- **Population:** 3,000,000
- **Time zone:** GMT–5
- **Currency:** US$
- **Political status:** Republic
- **Airport:** Tocumen International Airport

PANAMA

Legislative update

Law No. 41 of 2000
- To extend the definition of money laundering and establish more severe penalties

Law No. 42 of 2000
- To create a legal duty to properly identify clients and provide periodic reports to the Financial Analysis Unit (FAU)

Decree No. 163 of 3 October 2000
- To establish additional responsibilities to the FAU, inter alia, analysis of suspicious transaction reports and exchange of information and cooperation with similar agencies

Executive Decree No. 213 of 3 October 2000
- To empower the Superintendency of Banks to conduct inspections and secure documentation in connection with trust activities in Panama

Executive Decree No. 1 of 3 January 2001
- To create a legal duty to report to the FAU and applicable fines

Law No. 45 of 2003
- To define financial crimes and criminalise the alteration of accounting books or registers and insider trading

Law No. 48 of 2003
- To regulate the operation of Money Remittance Houses

Law No. 50 of 2003
- To make terrorism, subversion of public order or severe alteration of the public peace, and financing such activities directly or through non-profit organisations crimes

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PANAMA

Panama Private Foundations and Protectors

by Enrique Sibauste

Report Summary

- Introduction
- What is a protector?
- Criteria for the selection of a protector
- Powers of the protector
- Conclusion

Introduction

The Panamanian Private Foundation (PPF) was inspired by the popularity of this legal vehicle in Europe, in particular, by the Liechtenstein family foundation. As Panama is a civil law country, the Law No. 25 of 1995 (which created PPFs) came to resolve the need of some settlors that find it difficult to divest themselves from the administration of their assets or other ownership rights and also to create an effective estate planning vehicle to transfer property after death.

The Act does not contain a definition, but Article 1 identifies the procedure to create a PPF, which could be done by fiduciary agents and natural or juridical persons.

"PPFs are an effective estate planning vehicle to transfer property after death"

According to Article 19 of the Act, the foundation charter or the regulations may provide for the creation of a "protector, committee or other supervisory entity". The protector normally has powers to approve transactions before the foundation council can act, and may optionally have other powers, subject to the foundation charter and/or regulations.

When the foundation council takes decisions with the approval from the protector, they are released from liability in relation to the loss or deterioration of the foundation's assets or for any damages caused by their decisions.

What is a protector?

The term protector appears for the first time in the UK Fines and Recoveries Act (1833). The title protector does not differ from other titles that can be found in trust instruments, such as:

- guardian,
- trust advisor,
- appointer,
- beneficiary representative,
- counsellor,
- mentor,
- nominator,
- management committee, or
- the protector group.

All these terms are used to denote the same institution.

What is true about the protector is that its characteristics vary to some extent from one jurisdiction to another. There is not a unique set of criteria to determine its functions and duties.

"The characteristics of the protector vary from one jurisdiction to another"

The concept of the protector is becoming more accepted even in circles of traditional trust law.

The main argument for the acceptance is the liability of trustees for malfeasance in cases in which valuable assets have been dissipated.

One possible solution to the problem has been the incorporation of an independent body with powers and duties to supervise the management of the funds.

In the Principality of Liechtenstein, the figure of the protector is found in the context of their regulations. The figure is called custodian or collators and refers to a supervisory power established in the entity.

Criteria for the selection of a protector

For the selection of a protector, some fundamental aspects should be taken into consideration. The two most important issues are:

- the selection of the protector himself, and
- his jurisdiction.

In the case of the selection of the protector himself, the possibility of having a non-professional or a professional protector should be considered.

"The protector may be a non-professional personal or family friend or a professional individual or a corporation"

The non-professional protector

The non-professional protector is usually a personal or family friend who is appointed by the settlor relying on the personal confidence he has in this person. The problem involved with lay protectors usually stems from the lack of preparation for the position, in particular the degree of care and diligence. Other problems protectors face are:

- the situation in which the protector is a resident of the same jurisdiction as the settlor (may not advisable for tax and other legal purposes);
- the succession of the protector in cases in which the foundation charter or regulations remain silent.

In each case, some measures could be taken to solve these situations.

The professional protector

The professional protector can be either an individual or a corporation. A couple of points to bear in mind when choosing an individual as a protector are:

- the jurisdiction; and
- the replacement.

In these cases, remuneration could be established in the foundation charter or regulations, and the standard of service expected is usually higher. The problem involved here is the lack of personal confidence in this person, so some preventive measures should be included in the foundation charter/regulations to protect the foundation assets.

The second issue to focus on is the jurisdiction where the protector is located. This is a decisive point in the selection of the protector. The importance of the jurisdiction relies on the tax benefits and legal issues that may arise (if any). Another aspect to take into consideration is the duty of confidentiality that the selected jurisdiction provides.

Powers of the protector

According to Article 24 of the Act, the powers of the protectors or supervisory board must be spelt out in the foundation charter and or regulations and may include, among others, the right to:

- protect the interests of the beneficiaries;
- change the object clause;
- require accounts for the administration of the foundation assets;
- appoint members of the council or to increase or reduce their number;
- veto decisions of the council;
- act as custodian of the foundation assets;
- exclude beneficiaries and appoint others.

"The jurisdiction where the protector is located has implications for tax benefits, legal issues and confidentiality"

A protector could be given wide and extensive powers to become an omnipotent figure or just minimum powers to deal with specific situations.

In general, it is a difficult task to summarise all the rationales behind the implementation of this figure, but some general principles are provided for consideration.

The rationales for the use of a protector have been summarised in the following categories.

Protection for the settlor

The necessity for a protector appears in offshore jurisdictions due to the lack of trust between the settlor and professional council members.

The professional relationship in offshore locations is distinguished by the absence of personal interaction:

- in many cases, the settlor will never meet the council members;
- in others, members of the trust companies may leave after a merger or an acquisition between trust companies.

As a result, a protector is appointed to have the certainty of an independent supervision (e.g. the administration, decisions, exercise of powers, the distribution of funds) over the foundation property.

Control over council members

It is clear that protectors provide a means of control over the council members with regards to the settlor's wishes and the administration of the foundation assets. In any case, the settlor has the reassurance that if the council member(s) are not competent, it is possible to replace them.

"Protectors provide a means of control over the council members to ensure that the settlor's wishes are realised"

The protector provides an easy way to change the council member(s) if he/they become unsuitable for the job, as it will certainly take a longer period of time to apply to the courts for the removal of the council members (Art. 22).

Thus, it is clear that in the management of foundation funds the settlor requires some certainty that his wishes will be realised and the powers will be properly exercised.

A protector with proper powers in the foundation charter/regulations can execute this function with due diligence and independence from the council members.

Power of veto

The possibility to veto decisions provides a reliable effective weapon to the settlor. If the council members do not attend the wishes from the settlor, the protector can influence their decision. It is important to consider that a power to veto procedural decisions can also cause unnecessary delays.

Check and balance mechanism

The protector provides a means by which professional advice can be sought. It is possible to have someone knowledgeable to the settlor's family or a professional advisor who can give his opinion on important issues (e.g. investment decisions).

Control over the migration of the foundation

According to Art. 32 of the Act, it is possible to migrate a PPF; a protector could be empowered to consider the migration of the foundation.

In the majority of offshore trusts, a flee clause is established for cases in which the trust location becomes unsuitable (i.e. political instability, change of tax regime). The same result could be achieved under a PPF.

Conclusion

The rationales for the use of a protector vary to a great extent. The powers vested in them depend on the needs of each specific PPF.

"Rationales for the use of a protector vary and as a result a protector may be an omnipotent figure or may just have minimum powers to deal with specific situations"

As protectors are accepted and regulated in Panama, the draftsman of the foundation charter and regulations can create an extensive variety of administration arrangements for their clients.

About the Author

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