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# Peru

## International Estate Planning Guide Private Client Tax Committee

Contact:

Percy Castle Alvarez-Maza

*DS Casahierro Abogados, Lima*

[pcastle@dscasahierro.pe](mailto:pcastle@dscasahierro.pe)

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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, closed will or holographic will. 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 in writing*: The testator dictates the testamentary dispositions to the notary public, who takes note of them in handwriting, or by means of computer technology or other means of a similar nature. 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 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.

The Peruvian Civil Code allows a will granted under foreign law to be valid in Peru, provided 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 (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 is always 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 settler 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 one or more persons before a notary 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 is the person in charge of enforcing the testamentary dispositions.

Thus, according to the form of their appointment, the Peruvian Civil Code establishes that executors can be testamentary (appointed by the testator), legal (appointed by law) or administrator (appointed by a court) 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 that the judge appoints 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 other 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 legal entity, which must be authorised by law or by its by-laws. It is important to point out that, according to the Peruvian Banking Law, a company in 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, 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, siblings; of the fifth order, uncles and nephews; and of the sixth order, first cousins.

The spouse or, as the case may be, the surviving member of a common-law union, inherits a part equal to that of 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 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 property', 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'). The second regime is known as the '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, community property must first be liquidated, which 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 community property from the portion of the legitimate part.

By contrast, 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 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 on the death of one of the parties, unless otherwise agreed by the parties. In fact, the rule is that on 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 defined as a contract by which a person (settler) transfers in favour of another (trustee) one or several assets so that these and their fruits constitute the trust patrimony; hence, that said patrimony is destined to a specific purpose for the benefit of the settler or a third party (beneficiaries). The essential validity requirement for the constitution of the trust is that the settler has the power to dispose of the assets and rights to be transferred.

The trust generates an autonomous patrimony different from that of the settler, trustee and 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. It is originated by the unilateral will of the settler; 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 trustee. 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 used especially by family businesses.

The family wealth management trust and testamentary trust provide specific and safe

solutions in generational transition, establishing family wealth management that avoids conflict in the decision-making process regarding the administration and destination of assets. Despite these advantages, neither of these 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 a trustee can only be entrusted to certain regulated companies and not to any natural or legal entity.

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 holds one or more assets for 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 by-laws, but due to legal prohibition, they are not distributed among its members. 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 settler the remainder of the trust patrimony, unless in accordance with the contract, this corresponds to being in favour of the beneficiaries or third parties;
- it is not authorised to guarantee the results of the trust in any way before the settler or beneficiaries;
- to be accountable to the settlers and the state regulatory body; and
- as already mentioned in the present section, by legal prohibition, no individual may assume the position of a trustee, but only certain duly authorised legal entities may do so.

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 by-laws 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 for assets located in Peru or abroad.

Peru has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition; the same situation applies to the main Latin American countries. Therefore, governance in this matter is by the rules of the 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. If the contract is to be performed in different countries, 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 Peruvian Income Tax Law, individuals, both national and foreign, who are not deemed to be tax residents in the country, are only subject to Income Tax on income or capital gains of a Peruvian source.

Both Peruvian and foreign tax residents are subject to taxes on their global source income, so they must report earnings and assets on a worldwide basis.

Foreigners will acquire tax residence after being in the country for 183 days in a continuous or discontinuous permanence in Peru, including the days of arrival and departure during any period of 12 months. The tax residency condition will remain to the extent they do not leave the country for more than 183 days within any 12-month period. Changes in the tax resident condition during the fiscal year shall enter into force as of 1 January of the following fiscal year.

In the case in which a Peruvian national loses his or her domicile status in Peru, the individual will recover it once he or she returns to the country; however, such a change of domicile shall take effect in the fiscal year following the individual's arrival in the country, unless his or her stay in the country is less than 184 calendar days within any 12-month period.

### *B. Inheritance and donations to individuals*

Peruvian law establishes that unsettled successions are as such a taxpayer and 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 his/her the tax identification number (Registro Único del Contribuyente or RUC) until the moment the beneficiaries are designated (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 from a Peruvian source and with respect to the assets held in the country.

The property alienation of assets in favour of beneficiaries, as a consequence of inheritances and legacies, is not 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) as from the moment they are designated as beneficiaries.

### *C. Wealth and real estate taxes*

There are no inheritance or wealth taxes in Peru, but real estate is subject to tax levied by local government based on the value of urban and rural property, with progressive rates, between 0.2 per cent and one per cent.

In addition, the transfer of real estate is subject to a three per cent property transfer tax on the purchase price or on its municipality value, whichever is higher, with the first ten tax units being exempt (Unidad Impositiva Tributaria or UIT, which is a monetary measurement amount represented in local currency and established by the government at the beginning of each year following inflation and other calculations – today, approximately \$1,300 per unit – that tends to increase every year). It is assessed by local government and must be paid by the acquirer. This tax is not applicable in the case of transference caused by the foretaste of the inheritance.

### *D. Taxes on income and capital gains over individuals, regarding the investment and exploitation of assets*

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 domestic source income. Income and gains may be earned in cash or kind, in ordinary or extraordinary activities. Income from a 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 from a domestic source regarding the place of investment and exploitation of the assets:

- income obtained from the exploitation of real estate property located in the country, such as rentals derived from leases;
- capital gains derived from the sale of real estate property within the Peruvian territory; and
- interest produced by credits held in the country or economically related to it; interest derived from bank savings and other types of bank deposits are tax exempt.

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 being from a 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 individual income coming from activities that qualify as a business is taxable in the same manner as any Peruvian company income. This means that it is subject to the 29.5 per cent corporate tax rate over net income. Such a case should be analysed on a case-by-case basis, taking into account the nature, characteristics, amount, frequency, volume and/or periodicity of the transactions in order to determine their purpose, with the exemption of capital gains coming from real estate, where the law states that such corporate treatment will apply to capital gains obtained from the sale

of a third of properties made in the same fiscal year; and

- income and capital gains related to the investment and exploitation of assets qualified as being from a 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 being from a domestic source are levied with tax rates equivalent to 4.99 per cent, five per cent or 30 per cent, depending on the specific type of income:
  - interest: 4.99 per cent; this rate is applicable only if the interest is paid by a Peruvian non-related company where no tax haven is involved and only to a specific cap rate – any excess will be subject to 30 per cent;
  - dividends: five per cent;
  - capital gains derived from securities sales at the Peruvian stock exchange: five per cent;
  - lease of real estate property and movable goods: five per cent;
  - capital gains derived from the sale of securities outside the Peruvian stock exchange: 30 per cent;
  - royalties: 30 per cent; and
  - other capital income not mentioned above: 30 per cent; and
- foreign source income and capital gains 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.

Foreign foundations, trust and similar vehicles are not expressly recognised in Peru. Nonetheless, they are subject to the Peruvian Controlled Foreign Company Regime, through which resident individuals may be subject to income tax on certain types of passive income obtained by non-resident entities (ie dividends, interest, royalties, capital gains and leases) even though it does not distribute dividends. This regime is applicable when the following conditions are met:

- the resident individual has a participation (direct or indirect) in more than 50 per cent in the results of the non-domiciled entity;
- the non-domiciled entity is incorporated in a tax haven or low tax territory or a country where the passive income is subject to income tax at a rate equal to, or lower than, 75 per cent of the applicable rate in Peru; and
- the non-domiciled entity is a legal person or entity other than the taxpayer.

Finally, Peru has entered into double taxation treaties with Brazil, Canada, Chile, South Korea, Mexico, Portugal, Switzerland and Japan (Organisation for Economic Co-operation and Development Model Tax Convention), which aim to eliminate double taxation or reduce withholding rates on certain income at source (ie dividends, interest, royalties and capital gains). Furthermore, Peru has a multilateral agreement with the

Andean Community (Bolivia, Colombia, Ecuador and Peru). According to this agreement, the first right to tax is given to the source country.

*E. Ultimate beneficial ownership affidavit*

Peruvian companies and other legal entities, such as Peruvian funds and trusts, foreign trusts, or trusts with Peruvian trustees or protectors, are forced to identify and obtain updated information regarding their ultimate beneficial owner (UBO), and inform the tax administration. An individual is deemed to be a UBO if:

- he/she holds, directly or indirectly, at a minimum, ten per cent of an entity's equity; or
- not being a shareholder, he/she exercises control of financial, operational or commercial decisions, or has the power to appoint or remove most of the administrative, management or supervisory bodies; or
- if no person qualifies as the UBO based on these two criteria, the person who occupies the highest administrative position in the legal entity will be reported as such.