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Trust and comfort

A look at how the island of Curacao is attracting new clients to its shores.

Curacao, an autonomous territory of the Kingdom of the Netherlands, has been an international financial centre since the Second World War, when it provided a good emigration destination for Dutch companies during the German occupation of the Netherlands. Since then, the Curacao government has consistently encouraged international holding, finance, licensing and property companies, as well as mutual funds and offshore banking. As part of this effort, on 12 October 2011, the parliament of Curacao approved legislation introducing the trust vehicle, which joins the private foundation, in the hope of gaining common-law-based clients who value a vehicle they feel comfortable with.

Legal features

In principle, the Curacao civil-law jurisdiction does not recognise the concept of legal separation of assets as known in common-law jurisdictions. Under Curacao laws, all assets owned by an individual or entity are subject to legal redress by creditors who have equal rights to such redress. Contrary to this standard, the Curacao trust laws recognise the legal separation of assets by providing that the trustee is 'legally entitled' to the trust assets, which do not form part of the trustee's own assets. This implies that the trustee's private creditors do not have any redress rights to the trust assets and that the trust assets can never be part of the trustee's insolvency, bankruptcy, estate or community of goods. The Curacao trust is legally considered a specific agreement and not a corporation or entity.

The trust must be established by notarial deed before a notary in Curacao. This condition also applies to amending or revoking the trust deed at a later date. All trust deeds must be registered with the chamber of commerce in Curacao, so at all times the trustee's powers can be verified by third parties. These powers are legally considered to be known to the general public. This is especially important when the trust deed provides for restrictions or limitations of the trustee's powers and when the trustee enters into transactions with third parties regarding the trust assets. It is mandatory that the deed contains the purpose of the trust, a description of its assets, and the names of the beneficiary and trustee.

There must be a trustee located in Curacao all the time. Both individuals and legal entities (e.g. trust companies) can act as trustee, as can the settlor. The trustee can also be one of the beneficiaries of the trust, but never the sole beneficiary, and they must not act as protector. Unless the trust deed provides for restrictions or limitations, the trustee has full powers regarding the trust assets. They are obliged to maintain a separate bookkeeping record accounting for asset management on an annual basis and when the trust is terminated. The law has set the annual remuneration for the trustee at 5 per cent of the net income of the trust assets with a minimum of ANG1,000 (USD561) per year.

Curacao now offers its own fiscally friendly version of the common-law trust

The settlor can designate themselves as beneficiary and individuals who are not yet born and legal entities that are not yet established can be named as beneficiaries to the trust, provided they are sufficiently defined. The beneficiary is entitled to the annual net income of the trust. Appointing a protector, though optional, must be by trust deed, which implies that they cannot be appointed by the trustee. The protector cannot act as trustee. They may be a, but not the sole, beneficiary. Individuals, as well as legal entities, can act as protector.

The trust will be terminated if the trust deed contains a dissolution clause that is met or a limited term that expires, the trust assets evaporate, there are no trustees left, the sole trustee becomes also the sole beneficiary or the trust is dissolved by a court order following request of the justice department.

Tax features

The existing tax regime that applies to the Curacao foundation, *stichting particulier fonds*, has been roughly adopted for the trust. The general rule says that a trust is a fiscal resident of Curacao in any of the following situations: the trust is established according to Curacao laws, the trust is effectively managed in Curacao, or the trust has one sole trustee who is a resident of Curacao or a legal entity established in Curacao.

When a trust is considered a fiscal resident of Curacao, it is not subject to Curacao profit tax provided it does not conduct a business. However, the Curacao trust can elect to be taxed as a taxable foundation – each time for a period of three years – in which case it will be subject to Curacao profit tax at a flat rate of 10 per cent. This option can be useful when, for example, from a foreign tax perspective it is preferred or required that the Curacao trust is subject to a profit tax to enjoy a tax exemption elsewhere, such as participation exemption.

For the purposes of the Curacao personal income tax, any distributions by a trust that is a fiscal resident of Curacao to a beneficiary who is a non-resident of Curacao are not subject to Curacao personal income tax. In the case of Curacao inheritance and gift tax donations by non-residents of Curacao to a trust that is a fiscal resident of Curacao and inheritances from a trust that is a fiscal resident of Curacao to non-residents of Curacao are not subject to Curacao gift or inheritance tax.

With the addition of this trust vehicle, which took effect from the end of 2011, Curacao can now offer its global clientele its own fiscally friendly version of the common-law trust for the purposes of international tax planning as well as asset management and asset protection structures.

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