Day of the deed

Patrick W Martin and **Ashley Fife** consider the advantages of Bermuda trusts for Mexican residents

KEY POINTS

What is the issue? How Mexican residents can utilise offshore jurisdictions' trusts and insurance structures for estate planning.

What does it mean for me? Mexican residents are finding that trust and insurance structures available in Bermuda and other offshore jurisdictions can facilitate tax-efficient and flexible estate planning.

What can I take away? The creation of flexible structures (such as master/sub-trust structures, and structures using reserved powers legislation and private trust companies) may be suitable for Mexican residents' estate planning.

With a net worth of USD77.1 billion, Mexican telecoms businessman Carlos Slim Helú was ranked the second-richest person in the world in a 2015 survey.[1] At the end of 2014, 16 of Mexico's citizens were on *Forbes*' billionaires list.[2] As for millionaires,[3] Mexico, in 2014, had the second-highest number in Latin America, with 164,000, while Brazil was first, with 191,700.[4] Mexico is one of the 'Mint' countries,[5] whose populations in recent years have had the largest relative increase in millionaires worldwide.[6] This trend is expected to continue. Much of the increased wealth in Mexico over the past 20 years is attributed to greater economic trade and investment with the US.[7]

Foreign direct investment (FDI) in 2012 in Mexico came mainly from the US (58.5 per cent), Japan (13.1 per cent), Canada (8.2 per cent), Germany (5.9 per cent), the Netherlands (5.7 per cent) and France (2.6 per cent).[8] Along with these billions of dollars of international FDI (inbound and outbound) has come a detailed network of international commercial treaties, including free-trade agreements, electronic communication treaties, transportation agreements, and maritime and aviation treaties with more than 50 countries.

In addition, Mexico has income tax treaties or exchange of information treaties with more than 40 countries, including Bermuda, and has signed the OECD's Common Reporting Standard.

LEGAL AND CULTURAL CHANGE IN MEXICO

Mexican residents have historically invested heavily outside of Mexico through offshore jurisdictions, particularly prior to changes in the Mexican tax law that implemented anti-deferral tax regimes. Specifically, Mexican tax laws have been modified over the past ten years to create an anti-tax-deferral regime known as the 'Mexican CFC regime' (or 'Refipres').[9] This may be a misnomer as the Mexican rules are distinctly different from the US controlled foreign corporation (CFC) rules.[10] The Refipres regime was largely adopted in 2005 and imposes Mexican income tax on Mexican owners (directly or indirectly) of certain foreign legal structures, depending on the applicable foreign tax rate and the type of non-Mexican source income.[11] Mexico previously had only a 'blacklisted' regime (which continues in the case of certain countries) for certain foreign legal structures in specific jurisdictions.[12]

These changes in Mexico's international tax arrangements are part of both a long-held policy of encouraging international investment, and awareness of the increasing global mobility of investors, companies and specifically Mexican nationals and Mexican companies. As more wealthy Mexicans require and can access bespoke estate-planning alternatives, there may be a growing culture of estate planning in Mexico using offshore jurisdictions.

This tax policy is also partly due to the Mexican tax authorities' awareness of non-compliance by many Mexican taxpayers. An important 2009 letter from

1 Dolia Estevez, 'With Carlos Slim leading the way, Mexico's billionaires have a better year', *Forbes*
2 Ibid
3 A person with USD1 million or more in net assets, in addition to the value of their primary residence
4 'Luxury goods sales and millionaires on the increase', *Mexico News Daily*
5 Mexico, Indonesia, Nigeria and Turkey
6 Dolia Estevez, 'The 2014 millionaire race: goodbye BRICs, hello Mints', *Forbes*
7 *US investment in Mexico*, Woodrow Wilson International Center for Scholars, and Mexico Institute
8 *Foreign Direct Investment Factsheet*, US Embassy – Mexico City, January 2014
9 Mexican federal *Income Tax Law*, titulo VI, capitulo I, *regimenes fiscales preferentes* (Refipres)
10 US federal law, title 26, *Internal Revenue Code* (IRC), s957, etc, *seq*

the then Secretary of Finance, Agustín Carstens, to the US Treasury Secretary demonstrates their focus on identifying Mexican nationals with unreported income.[13]

BERMUDA-MEXICO TIEA

On 15 October 2009, Bermuda and Mexico entered into a tax information exchange agreement (TIEA) and memorandum of understanding, making Bermuda the first offshore jurisdiction of its kind to enter into an OECD-compliant TIEA with a Latin-American nation.[14] The TIEA was subsequently ratified by Mexico's senate and new regulations introduced into Mexican income tax laws to implement the full benefits of the TIEA. It is understood the benefits include the following:[15]

- **Bermuda ceased to be a preferential tax regime for the purposes of applicable withholding tax;**
- **certain revenue and other payments made by Mexico residents to related persons based in or operating from Bermuda are not subject to a withholding tax rate of 40 per cent and are, instead, subject to standard rates set in Mexican tax laws; and**
- **Mexican taxpayers who generate income derived from interests in Bermuda are not required to file an annual information declaration in relation to such income during applicable tax periods.**

Developments of this nature reflect the Mexican government's willingness to implement laws that accept tax transparency and deferral in certain scenarios, and recognise the use of offshore financial centres for inbound and outbound investment.

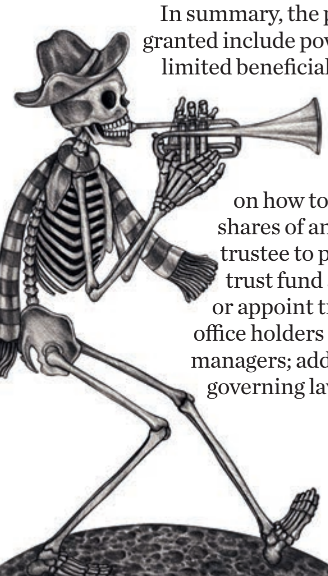
MEXICO AND TRUSTS

Mexico has experience with the entity known as the *fideicomiso*, which it adopted into legislation in 1924. The *fideicomiso* is heavily influenced by Anglo-Saxon trusts and is predominantly used for commercial purposes,[16] but may not be as flexible as trusts available in many offshore jurisdictions.[17] Mexican practitioners' experience with the *fideicomiso* may have facilitated their willingness to use offshore trusts for estate planning for Mexican residents.

BERMUDA'S RESERVED POWERS LEGISLATION

Last year, Bermuda amended its trust laws to include comprehensive and advanced reserved powers trust legislation. Section 2A(2) of the *Trusts (Special Provisions) Act 1989* (TSPA) lists powers that the settlor may reserve or grant to another person without: invalidating the trust; preventing the trust taking effect in accordance with its terms; or causing the trust property to form part of the settlor's estate.

In summary, the powers that may be reserved or granted include powers to: revoke the trust; retain a limited beneficial interest; amend the trust deed; distribute income or capital or both; act as director of underlying companies or appoint and remove the directors; direct the trustee on how to exercise voting rights relating to shares of an underlying company; direct the trustee to purchase property to be held in the trust fund and to sell trust property; remove or appoint trustees, protectors, beneficiaries, office holders and advisors, including investment managers; add or exclude beneficiaries; change governing law; and veto trustee decisions.



Section 2A(4) TSPA provides, *inter alia*, that, where a power to revoke, a general power of appointment or a present beneficial interest in the trust property is reserved or granted to a person, the trust deed may provide that, where such person is not the sole trustee, the trustee shall owe no duty to anyone else during that person's lifetime.

Section 2A(7) TSPA provides that, where a trust deed does not expressly categorise the reserved or granted powers of a Bermuda law trust created after the introduction of s2A, in the absence of contrary provision in the trust deed: powers shall be non-fiduciary when reserved by a settlor or granted to a beneficiary (so long as the power holder is not the sole trustee); and, in any other case, such powers shall be fiduciary.

Bermuda also provides a flexible, cost-effective regime for the formation and administration of private trust companies (PTCs). PTCs are not regulated as trust business in Bermuda. Licensed corporate trustees may be appointed as trustee for the independence they provide. However, Mexican residents may consider a Bermuda PTC as trustee of a revocable trust or discretionary trust. This may facilitate continuity of trustee, involvement of family members in the trustee's decision-making and investment flexibility. Bermuda PTCs permit corporate directors and the officers need not be Bermuda resident.

INSURANCE TRUSTS

Many insurers have established themselves in Bermuda with the aim of issuing policies to non-Bermuda residents, including Mexicans. It is understood that, if life policies are structured effectively, income and growth on the assets within the policy may be tax-effective for Mexican-resident beneficiaries on establishment and throughout the life of the policy.[18]

In certain circumstances, Mexican laws may prevent Mexican residents from acquiring insurance from non-Mexican-based providers. However, it is understood the restrictions may not apply where the sale of the policy occurs outside of Mexico (i.e. solicitation, completion of application, issue and delivery of policy, and so on). Mexican legal advice should be obtained to ensure transactions are not caught by the restrictions.

Insurers frequently employ offshore trust structures with the intention of ensuring that all material aspects of the transaction occur outside Mexico. An example of such a structure is where a Mexican-resident settlor settles funds into a master trust established by the insurer. The trustee then settles a sub-trust for the benefit of the Mexican-resident settlor and their family. The trustee of the sub-trust may acquire the policy as directed by the trust deed. There are other variations, some of which use aspects of Bermuda's reserved powers legislation. These structures may also be used to acquire policies that are compliant for US tax purposes.

CONCLUSION

Mexico's high-net-worth individuals are increasing in number and wealth. This article only outlines certain offshore structures that may be considered for Mexican residents' estate planning in relation to their global assets. Mexico's experience with trust-like structures such as the *fideicomiso* enables Mexican residents, in appropriate circumstances, to use trusts and insurance products offered from reputable jurisdictions.

11 A detailed discussion of the Refipres rules is beyond the scope of this article
12 *Jurisdicciones de baja imposicion fiscal* (Jubifis); Bermuda was and continues to be identified as a Jubifis jurisdiction. See PwC, *Doing Business in Mexico 2015*, page 162
13 'Mexico asks US for help in finding hidden assets in US banks', *USA Today*, 18 September 2009
14 Tim Faries, 'Say yes to Bermuda', *Captive Review*, July 2011
15 Ibid
16 Ian Meakin, *The Mexican Fideicomiso: Theoretical and Practical Approach*, University of Geneva, Faculty of Law
17 While there are similarities between the Mexican *fideicomiso* and common-law trust, there are fundamental differences too; www.step.org/jr-mexico
18 It is understood that, following changes to Mexican tax laws in recent years, particularly careful planning may be required in relation to Mexican-resident beneficiaries' receipt of redemptions from offshore life insurance policies

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