

Decipher the Code

How trust and estate practitioners will be affected by the changes in Argentina's new Civil and Commercial Code

By Javier Canosa

Abstract

- The Argentine *Civil and Commercial Code* (CCC) came into force on 1 August 2015.
- The CCC amends the Argentine trust law (*Law No.24,441*). Under the CCC, the entirety of an individual or company's assets may be held in trust. The trustee may also be a trust beneficiary.
- Under the CCC, future spouses can now opt, by entering into marriage conventions, between a shared property regime and a separate property regime.
- The CCC also modifies the forced-heirship portions: the reserved portion for descendants has changed from four-fifths to two-thirds, and for ascendants from two-thirds to one-half. The surviving spouse's reserved portion remains half.
- As for business entities, one-man corporations (SA) have been introduced. The CCC provides, too, that resolutions of the board or shareholders may be adopted by electronic means (e.g. videoconference). Such resolutions need the consent of all relevant members.

Argentina's new *Civil and Commercial Code* (CCC), enacted in October 2014, came into force on 1 August 2015. It was initially intended to come into effect on 1 January 2016, but another law, of December 2014, expedited the application of the CCC. Argentina's two pillars of legislation, the *Civil Code* and the *Commercial Code*, which had been in force for over 150 years, were completely changed and amended in less than ten months.

The CCC introduces many amendments that may affect our clients.

AMENDMENTS TO TRUST REGULATIONS

The CCC amends the Argentine trust law (*Law No.24,441*) (the Trust Law). Trusts are now regulated in chapter 30 of the CCC, which incorporates the suggestions of legal scholars and case law with respect to certain issues of interpretation and application of trust law. The

main changes to trust law provided for in the CCC relate to: property that may be held in trust; the duty to insure trust property risks; trustees; and trust-backed obligations.

Property that may be held in trust

Pursuant to s1670 of the CCC, the entirety of an individual or company’s assets may be held in trust. However, future inheritances cannot be held in trust. Moreover, interests in secured property cannot be assigned without their secured credit, and, therefore, they cannot be held in trust.

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Section 2186 of the CCC provides that ‘... interest in secured property is accessory to the secured obligation. It is not transferable without the secured obligation, and is terminated with the secured obligation, except when established by law...’

Duty to insure trust property risks

Section 1685 of the CCC provides that ‘notwithstanding [the trustee’s] responsibility, the trustee has a duty to purchase insurance against civil liability to cover damage caused by the trust property’.

Furthermore, s1685 provides that, whenever the trustee fails to purchase insurance or when the insurance coverage proves insufficient with respect to risk or amount, the trustee is responsible under the terms of s1757. Therefore, in this case, the trustee is strictly liable for the damage caused by the risk or defect of the assets held in trust.

Trustee may also be a beneficiary

Although the Trust Law did not expressly establish a prohibition on the trustee being a trust beneficiary, most scholars believed this prohibition was implied.

Now, under s1673 of the CCC, it is expressly established that the trustee can also be a trust beneficiary. In such cases, however, the trustee must avoid any conflict of interests and must act for the benefit of the other parties to the trust agreement. Section 1672 of the CCC provides that the trustee cannot be a remainder beneficiary (*fideicomisario*).

Trust-backed obligations: guarantee trust (*fideicomiso en garantía*)

Section 1680 of the CCC introduces the definition of the guarantee trust, or *fideicomiso en garantía*, which allows for trust-backed obligations; if a specified obligation is backed by a trust, the trustee may apply the sums of money constituting the trust property, including sums of money coming from judicial or extrajudicial recovery of claims or rights in trusts, to the payment of the secured obligation.

Example

Ana, an Argentine woman, has decided to create a trust to be administered by Esteban, her son. Now, under the CCC, Esteban may be also the trust beneficiary. Esteban, in his capacity as trustee, will have the duty to purchase insurance so that he is not be liable for any damage caused by the assets held in trust. Such assets may consist of all Ana’s assets, as well as any interest in secured property, with its secured obligation.

AMENDMENTS TO THE MATRIMONIAL PROPERTY REGIME

Title 3 of the CCC refers to the matrimonial property regime; chapter I refers to the general provisions of the matrimonial property regime, and s1 deals with matrimonial conventions, a whole new concept under Argentine law.

The main amendment is that, based on the principle of free will, future spouses can now opt, by entering into marriage conventions, between a shared property regime and a separate property regime.

Section 463 of the CCC establishes that, in the event that no convention is made or the convention does not set forth any provision regarding the property regime, the traditional shared property regime will apply.¹

1. Section 463

The former *Civil Code*, in force until 1 August 2015, characterised the matrimonial property regime as the formation of a mass of goods that, on termination of marriage, would be shared between the spouses. In this case, each spouse would have a common expectation as to the acquired goods. The former *Civil Code* provided a legal, imperative and immutable regime. Prenuptial conventions were allowed only in the situations set out in the *Civil Code*, which did not include the right to opt for a particular regime.

In accordance with s446 of the CCC, conventions may be created for the purpose of the following:

- designation and appraisal of the goods that each of the future spouses brings to the marriage,
- admission of debts,
- donations made between each other, and,
- choosing one of the matrimonial property regimes contemplated in the CCC.

For future spouses to enter into marriage conventions, certain requirements must be met. In this respect, s448 of the CCC provides that, in order for the conventions to be valid, they must be executed by a notarially recorded instrument (*escritura pública*). Moreover, for the conventions to be effective vis-à-vis third parties, the marriage certificate must include a note in the margin specifying the regime chosen.

In the event that the spouses decide to change the regime, the amendment must also be made by convention and by a notarially recorded instrument. In addition, the spouses must have been married for at least one year.² In the event that there are creditors affected by this change, they will have one year to object from the date they became aware of the change.

Shared property regime

Notwithstanding some changes, the new regime of shared property is still characterised by the distinction between personal assets and shared property. Each spouse is not entitled to receive any personal assets belonging to the other spouse on dissolution of the marital partnership. On the other hand, shared property must be shared, because it is presumed that the acquisition of the assets was carried out jointly. Each spouse is liable to their creditors with their own assets and the

shared property acquired by them. In addition, each spouse is liable for the cost of maintenance and repair of shared property.

Section 464 of the CCC sets forth a list of personal assets, including assets that each spouse owns at the moment the marriage is solemnised, and assets acquired after marriage, whether by inheritance, legacy or gift. If such assets were jointly acquired, they will be deemed personal assets in equal proportion. This is why it is important to specify in the marital agreements which assets each spouse contributes to the marriage.

As a general rule, all assets that are not personal will be shared. Section 465 of the CCC establishes a list of shared property, including assets acquired as a result of lottery winnings, proceeds resulting from the profession of each spouse, and assets acquired after marriage if the right to them vested prior to divorce.

Each spouse is entitled to manage and dispose of their personal assets. The management and disposal of shared property, however, belongs to the spouse that acquired that property. The exception to this rule is when the consent of the other spouse is given for transferring or taking out mortgages on recorded shared property, shares of stock or businesses.

Separate property regime

The main amendment under the CCC concerns the regime of separate property. Under this regime, the spouses maintain the full management and disposal of their personal assets, and each of them is liable only for the debts each incurs, except those incurred by one of the spouses to pay for ordinary household needs, or the maintenance and education of their children.³ Only in these cases are the spouses jointly liable. The regime terminates on dissolution of marriage or by modifying the regime agreed between the spouses. Once the marriage is dissolved, the undivided property will be divided in accordance with the provisions regarding inheritance set forth in the CCC.

Provisions common to both regimes

Notwithstanding the differences between the two regimes, they have several provisions in common,

2. Section 449

3. Section 461

such as the duty of contribution and support between spouses, household and common children; the need for spousal consent to dispose of the rights related to family housing; mandates between spouses to represent each other; and legal representation when one spouse is absent or unable to express their will.

Moreover, it should be noted that the termination of the shared property or the separate property regime will result from the dissolution of the marriage, or by modifying the regime agreed between the spouses.

Example

An Argentine married couple, Juan and María, get divorced. Their assets would, historically, have been shared between them. This means that, if, for example, María bought a car during the marriage, it would belong to María and Juan, in which case, on divorce, agreements must be made in order to divide the shared property. Now, under the CCC, Juan and Maria can opt, when entering into and also during the marriage, between a shared property regime and a separate property regime. In this case, the couple may enter into a marriage convention agreeing to be subject to a separate property regime. Taking the above example, Maria's car would belong to only her during and after marriage.

AMENDMENTS TO FORCED-HEIRSHIP RULES

The CCC, through book V, title X, introduces amendments to the forced-heirship rules. In Argentina, there are two systems of inheritance: a system that provides that the heirs will be those designated by the testator in a will, and a system that provides that the heirs will be those established by law, regardless of any will.

As a result of the combination of these two systems, there are three types of heirs in Argentina:

- forced heirs (descendants, surviving spouse and ascendants);
- non-forced heirs (brothers, sisters, nephews, uncles, aunts and cousins); and,
- testamentary heirs.

The forced-heirship portion is a portion of the estate that law reserves for certain heirs. In consequence, pursuant to s2444 of the CCC, descendants, ascendants and the surviving spouse

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have a reserved portion in the deceased estate of which they cannot be deprived either by will or by any free *inter vivos* act (gifts).

The forced heirs hold possession of the assets of the estate from the moment the decedent dies.⁴ This means that, on the death of the decedent, the forced heirs have all rights and shares of the decedent in an undivided way, except those that cannot be inherited.

The remaining heirs, either established by will or established by law, such as brothers, sisters, uncles, aunts, nephews and cousins, cannot possess the assets of the estate without the intervention of a judge, before whom they must demonstrate the death of the owner of the assets and their right to inherit.

Proceedings

The forced heir is entitled to initiate legal proceedings to receive their forced portion, pursuant to s2450. These proceedings may also be initiated when the decedent has left no assets on their death but has made gifts during their lifetime. Section 2451 governs the supplementary action by means of which a forced heir who was given less than their forced portion is entitled to recoup the shortfall. In accordance with the above-mentioned provisions, sections 2452 and 2453 set forth the process for the abatement of gifts and legacies, in order to receive or supplement their portions.

Forced portions

The CCC modifies the reserved portions as follows:

- for descendants, the forced portion changes from four-fifths to two-thirds;
- for ascendants from two-thirds to a half; and
- the surviving spouse maintains their reserved portion of a half.⁵

4. Section 2280

5. Section 2445

The portions are calculated by taking into account the sum of the liquid value of the estate at the time of the decedent's death and the gifts provided for each of the forced heirs at the time the gift was made.

For the calculation of the portion corresponding to each descendant, only claimed gifts which were made 300 days prior to their birth, or the birth of the ascendant whom they represent, will be taken into account. With regard to the surviving spouse, gifts made after marriage are taken into account.⁶

Pursuant to s2446, if there are only descendants or ascendants, the portion available will be calculated in accordance with the applicable reserved portions. If there are heirs with different forced portions, the portion available will be calculated in accordance with the greater reserved portion.

Improvement

The CCC introduces the concept of improvement, which allows the decedent to reduce the reserved portion in order to increase provision for disabled heirs, whether they are descendants or ascendants.⁷ The decedent can dispose, by the means they find appropriate, even by a trust, in addition to the available portion, one-third of the reserved portion.

OTHER AMENDMENTS

The CCC introduces the process of bidding, under which any heir is entitled to bid for any of the estate's assets. The heir's bid must be greater than that of the asset's appraisal, and will be successful provided that co-participants do not outbid.⁸

Furthermore, s2493 of the CCC regulates testamentary trusts, although the rights of the forced heirs in the reserved portion must be considered. Notwithstanding this, s1670 expressly prohibits the creation of trusts over future inheritance.

AMENDMENTS TO THE CORPORATE LAW REGIME

Regulations of the CCC affecting companies

Section 143 of the CCC establishes that the personality of legal entities is different from that of its members but, at the same time, the CCC

provides for an extensive version of the doctrine of piercing the corporate veil. In this sense, s144 establishes that, whenever the entity is used for the pursuit of goals different from those of the legal entity, those acts shall be attributed to partners, associates, members or controllers (direct or indirect), who shall be jointly and severally liable for the damage caused by the entity. This is also applicable whenever the purpose of the entity is to infringe the law or public order. I believe the wording of s144 of the CCC is too broad, paving the way for innumerable claims for extended liability against persons who may have had nothing to do with an entity's operations.

The CCC classifies entities as either public or private. Public entities are the federal state, the provinces, the city of Buenos Aires, the municipalities, autarchic entities, foreign states, organisations created by public international law and the catholic church. Private entities include companies, civil associations, simple associations, foundations, churches, communities or religious entities, mutual entities, cooperatives, and building consortiums (a creation of the CCC).

As to the functioning of the so-called private entities – for our purposes, private companies – the CCC provides that:

- Amendments to the by-laws can be carried out as provided in the by-laws or in law. Such amendments are only valid (and have effect) as from the execution of such amendments and not as from the registration of such amendments.
- By-laws must include rules on governance, administration and representation of entities. In the absence of such rules, the following will apply:
 - The CCC provides that resolutions (of the board or shareholders) may be adopted by electronic means (videoconference, phone, etc). All relevant members must consent. The minutes must be signed by the president and another administrator, explain how the resolution was adopted and maintain a record of the resolution.
 - Self-convened shareholder meetings are permitted (the CCC refers to members of the council – it is unclear if this is

6. Section 2445

7. Section 2448 provides a definition of a disabled person

8. Section 2372

also applicable to the board of directors), provided that the resolution is unanimous and all the relevant members are present.

- Section 159 provides for the fiduciary duties of directors and members of the entity.
- The liability of the administrators is unlimited, joint and several vis-à-vis the entity, its members and third parties for the damages caused by fault (not wilful misconduct), by action or omission.
- When there are obstacles preventing the entity from making decisions, the president or any of the co-administrators can perform conservatory acts. There should be a partners' meeting within ten days from the execution of such acts.
- Mergers and spin-offs require the unanimous consent of all the members of the entity, unless the by-laws provide otherwise.

Amendments to corporate law

The law that enacts the CCC (*Law No.26,994*) also amends a number of other laws, including the Argentine corporate law (*Law No.19,550*) (the Corporate Law).

The main introduction into the Corporate Law is the corporation (*sociedad anónima* (SA)) of only one member. Section 1 of the Corporate Law provides that there will be a company when one or more persons, according to the corporate types provided for in the Corporate Law, are obliged to contribute in order to produce goods or services, participate in the profits and contribute to the losses.

The one-man corporation will only be applicable to corporations; a one-man corporation cannot have another one-man corporation as a member.

The main differences between the other corporate types and the one-man corporation are as follows:

- the capital must be fully paid in when incorporating the company (other companies only require 25 per cent of the capital to be paid in when incorporating); and,
- the one-man corporation must have a board of at least three independent auditors (who must be accountants, lawyers or companies whose members are accountants or lawyers).

In connection with liabilities, the Corporate Law⁹ provides that the partners of a business entity are liable vis-à-vis third parties equally

and proportionately unless joint liability stems from:

- a specific stipulation of joint liability with respect to one or several relationships;
- a specific stipulation in the by-laws; or
- the common rules of the corporate type chosen and in respect of which certain formal or fundamental requirements were not complied with.

In connection with the governance, administration and representation of companies, s23 provides that any of the members of a company can represent the company vis-à-vis third parties.

In order to purchase registered assets (real estate, trademarks, planes, vehicles, ships, etc), the company will have to prove its existence and the powers of its representatives must be agreed by all the members of the relevant company.

Example

Pedro has the possibility of constituting a one-man corporation. This means that, on the one hand, he will have to bear the burden of any losses or liabilities incurred by the corporation, but, on the other, he will own the entire business and receive all the profits.

Amendments to the Public Registry of Commerce

The CCC and the Corporate Law refer now to the Public Registry (PR), as opposed to the former Public Registry of Commerce.

On 31 July 2015, the PR published its new *Resolution 7/2015* (the Resolution). The Resolution is a comprehensive text that regulates all the procedures that are carried out by the PR and includes all prior individual regulations of the PR. The Resolution (and the new registration system) came into effect on 2 November 2015; however, certain regulations have been applicable since 3 August 2015, such as:

- those relating to registration of trust agreements;
- those relating to one-man corporations;
- the cure procedure for companies not duly incorporated; and
- the general system for incorporation, functioning, withdrawal of registration, dissolution, and winding-up of civil associations and foundations.

⁹ Section 24 of the Corporate Law

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CONCLUSION

Argentine practitioners have many changes to digest in a short period of time. The new CCC is quite different to the old *Civil Code* and *Commercial Code*. The legislative technique is also quite different; the former codes had notes explaining the rationale under each article.

Many of the amendments are, however, welcome. With regard to trusts, the amendments introduced by the CCC have maintained the systematisation and text of the current Trust Law.

The amendments to the marriage property regime give individuals greater freedom to manage and dispose of property. Spouses-to-be may choose between two different property regimes, with different consequences. The CCC allows future spouses to protect their personal property by keeping it away from the marital partnership.

The forced portions established by the previous *Civil Code* were considered excessive; the new CCC gives more freedom to individuals.

Finally, corporate-wise, I welcome the possibility of holding board meetings by electronic means. It is odd that the requirement to have a majority of members of the board resident was maintained, since members of the board can now make decisions about the company electronically, far from the corporate domicile. The other major improvement is the one-man corporation but, in my opinion, this will be rarely used as it is a more expensive burden for directors and shareholders.

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