A family affair

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If ever the concept of the Family Office had a natural home, that home would be Latin America, particularly South America, where most of the largest family businesses in the region are located. Those who understand why I say that also appreciate that it is the word "family" preceding "office" which says it all: family is very important in Latin America, where blood ties endure in a culture immersed, historically, in an Iberian, conservative, Catholic tradition which regards family values more importantly than is normally found in most of western society today. The family itself remains key, serving as the anchor for social stability and as an economic network too.

Exaudi Research, with offices in the United States of America and Venezuela, has produced, in conjunction with several academic institutions, a study of the region which points to just over 85% of private companies being defined as family businesses (in which at least between 11 and 50 people are employed full-time). Where perhaps the North and South American divide does not run along geographical lines, and becomes very obvious (language aside), is the attitude towards business itself: from Mexico to Chile there is no difference between the family and business interests. In addition to this, foreign collaboration is not encouraged – especially if that involves an equity stake. Xenophobia, of course, can be to the detriment of the economic welfare of any enterprise, but the card which every family business has up its sleeve, wherever it may be, is its ability, unhindered, to be light on its feet: not only can it be more flexible, the decisions which flow can be made quickly.

Besides any cultural considerations, however, Latin American families have circled their wagons for another very important reason and that is the historical fragility of the legal framework which harks back to colonial times, before the region's countries gained independence between 1810 and 1830 (excepting Cuba and the Dominican Republic). Unlike the US, it was continental Europe, specifically the Spanish and Portuguese, that almost completely dominated this part of the Americas and left behind a civil code legal system, itself derived from Justinian's Roman law, which had spread, in various forms, across continental Europe.

Unfortunately, the laws inherited were not as adaptable as either common or, say, German civil law, a difference which would subsequently affect commercial activity in this part of the Americas. It is important to appreciate that unlike common law, the emphasis in civil law is weighted more towards protecting the rights of the state rather than those of the individual. Conversely, common law, as it developed in England during the 11th century, placed the emphasis on the assertion of the law over the state (at that time meaning the king). Interestingly, Argentina's legal system contains elements of common law influenced after following closely the US constitution when writing its own (but for practical purposes it is a system of civil jurisprudence).

Before the Norman Conquest in 1066, English law was a hotchpotch of Anglo-Saxon, Danish and Roman canon law, but it was the reign of Henry II when common law, as we know it, was established. Where precedents did not exist, plaintiffs sought relief by petitioning the monarch and as the number of petitions mounted, the monarch passed on the task to the Chancellor (historically the keeper of the royal conscience); by the 15th century an independent system called the Courts of Equity, also known as the Courts of Chancery, had developed.

Importantly, when contemplating the relative scarcity of family trusts in Latin America, it must be borne in mind that trusts are the offspring of equity, a foreign (literally) concept in law and goes beyond equidad (fairness) and that which Aristotle wrote about. Last month's column (Fingers and Toes) referred to Panama's recent ratification of the Hague Convention on the Law Applicable to Trusts and their Recognition but went on to say that, nonetheless, trusts in Panama remained an appendage to the general body of civil law.

In civil law it is statutes, without input from judges, that prevail. Judges apply reason to interpret the codes and rules, but it is the legislature that frames the statutes, codes and dictates the formal procedures which are imposed on the courts. So the common law jurisdictions offer less rigidity and greater flexibility because judges' decisions can establish the future application of law, whereas a civil law judge's decision is restricted to the particular case under consideration.

This opacity has encouraged Latin American families to place more reliance on themselves than the law, believing it to be far safer to look to relatives or close friends in whom they can have confianza (trust). Although many large family businesses hire professional managers (yielding in part to competitive pressures), nonetheless, the typical firm continues to be an hierarchical dictatorship where information is kept secret and foreigners, especially, are considered suspect. Even when necessity has driven entrepreneurs to international equity markets they have often chosen to raise capital by listing a subsidiary and offering only a minority of its shares to outsiders.

Families in business the world over have two concerns: management succession and governance, neither of which, in my experience, are given sufficient attention. There is often little effort made in training and integrating the next generation so that they will be equipped to take the reins. Coupled with this is a reluctance often to write down a set of rules, best described as guidelines, usually in a formal document, which is known as the family's constitution. There is no standard form for such a document, but it should address the long-term goals, management philosophy and family values as well as the role of family members, dispersion of control, structuring and resolution of conflicts.

The family, if they are not directors of the business, should be closely involved in the major decisions made (perhaps in the capacity of non-executive directors). It is true, however, that if none of the family members have either the interest or the requisite competence which the business requires, then outside professional management should be sought. And as challenging as moving outside the family circle can be for the reasons already given, provided that any imported management has the right values, philosophy, experience and ability, it is reasonable to expect that over time the necessary level of trust will be achieved.

The outsider brings impartiality (besides, perhaps, fresh ideas and a less insular view), serving, if necessary, as an umpire should friction arise between family members over certain aspects of the business.

Part of any family strategy must include estate planning too and, here again, it is wise to appoint an independent foundation council or trustee; the family's concerns and wishes can still be catered for by careful drafting of the terms of the foundation or trust. It is likely, however, that in Latin America charters will win over trust deeds in most cases because, as I wrote about in last month's column, I believe that the foundation will continue to gain more converts than the trust.

So it is somewhat ironic that lawyers in Latin America often point to Roman law for the birth of the ubiquitous trust, even if it is difficult to argue that England's trust is a direct descendant of it (at best, I suggest, a second cousin). It is true that fiducia (good faith) existed in Rome's law of contract in a manner which would be recognised in the principles of the English trusts, to which one can add that Christian Rome's canon law had conscience at its root (in common with its application by the English monarch's Chancellor) and itself evolved from Roman civil law. Furthermore, it was initially Roman Catholic clergy who were the first judges of equity in England and so ecclesiastical courts played an important role like Lord Nottingham did, who was appointed Chancellor in 1673. He has been called the father of equity for assembling its principles and rules, just as Gratian, an Italian monk in the 12th-century, has been so described in the case of canon law. Two men, centuries apart, but travelling the path of conscience, and working assiduously, contributed significantly to the evolution of the English trust.

Whatever path family businesses take, if management, long-term goals and structuring is secure, the families will be happy, unlike those who flounder and will be, as Leo Tolstoy suggested, unhappy in their own way.

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