the moment they are designated as beneficiaries.

In the case of donations executed between individuals, the property alienation of assets will not be levied with income tax.

C. Taxes on income and capital gains over individuals, regarding investment and exploitation of assets

Income or capital gains are only taxable as long as they represent an increase in the net worth of the beneficiary. Income and gains may be earned in cash or kind, in ordinary or extraordinary activities, and be of domestic or foreign source. As mentioned, individuals who are Peruvian tax residents are subject to tax on earnings of both domestic and foreign sources. Non-residents are subject to tax only on their income of domestic source.

Income of domestic source is deemed to include earnings derived from the exploitation of both tangible and intangible assets in the country and from the provision of services in Peru, either permanently or transitorily, with or without a commercial establishment. The following, among others, also constitute income of domestic source:

- income obtained from the exploitation of real estate properties located in the country, such as rentals derived of leasing;
- the capital gains derived from sales of real estate properties within the Peruvian territory;
- interest produced by credits held in the country or economically related to it; interests derived from bank deposits are tax exempt;
- income and capital gains derived from shares, bonds and other securities issued by Peruvian entities; and
- the exploitation of trademarks and know-how used in Peru (ie, royalties) and capital gains derived from the sale of such trademarks.

In the case of Peruvian tax resident individuals, the income tax treatment is as follows:

- Income and capital gains related to the investment and exploitation of assets qualified as domestic source are levied with a flat tax rate equivalent to five per cent. This is an effective tax rate calculated considering a nominal rate equivalent to 6.25 per cent and a fixed deduction of 20 per cent.

It is important to bear in mind that if the individual carries out activities qualified as business income (ie, the sale of three real estate properties in the same fiscal year and the development of real estate projects to sale properties), the taxation applicable is the same as any Peruvian company. This means the application of the corporate tax rate equivalent to 29.5 per cent over the net income.

- Income and capital gains related to the investment and exploitation of assets qualified as foreign source (ie, dividends, interest and capital gains from abroad) are levied with accumulative and progressive tax rates equivalent to eight per cent, 14 per cent, 17 per cent, 20 per cent and 30 per cent, depending on the level of income and capital gains obtained within the fiscal year.

In the case of non-Peruvian tax resident individuals, the income tax treatment is as follows:

- Income and capital gains related to the investment and exploitation of assets qualified as domestic source are levied with tax rates equivalent to 4.99 per cent, five per cent or 30 per cent, depending on the specific kind of income:
 - interest: 4.99 per cent; this rate is applicable only if the interest is paid by a Peruvian non-related company and no tax haven is involved;
 - dividends: five per cent;
 - capital gains derived from securities sales in the Peruvian stock exchange: five per cent;
 - leasing of real estate properties and movable goods: five per cent;
 - capital gains derived from security sales outside the Peruvian stock exchange: 30 per cent; and
 - royalties: 30 per cent.
- Income and capital gains related to the investment and exploitation of assets qualified as foreign source are not taxed in Peru.

Finally, Peruvian investment funds and Peruvian trusts are passed through (not opaque) for income tax purposes; therefore, if such vehicles do not generate business income, the tax rates listed above are applicable.