Andorran Trusts – A Brief Introduction

by Neil D Futerfas Esq

Attorney and Counselor at Law,

White Plains, New York

He is the author for the entry on Andorra and acted as co-author for the entries on the United States and The Hague Convention in International Trust Law and Analysis (Warren, Gorham & Lament, 1966) and in this article looks at the little known trust laws of Andorra

Andorra, the tiny principality situated in the Pyrenees, has recently gained increasing international prominence. Previously administered through co-Princes which were based in its two large neighbors, France and Spain, in 1993 it adopted its first constitution - which calls for a parliament and a Prime Minister appointed by tbe General Council - and it is steadily emerging into full independence. While not a full EC member, the Principality is a member of the EC customs union and has, within the past three years, established a Mission at the United Nations which also acts as its Embassy in the United States and Canada.

". . . the fideicomis ... is a vehicle, also found in a few other civil law jurisdictions ..."

Andorra's legal system features a somewhat unique trust framework, which may generally be subsumed under the label *fideicomis,* or 'testamentary trust' in common-law parlance. In the most general terms, the *fideicomis*[1] *is* a vehicle, also found in a few other civil law jurisdictions, whereby one transfers property as a gift to another who is to act as nominal owner with instructions to transfer the asset to a third party. Panama and Costa Rica are examples of other jurisdictions employing a variety of the *fideicomis* as a principal trust device. Andorra also employs family foundations, fiduciary gifts and other quasi-trust devices, the legal framework for which, as with the fideicomis, has to a large extent not been codified, as treaties by revered scholars still constitute an important source of trust jurisprudence[2].

"... French and Spanish law have no force in the Principality."

French and Spanish law have no force in the Principality[3].

The *fideicomis* compared to the common-law trust;.

The Andorran *fideicomis* has something in common with the Anglo-Saxon trust, but really is much different.

One important difference which the practitioner must note has already been touched upon, namely, while the common law trust is generally formed under, and/or is fairly strictly regulated by a statute or decisional law[4], Andorra, until very recently, relied mostly on the revered treaties and customary law as practiced and handed down over the centuries. Thus, in terms strictly of certainty of planning or advising as to the likely outcome of a given dispute, it may be that the common law jurisdiction would provide the surer answer,

LEGAL ORIGINS

The roots of the *fideicomis,* as with most Andorran law, go back to "customary" law (with roots in the 12th century) and Catalan law, as well as Roman and canonical traditions which have been employed and modified over the centuries. As stated, it is very largely the revered compendia of hallowed tradition and ancient practice and custom which guide those seeking answers today to questions regarding the Andorran trust.

The decrees of the co-Princes and legislature are, in effect. the country's legislation; yet, in the absence of an official reporter of laws and with no mandated statutory publication, following the applicable legislation can be difficult. Also, determining the precedence of applicable legislation presents challenges as the "latest-in-time" rule is not followed.

Age-old Catalan custom is important in the development and application of family-law jurisprudence in Andorra. Perhaps surprisingly, though, it must be said, in terms of the codification of statute and the compilation of case law, the Andorran authorities are making large strides[5].

"An Andorran trust is generally formed through testamentary designation ..."

An Andorran trust is generally formed through testamentary designation of a person or entity as trustee or "trustee heir". Interestingly, under traditional practice, the trustee heir often appears to outsiders as simply another heir, while he/she is actually performing the quite sensitive role accorded himlher under Andorran law. The duties and obligations of such a position are permitted to be relayed to the trustee orally, though most often, and the recommended fashion, is to have formal documents drawn up. In contrast, the predominant common law tradition is that both establishment and management of a trust are accomplished through formal written documents, though conduct implying a trust can obviously suffice to support its creation, (and early on an individual's dying wishes could support distribution of assets in accordance with such wishes).

An Andorran *fideicomis* is generally presumed to be revocable while the donor is alive (this is not the case with the Andorran family foundation, which is irrevocable); this is in contrast with what is arguably the predominant common law rule, namely, that the trust is irrevocable unless the settler retains the power in the trust instrument to revoke it.

An Andorran trust settler employing the traditional trust will generally not be a beneficiary, since the *fideicomis* has as its principal object post-mortem dispositions[6] in contrast, in most other jurisdiction the settler can clearly enjoy the status of a beneficiary.

"Andorra employs a unique generational tracking system ..."

With respect to the applicable perpetuities period, Andorra employs a unique generational tracking system according to which the trust may exist for up to four generations of descendants, with the fourth generation being free to dispose of remaining trust assets, In terms of *inter vivos* fiduciary gifts, some local authorities set the limit at 30 years; a recommended approach, whenever possible, is to establish clearly the trust's term so that perpetuities issues are sidestepped. By way of contrast, under many common law regimes, the perpetuities period is set at a life in being plus a number of years (most often 21), or a set number of years[7], or an indefinite period[8], or in a variety of different ways,

There are a number of other relevant and fascinating comparisons and distinctions to be made between Andorran and common law trust regimes, and the reader is urged to explore these in the relevant professional publications (see International Trust Law and Analysis).

"There are any number of reasons why one seeking to establish a trust might choose Andorra ..."

WHY ANDORRA?

There are any number of reasons why someone seeking to establish a trust might choose Andorra - but obviously the final determination must be made only after a very careful and diligent examination of the particular wishes, needs and circumstances of the individual settler(s), and the specific benefits and drawbacks which Andorra and other potential sites offer. Clearly, consultation with a competent lawyer, accountant and trust specialist is an absolute prerequisite to making any determination with respect to any projected disposition of assets. A few major points will be set forth:

"... no governmental taxes on private trusts."

- No individual, income, gift or inheritance tax is imposed on Andorran residents or foreigners residing in the Principality. If very careful planning precedes any activity trust transactions can potentially be non-taxable events locally.
- No minimum capital requirement applies as to heirship trusts or the other quasi-trust devices. A significant minimum capital is required for Joint Stock Companies but no minimum capital is required for Limited Liability Companies.
- Generally speaking there is no local residency requirement for trust settlers.
- Registration is not compulsory for non-corporate trusts [10]. As a general rule, names of beneficiaries do not appear in public records.
- If the wishes of the testator/settler are being adhered to, there are no limits to accumulation of trust income[11].
- Trust beneficiaries are not required to be Andorran resident or nationals.
- The *fideicomes* as administered in Andorra is among the more confidential of such regimes[12].
- There are no governmental taxes on private trusts. Governmental fees on corporate trusts range from about US$ 500 to US$ 1000.

CONCLUSION

With competent professional guidance and careful planing, Andorra can provide an interesting situs for establishment of a trust,

Notes

1 For an explanation of related terms, see Black's Law Dictionary (West Publishing, 5th Ed.,1979).

2 See, for an important example, the translation into English of Antonio M Borrell i Soler, Dret Civil Vigente a Catalunya (1923) in International Trust Law and Analysis (Warren, Gorham & Lament, 1996)

3 Parties can agree otherwise; in some cases French or Spanish law may apply through direct reference.

4 For example, the United Kingdom has enacted nearly twenty statutes having various degrees of applicability, ranging from the Statute of Elizabeth in 1570 to very recent comprehensive legislation.

5 Caveat: United Kingdom and United States law on the sensitive and central issue of the circumstances under which trust assets may be exposed to creditors of the settler is ever-developing and changing , and in directions not necessarily clear. In the Principality, a transfer can be voided if fraudulently made. And a gifting is voidable if, within 18 months of the final payment with respect to it, the settler declares bankruptcy.

6 Quasi-exceptions; trust terms may permit the trustee heir to benefit, and a settler can employ "fiduciary gifting" or, more rarely, a family foundation, to benefit from trust assets during his/her lifetime.

7 In the United Kingdom, up to 80 years

8 Example: Nauru

9 Also, corporate-form trust devices must abide by Andorra's foreign participation rules, as these have been amended in recent legislation.

10 Corporations must register in the Company Registry.

11 Clearly, other jurisdictions' laws may affect the advisability of, and the scope of, permissible trust accumulation in the Principality. Consultation with competent counsel is essential.

12 However, if real property is registered, the trust or fiduciary will be identified. Violations by certain professional of client confidences can result in jail sentences of up to three years. Bank employees face even stiffer criminal sanctions for confidentiality violations.

Neal D. Futerfas
Attorney-at-Law
50 Main Street - Ste. 1000
White Plains, NY 10606

Tel:
+1 914 682 2171

Fax:
+1 914 428 0963

Discretionary Acts of Trustees not subject to Natural Justice

Case Note 3

What is natural justice and how, if at all, does it apply to discretionary acts of trustees? These questions were answered in a New Zealand case on the exercise of the discretion of trustees of a superannuation fund.

The superannuation trust of a company provided for the full payment of a pension where a pensioner resigned from the company before the age of 60 if the resignation was due to retrenchment. A lower payment was due, with discretion by the trustees to make extra payments up to the maximum, if the termination of employment was for any other reason.

A former employee, S, of the defendant company had worked in various management positions since 1977 with no written contract. After nearly 20 years S had been asked to resign for performance reasons, but was offered four months salary and superannuation. After he had left the company S brought proceedings against the trustees of the superannuation scheme claiming that he was entitled to a full superannuation as there had been retrenchment and that the trustees had been in breach of natural justice for failing to properly investigate his dismissal or to provide him with an Opportunity to present his case.

The plaintiff claimed that because of these failures he had been deprived of his full entitlement.

Much of the case was concerned with industrial law and the legality of the dismissal but an important point was presented on behalf of the plaintiff which concerned the conduct of the trustees of the superannuation scheme.

Counsel for S submitted that the trustees of superannuation trusts have duties which go beyond the duties of trustees of traditional trusts. Trastees of superannuation schemes, when faced with an enquiry by beneficiaries, should consider the questions raised in a real and genuine manner. Reasons for their decisions should be given. The trustees, when approached by S, expressed concern with the circumstances under which his employment had been terminated but merely sought information from the company and did not refer the resulting letter from the company to S. The trustees simply acted upon the information received.

After dealing with some pleading points the judge, Mr Justice McGechan, said he was not inclined to view trustees of superannuation trusts as in some unique trustee category with unique duties,

In a previous New Zealand case, ***re UEB Industries Ltd Pension Plan*** 19921 NZLR 294 (CA), Cooke P supported a practical and purposive interpretation of a superannuation trust deed, bearing in mind that the beneficiaries are not volunteers but have beneficial rights with contractual and commercial origins. The benefits under these trusts have been "earned" and are intended to make employment more attractive. These factors carry over into any evaluation of the discharge of their duties by superannuation trustees.

The question pleaded by the plaintiffs was whether the trustees should observe rules of natural justice. The judge thought not. The requirement to observe natural justice, including an obligation to hear both sides, usually arises in the context of the exercise of statutory power or in the private law context of breach of contractual implied terms connected with membership of organisations.

The courts are not bound by rigid categories. Some cases demand natural justice with procedural fairness outside a statutory or contractual basis but the judge found it difficult to find, in the context of the exercise of a discretion, the need for natural justice to be shown by a trustee based upon a trust deed. The indications were to the contrary.

For example, in the absence of bad faith and provided the exercise falls within the boundaries of the powers conferred, the courts will not compel, exercise or interfere with the exercise of a trustee's discretion. The judge quoted this principle as expressed in the standard works on trusts to support this view.

The highest at which intervention can be put is where a trustee has taken into account irrelevant considerations or failed to take into account relevant ones. Otherwise, where a trustee acts in good faith, the court should not interfere with his actions (re ***Hastings-Bass (deceased)*** (1974) 2 All ER 193).

The onus of proof of bad faith which will justify interference lies on the parties so alleging. There is no general obligation on trustees to give reasons for the exercise of their discretionary powers (re ***Londonderry's Settlement*** (1964) ***3*** All ER 855).

Where there is, as in this case, a *prima facie* disinclination to interfere with the exercise of discretion, a primary presumption of good faith and where there is no obligation to give reasons, it seems unlikely the law would recognise some special obligation to observe natural justice. The idea is unnecessary. Any question relating to bias is covered by the trustees' recognised duties of impartiality and the avoidance of personal profits. The discretion of trustees to hear conflicting contentions is covered by trustees' traditional duty of diligence which, in appropriate cases, can encompass the duty to make enquiries. If the trustees had to comply with the roles of natural justice it would add new terrors and costs each time a discretionary termination was undertaken. If the trustee had to call for potential beneficiaries with conflicting interests, to submit their views and allow time for replies and hold hearings, where would it stop?

The trustee need do no more than discharge the recognised duties of impartiality and diligence. Of the facts of the case the judge decided that the claim against the superannuation trustees based upon breach of natural justice or, indeed, even as a simple breach of trustees' duties of diligence, could not succeed.

Stuart v Armourguard Security Ltd,
1996 lNZLR.

John Goldsworth
Editor