Corporate Business: Comparative Analysis of the Argentine Cooperation Consortium and the New Colombian Corporation Law

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1. INTRODUCTION

This paper compares the two different legal systems used by business enterprises in Argentina and Colombia and demonstrates that Latin American law needs more flexible structures to manage business. The international interest of this comparison may lie in that it involves the business structures of two South American legal systems that are in different coordinates. These two legal frameworks, updated by recent laws, allow the use of more open and less dogmatic legal structures which help businessmen to solve the legal cases that may arise.

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The laws that determine concrete legal systems may be interpreted according to the latest world trend which is the creation of a sort of "soft law" or more open laws, which may better adapt business to the region. An international work confirms this trend, which is also shown in the wording and application of the Unidroit Principles for International Contracts; a clear sign of the new International Business Law, which is halfway between the rigid rules of Latin American and European Civil Law; and the Common Law, which gives rise to a wider soft law linked with the *lex mercatoria*.

I present the following ideas for contracts and international and national business in this paper:

1. International business, which for Argentine law is equal to international legal acts and environments, has experienced changes due to the different circumstances of modern times.

2. The legal characterization in civil law refers to a special way of organizing legal acts toward the creation of legal structures or mechanisms which establish precise effects within the legal system.

3. The difference between bilateral contracts and other ways of creating legal relations within the frame of free will must be established.

4. Enterprise is not a unitary legal concept, but rather an economic criterion. There are legal uses and aspects concerning enterprises. An enterprise, in Latin American law, includes legal elements and is always an organization created to be developed further in the markets.

5. There is an ample diversity of legal systems which may be applied to international business, that go beyond the national and the private international law sphere. The following should also be considered: uses and practices, substantive international law, integrational law, interblock law, and the World Trade Organization ("WTO") laws. The Convention on Contracts for the International Sale of Goods ("CISG"), the Rules to Be Applied to the Documentary Credit, and the

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Incoterms are examples of substantive international laws. The Unidroit Principles have been applied to international contracts, constituting an example of useful soft law to be applied to the creation, development and winding up of multinational business.

6. The State interferes with the freedom of trade and may alter the position of economic agents and the economic outcome of each activity.

While the Earth moves in the universe during its endless translation-rotation at thirty kilometers per second, and completes a circumvolution around the sun in 365 days and six hours, we enter the twenty-first century at such speed. State-of-the-art technology of artificial life advances and, even though, it runs twenty-five years behind genetic engineering, it has formulated the limits of artificial intelligence, which is a particularly dynamic section of the computing science, in Asilomar, a city that is situated in the Californian bay of Monterrey.

Law is a social science; it develops through living structures, which are closer to a fractal concept than to a Euclidian geometric reference. Legal rules, even though they must have harmonic lines, do not remain in the mere aesthetic construction, as repeatedly expressed by many authors. That is why the research of a legal figure generally faces legal realities that do not represent harmonic structures in a Euclidian sense. On the contrary, they offer variations, not only in geometry which could be included in the geometry of organisms, by following the similarity to the fractal geometry.

The legal system begins with language and speech which is then translated into signs. The law is a large system of definitions and concepts, which try to govern an important part of the human behaviour, especially when expressed in subjects' interactions, together with different systems of practices.

Law is divided into different subsystems, groups of rules and specific regulations. It attempts to be interconnected. Commercial law is developed in the markets. The concept of market, as well as that of enterprise, is both economic and sociologic. There is not only one market; markets represent different spaces of social life, among which subjects, things (isolated objects, groups of things, universalities, assets) and legal relationships arise from conduct, acts, contracts, agreements and self-managing assets systems ("SAS"). The latter are not well

designed and systematically identified by legal scholars or by the codes that come from ancient thoughts.

From speech, which is a selection and updating act, the law moves on to the written rules, which provide stability, durability and recoverability. Law has its own vocabulary, which must be accurate because it conveys ideas or abstract constructions. Law must be expressed through a system using associative fields. Law is a science and a technique, a social practice that tries to reach an ethical and organizing purpose as regards human society. As expressed by Barthes:³ “the world is full of signs, but not all those signs have the simplicity of the alphabet letters, or of the signs of traffic codes or of the military uniforms; they are infinitely more complex and subtle.” “Signs are formed by differences.”

A list of self managing assets systems can be made. In present coexisting group and mass societies, users must understand their possible applications, their limits and scopes, and the civil liability reflected among their components.

2. **ARGENTINE COOPERATIVE CONSORTIUM**

   In Argentina, the UTEs are cooperative consortiums whose purpose is transitory, specific and limited, although it must not necessarily be commercial. The purpose of profit is not exclusive of the UTE but is a direct purpose of the venture participant. Due to the insufficient general system of UTEs, the Argentine Congress passed a law creating a cooperative consortium in an attempt to find a different pattern as an alternative to the strict characterization of business organizations which has an excessive amount of mandatory legal provisions.

   The cooperative consortium was created by the passing of Act 26005 of 2005 to foster the creation of a kind of joint venture which would be capable of adapting itself to international trade conditions that developing countries wish to fulfill in order to trade with developed countries or countries that are leaving the category of “emerging” countries.

   The legal rule states that the cooperative consortium may be constituted by physical or legal persons domiciled or created in the Argentine Republic.

   The Act created a common cooperative organization, established to “facilitate, develop, increase or carry out transactions related to the economic activity of its members.” The organizations are neither legal persons nor legal subjects, not even companies. They are considered as

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having a contractual nature. Additionally, for us, they are considered to be legal business-organization systems.

The common cooperative organizations were established, at the beginning, to gather companies to form bigger ventures aimed at exporting activities. Today, they are used in an endless number of activities, such as enterprises for exportation. They are open entities with an “operative common fund” that are registered with the Public Commercial Registry.

There is a high degree of regulatory freedom in this kind of legal organization that is managed by all of its members and a representative of the group. It can be seen that there is a high degree of legal flexibility, even in matters related to the responsibility of the companies that form part of the cooperative consortium.

3. **THE COLOMBIAN SIMPLIFIED CORPORATION**

In our opinion, Colombia has made the best progress in the business-organizations field in Latin America due to its adoption of flexible laws which create greater possibilities for the development of business for smaller companies. These flexible laws are why many foreign investments have been channeled through the Colombian legal system, which appears to be very successful.

The Colombian laws assemble the most advanced trends of the world’s business organizational laws and disregards many mandatory legal solutions. In this way, the recent system is considered a paradigm as to the choices made based on free will. It may be created by a sole individual and by a private instrument to be registered with the Public Commercial Registry. The limitation of liability is strong and is not affected by tax or labor laws.

The doctrine of inapplicability of legal personality may be applied in case of fraud or abuse in the use of the legal personality. Indeterminate purpose and indefinite duration are admitted. The most important attainment is its ample freedom in its “organizational system,” especially its “internal structure” to take decisions and for the management of the company. To the previously mentioned must be added an additional list of freedoms and flexibilities in Colombian law which make this kind of company a simple vehicle that promotes business, creates companies and fosters investment.

4. **LEGAL PERSONALITY AND ITS INAPPLICABILITY**

In Rome, during the Empire, appears the idea of the existence of a collective entity of public law, which acts together with the citizens. So, the legal construction that we study and call “legal person,” first appears
in the public-law sphere and is then used for religious or professional schools or corporations.

Emperor Justinian made a difference between societas and co-ownership. The former was a bilateral, consensual, perfect, and in good faith contract, by virtue of which two or more persons (socii) were reciprocally bound to contribute to the society either their property or their industry with the purpose of conducting common transactions and obtaining advantages, even though not necessarily assessed in money, as well as to enjoy them in common. Co-ownership or common ownership of property could either be voluntary or not, since they might arise from a legacy or donation.

Since olden days has existed the idea of transforming a group of individuals into a legal unit to develop an activity to carry out a certain purpose.

Halfway through the XIX century, German jurists called legal persons to entities organized by a diversity of individuals, who formed part of those entities to fulfill a specific legal purpose, while in France they were called moral persons to be distinguished from those called civil persons. It was then, when Friedrich Karl Von Savigny conceived the well known theory of fiction, according to which the legal person is an artificial person, whom the law considers a subject having patrimonial rights and legal capacity; and the legal capacity—an essential characteristic of the human being—is extended by the law to those ideal subjects in order to facilitate these organizations of individuals the exercise of the rights and the fulfillment of their obligations derived or inherent to the real and particular aim that these organizations pursued.

Under this point of view, legal persons would only be fictitious and artificial subjects that existed solely for legal ends. That fiction was supported within the legal sphere by a mechanism that permitted obtaining a unique will only for the acquisition and the exercise of the rights of that group.

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4. José M. Caramés Ferro, Curso de Derecho Privado Romano 354 (Perrot 1953). Note the difference with the Argentine Company, which always has a profit purpose.
This idea of legal fiction was adopted in Latin America by Andres Bello in the Chilean Civil Code. The concept was then adopted by the Colombian Civil Code, whose Section 633 defines a legal person as "a fictitious person, able to exercise rights and enter into obligations as well as to be judicially and extra judicially represented." Velez Sarsfield, Authority and Drafter of the Civil Codes of Argentina, Uruguay and Paraguay, also uses this idea and concept of legal persons.

The traditional, simple concept coined in Spain by Girón Tena referred to a legal person as follows: the ability to be a subject, active or passive, of legal relations. The Spanish lecturer has also pointed out that legal person "means the existence of a new legal subject independent from those of the group they compose."9

In Italian Law, Brunetti expresses that in legislation prior to the Codice and under Section 77 of the Commercial Code, every organization was considered as a person. This position is identical to the present situation in Argentina, and is different in Europe, where many business organizations are not considered legal persons.

In present Italian law, corporations, limited partnerships, limited liability companies and cooperative organizations are considered "persons." Personal companies have, on the other hand, only an asset, self-management autonomous system that is clarified in Regulatory Ministerial Order nº 928 of the Civil Code of 1942, but with important changes.

The asset autonomy granted to the organizations of individuals has a direct relation with the German co-ownership system.

In Argentine law, business organizations are "created" from a meeting of minds and only acquire "regularity" (that is, their typical requirements become mandatory) when the business organization is registered with the Commercial Public Registry (Section 7 of Act 19550 of business organizations).

The Argentine Civil Code establishes which are the legal collective, public and private organizations. Section 33 provides that legal persons may be public or private. Examples of public persons are: (1) the National State, the Provinces, and the Municipalities; (2) autarchic entities; and (3) the Catholic Church. Examples of private persons are: (1) associations and foundations whose principal purpose is the common welfare, that own assets, are capable of acquiring goods according to their by-laws, are not sponsored by the State and are authorized to

7. GARCÍA, supra note 5, at 37.
operate; and (2) civil and commercial organizations or entities which, according to the law, have capacity to acquire rights and assume obligations even though express authorization by the State might not be necessary to operate.

In the old Germanic law, which had an associative trend, an individual, by himself, did not mean anything to the law; such an individual was only taken into consideration when belonging to a social group. It was not until the Middle Ages that associations evolved. From being a group of persons, associations began to be recognized by the legal system as autonomous entities different from the individuals that composed them. Through the different communities (represented by peasants, noblemen, church members and craftsmen) humankind developed, and the legal system evolved accordingly.

Along with private communities, public communities also appear (i.e., the Municipality and the Council), which will continue multiplying as a means to obtain what a physically isolated person cannot achieve.

In Central-European law, the Sippe is the basic organization that gathers the purposes of its members—their interests are those of the organization; the will of all its members is the will of the community. In contrast to this idea there is another concept, that of organization, which is applied at the beginning to municipal communities, territorial municipalities, charity and religious associations, and unions or corporations.

The German European Law is permeated by the Roman jurists, as well as by the legal compilers and canonists.

Then, the societas appears as distinguished from the universitas. The societas is only a compulsory relation between individuals; it is neither a legal subject nor an entity able to act. The assets of the societas will be co-owned by all of its members. The universitas, on the other hand, is a clear legal subject—a person different from its members and with independent existence. It has the capacity to act, it has asset-management powers, and it can sue and be sued; it may even have its own credits and debts. It is not liable for the acts of its members, and its existence is independent from the existence or change of its members. The difference between universitas personarum and universitas bonorum appears later on.

The collision and interaction between the Roman and Germanic systems was unavoidable. The present legal systems and their legal provisions arise from these two systems.

Kelsen has pointed out\(^\text{11}\) that the concept of legal person arises due to the need of imagining a person with subjective rights and legal

\(^{11}\) HANS KELSEN, TEORÍA GENERAL DEL DERECHO Y DEL ESTADO 109 (2d ed. 1958).
obligations. Legal thought, he continues, is not satisfied by knowing that a human act or omission constitutes a duty or a right. Somebody has to exist that might “have” the duty or the right.

The Argentine Civil Code in Section 39 establishes that members are different—as persons—from the ideal entity, when it states that:

Organizations, associations, etc. will be considered completely different persons from their members. The assets owned by the association are not owned by any of their members and neither of their members nor even all of them are obliged to pay for the organization debts, if they had not expressly undertaken the obligation to pay or to be jointly liable.

The rights of the members arise from the law or the contract, but this should not go against the law. There is a generic responsibility of the “entity,” contractual as well as extra-contractual (this latter, within the limits of Section 43 of the Civil Code). The issue of members’ liability is different in the different collective structures.

Legal persons can be sued and their assets foreclosed (Section 42), since they are liable for damage caused to the organization by those that direct or manage it, or by their dependents (Section 43).12 Assets generally are owned by one person and each person has his or her assets. This system is derived from Roman law.

In Argentine law, there are collective assets which are not owned by only one person (common property, undivided inheritance) and other assets that do not have an individual owner, at least for a length of time. (For example, in Argentina, the trust administrations or the mutual investment funds.)

The legal personality implies the existence of the principle of free initiative and of asset autonomy, among others. Due to public-order reasons, the state’s controlling bodies have exercised control over certain legal persons. The concept of legal personality was a judicial construction in Anglo-American law in the case Salomon v. Salomon and Co. Ltd. and in the Supreme Court of Texas ruling in State of Texas v. Standard Oil Company.

In Salomon, the company was a mere vehicle to hide the businesses and, upon insolvency, it was considered that the corporation had been

12. Civil Code: Section 42—Legal persons may be sued for civil actions, and their assets may be foreclosed.
Section 43—Legal persons are liable for damage caused by those who direct or manage the organization when in office. They are also liable for damage caused by their assistants or things under the provisions established in title “Obligations arisen from illicit acts that are not offenses.”
created to limit the liability of its owners. The court ordered "piercing of the corporate veil" to establish the liability of the company's members or partners.

In *Standard Oil*, (1892) we see again a stop to the abuses that, through different strategies, caused damage to third parties and distorted reality.

In Argentina, one of the first petitions to challenge the legal personality of a business organization before the amendments introduced by Act 22903, "the interference with the legal system and its limitations, was sustained in a case which was widely known" after knowing, in 1976, the extension of liability solutions that the Supreme Court of Argentina established in the case *Cia. Swift de La Plata s. quiebra.*

This issue has been studied in different countries. In Brazil, Tepedino shows us that the question of "disregarding the legal personality" has originated two trends of thought among legal scholars, one being of objective nature and the other following a subjective approach. The author reminds us that in order to accept the disregarding of the legal personality, Requiao demands the existence of fraud or abuse of the law.

Section 50 of the New Brazilian Civil Code (unified to a great extent with the Commercial Code) states:

Em caso de abuso da personalidade jurídica, caracterizado pelo desvio de finalidade, ou pela confusão patrimonial, pode o juiz decidir, a requerimento da parte, ou do Ministério Público quando lhe couber intervir no processo, que os efeitos de certas e determinadas relações de obrigações sejam estendidos aos bens particulares dos administradores ou sócios da pessoa jurídica.

16. *Id.* at 138, n.5. That is to say, the fraudulent manipulation of a legal person. The Brazilian courts have dealt with this issue in cases of alimony, child support, abuse or fraud, assets commingling and others.
17. Translated into English—"In case of abuse of legal capacity, characterized by deviation of the end, or by patrimonial confusion, the judge can decide, at the the request of the party, or of the Prosecutor’s Office, if asked to intervene, that the effects of certain determined responsibility obligations be extended to the personal assets of the administrators or partners of the legal entity (juridical person)."
Apart from the papers and essays of those who studied the question of “disregarding the legal personality,” Argentine Act 22903 of 1983, which amends the Business Organization Act, established new provisions intended to modify the limitation of the direct liability of the business organization’s operators in cases where the legal provisions are applied in order to deceive others.\textsuperscript{18}

In Argentina, the system is developed in a paragraph of Section 54 of the Business Organizations Act 19550:

Inadmissibility of legal personality. The conduct of an organization which is intended to cover up purposes that are beyond that of the business, and is intended to be used to infringe the law, the public order or the good faith to violate the rights of third parties shall be attributed directly to the members or the controlling companies which allowed such conduct and who will be jointly liable for the damage caused. Therefore, the legal personality is not “intervened” or “dismissed,” but rather a different legal effect is applied. This effect is the inadmissibility of the legal personality. The liability is extended to the members or the controlling companies that allowed the illegal conduct set forth in the legal provisions.

The Argentine law makes reference to the “acts” of the company, that is to say, to its activities and to the legal acts arising therefrom. The activities and the acts may be internal or external.

Some legal provisions are broad (infringement of the laws, of the public order) and some are more restrictive. The violation of the principle of good faith must be referred to an act (which must also be detrimental); the good faith is a concrete principle of the law which is specifically applied in commercial law.\textsuperscript{19} The infringement of the rights of third parties and the attempt to pursue objectives beyond those contemplated for the organization are more concrete violations to the contract creating the organization.

Konder Comparato\textsuperscript{20} states that the deviation in the use of the person-corporation breaches the contract and generates the suspension

\textsuperscript{18} The author participated in the Commission for the drafting of this act.
\textsuperscript{20} FABIO KORDER COMPARATO, O PODER DE CONTROLE NA SOCIEDADE ANÔNIMA 269-275 (2005).
(rather than the destruction) of the effects of the separation of assets. 
This occurs, in fact, when the events set forth in Section 54 happen; the 
legal personality becomes inadmissible.

In Argentina, on the issue of the legal personality, differences 
existing among legal texts, all of which\textsuperscript{21} generate a feeling of discomfort 
or frustration in the present way of life. It is this author's opinion that, 
nowadays, the legal personality and its principles are not very useful. It 
is also true that legislators know and care little about it, its use is 
extended in different directions, and there are diverse interpretations by 
courts.

Argentine private law (i.e. civil and commercial law) has the same 
problems that Latin American law has—the lack of updating of legal 
provisions in view of new business scenarios. We believe that the 
limitation or not of liability is more related to the kind of organization 
than to the personality. It is necessary to analyze in depth whether it is 
necessary to keep the concept of "legal personality" or replace it.

5. \textbf{Asset Self-Management Legal Organizations}

Basedow\textsuperscript{22} draws attention to the interaction of public and private 
law by using this term in the title of a chapter of a book which is very 
important and has great influence on the legal system. The above 
interaction between public and private law is coupled with the extreme 
hard social reality existing in many parts of the world.

Differing elements are present in a legal relationship—the subjects 
(individuals or legal persons) and other organizational structures that 
have no personality; the property (which can be material or immaterial 
objects); and the "efficiency" element (i.e., "that element which gives 
rise to the rights throughout the life of such relationship"). All of these 
elements constitute the "facts" which Vélez Sarsfield mentions in the 
ote to Section 896 of the Argentine Civil Code, explaining what he had 
studied (or considered) to prepare it.

If the natural or human fact set forth by the law (factum) occurs, and 
if there is an agreement between such act and the legal definition, the 
legal effect\textsuperscript{21} shall fatally arise from the statutory point of view. From a 
different point of view, the question coincides with the growing 
importance that is given to the freedom of choice, which is not limited to 
choosing the courts that have jurisdiction and the law which is applicable

\begin{itemize}
\item \textsuperscript{21} An example is Spain, with reference to the new system of formation of business 
organizations of December 2007, see RICARDO CABANAS TREJO, Ricardo, INSCRIPCIÓN Y 
PERSONALIDAD JURÍDICA 359 (Consejo General del Notariado 2009).
\item \textsuperscript{22} “El derecho estatal y la economía. El derecho comercial como una amalgama de 
legislación pública y privada.” See BASEDOW, ET AL., supra note 1.
\item \textsuperscript{23} Bueres (dir.)—Highton (coord.), Código Civil, t. 2-B, p. 385.
\end{itemize}
but "also shows a growing material scope that extends to the generation itself of the legal relationships."  

If the legal presumption arises from a fact or an act, the following may arise: acquisition, modification, transfer, loss or extinction of rights, obligations, or both. 

Modern legal texts make reference to the "objective contact" of the contract executed by the parties as the element that determines the applicable law. This contact, which may be legal or economic, "with a State Party of the MERCOSUR" introduces the economic criterion in the legal system regarding the contract type, following the modern trends in this field (e.g., the French system). 

The subjects or actors have changed in the markets, and it can be considered that the ancient "entrepreneur—non-entrepreneur—State" trilogy has been replaced as follows:

1. Civil or commercial entrepreneurs who operate in the market through different organizational vehicles: individual ventures and other asset self-management legal organizations. Not all the organizations have legal personality. Nowadays, the Argentine Consumer Protection Law defines them as "suppliers."
2. Consumers.
3. Other independent agents.
4. The State as economy regulator or entrepreneur.
5. Legal Scholars

These market subjects are highly specialized due to the huge increase of activities and to the value and volume traded. Markets have become so diverse and different, sophisticated and complex, that they can only be understood by specialists. 

Showing the characteristics that have been mentioned would be legal organizational systems that allow an individual or group of individuals (the parties) to manage, administer, represent and dispose of

25. The provision refers to the extinction (section 896 of the Civil Code) but reference can also be made to "loss," which is a different concept and is not synonymous.
26. Cfr. Acuerdo sobre Arbitraje Comercial Internacional del MERCOSUR (argentine law 25.223) in its sections 3 3(b), 3(c), 3(d) and 3(e).
(collectively referred to as manage) assets, which are in whole or in part used for a purpose and a legal cause which unifies, harmonizes and categorizes it as a common pledge for all creditors of such organizations.

Apart from failing to consider all the problematic aspects of the asset self-managing organization, "legal personality" is blurred by its subdivision into a further sub-category which does not serve any useful purpose ("legal subject"), since, apparently, legal subjects have a different meaning (Section 46 of the Civil Code) to that stated as a general rule in Section 39 of the Code.

The importance of this alternative is shown by the existence of multiple options or legal structures that qualify for developing entrepreneurial activities within the field of private law. Entrepreneurial options have to be multiple, flexible, open, and clear (however incomplete, imperfect or contradictory they may be today) as they are framed in the Argentine legal system.

As has already been asserted in an essay published in 2009, there are different elements in the classical legal relationship that has been taught up to these days: the subjects (individuals or legal persons) and other organizational structures that have no legal personality; the assets, and then, the "efficient" element, i.e., "that element which gives rise to the rights throughout the life of the organization till its dissolution."\(^{28}\)

6. CONCLUSIONS

This is a radical proposal to Latin America, to replace this "system" of "legal personality," which is no longer useful and does not in fact represent a true system. The general system theory shows that symbolic or conceptual systems such as the Law, must, like the rest, attempt a harmonization of all its parts, the "whole" and its "integrity."

The system theory,\(^{29}\) which is a new paradigm and research tool, compares and unifies the research of both the "real subsystems" that arise from observation or derive therefrom, and the conceptual systems such as logics, mathematics, music, from which symbolic constructions and abstract systems spring.

If reality is a hierarchy of organized integrities, "the image of man will differ from the image created by a number of random physical particles as utmost and "true" reality. The "world of symbols, values, social entities and cultures is something "real" and its inclusion in a

\(^{28}\) Our Argentine System needs to be adjusted to be an updated, coherent and a useful vehicle to develop international business. See RAÚL ANÍBAL ETCHEVERRY, "NEED TO REFORM THE CIVIL AND COMMERCIAL CODE AND SUPPLEMENTARY LAWS TO PROVIDE CLARITY, ORGANIZATION AND COHERENCE TO THE CIVIL, COMMERCIAL AND SOCIAL ORGANIZATIONAL AND SELF-MANAGING ENTITIES, La Ley, 8/04/2009.

\(^{29}\) LUDWIG VON BERTALANFFY, TEORÍA GENERAL DE LOS SISTEMAS XV, XVI.
cosmic hierarchy might reduce the clash between "two cultures," hard sciences and human sciences, technology and history, natural and social sciences or any other antagonistic formulation.  

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Reality shows that there are a lot of systemic legal organizations or "entities" which may or not have personality. All of them, like individual subjects, do not act in isolation, but rather they interact within a community in one or more markets. They can be created or dissolved, they may or not interact with others in groups, according to the reality of the business.

In contrast to these subjects, we find others who are now called "consumers," which receive, to some extent, the result of the effort of such organizations for the production or exchange of goods or services. The population is considered a consumer and is awarded legal protection.

It is necessary to construct a unified market notion for all these actors to be completed with the rules of each market relating to competition and loyalty laws. Membership and property are terms that complement each other in collective organizations. The organization of the market would give rise to the virtual formation of a big entity which is given that name irrespective of the number of participants. And there are several markets, like national, regional and international markets.

In the three market ends (the producer, the distributor or intermediary, and the consumer) rest the laws that foster freedom not only of commerce, such as the French law of March 2, 1791, by means of which any person could freely make any trade or exercise an art or profession. It is also established in French law that there is an obligation to respect the freedom of opportunities and loyal competition for any kind of civil or commercial activities.

There is a fourth and decisive actor in each market—the State. With its various degrees of intervention and decentralization, always present in the direct or indirect regulation of the economy rules, and therefore, in the regulation of the markets, the State’s role is twofold. First, it is autonomous when playing the role of an entrepreneur, and then, at the same time, it acts as a public power as it exercises control of the economy.

In the market, and with the four mentioned actors, there appear a series of conducts, legal acts, contracts and other agreements which

30. Id. at XVII.
31. About the competition law, among others, see R. Illescas Ortiz, La legislación española sobre la competencia y su adaptación a la normativa, “Derecho de la competencia: la libre competencia”; “Derecho de la competencia: la competencia leal,” op cit, passim.
32. As the author has already stated, it can be seen that there is another concept which goes beyond that of "contract" which has not been completely developed, at least
articulate the production or exchange of goods and services. Some authors make reference to "transactions" which is a word that clearly expresses the customs that go beyond conducts, legal acts and contracts. One cannot think of a limited market strictly devoted to commercial or mercantile acts, conducts, contracts and transactions. A true market allows for the participation of all operators, irrespective of their activity. The market rules must be clear, not abusive and based on ethics.

The self-managing legal organizations are those which operate business. They are those who habitually execute bilateral contracts. They are currently operated by individual persons, on the one hand, and legal organizations, rather than entities, created to manage independent assets, on the other. Irrespective of the fact that the law may consider these latter "legal persons" or not, all of them act or may act in the market developing a single or various activities. They are not contracts, since both legal sub-systems have a different nature.

In this workplace, we can make the following reflections to the readers:

a) They do not constitute a bilateral or exchange relationship, but create a market operative system.

b) They do not constitute a kind of "system or subsystem" built for a purpose other than operating. For example, the "credit card system" which establishes a certain order, a legal organization which allows the possibility or modality of completing different exchange and credit transactions, but which is not considered an "operative entity."

c) The new concept proposed is a legal organizational system capable of creating and developing an order among persons, property and legal relations which allows the administration and disposition of assets either partially or as a whole.

d) This "administration" or "disposition of assets" is evidenced by "legal conduct" which does not need to be embodied in a "person" that operates through conduct, acts, contracts, agreements or covenants, which affect the assets that such

in our legal system. This has generated a wide scope of meaning for "contract." Apart from the contract, there are "transactions" and "covenants," "agreements" and other legal concepts that already exist but have not been defined and systematized by statute. For example, financial or banking transactions.
“system” administers and controls with a higher or lower degree of autonomy.

e) Such system must have a cause, purpose, object, human and business resources, property, legitimacy or legitimization within the legal world.

f) In our opinion, it is not an open system, such as the contract system, which creates bilateral legal relations which may be multiple, but rather, it is a closed system that must always be authorized and structured, at least in its basic principles, by the law, either directly or indirectly.

Nowadays, business among individuals has become scarce and, in fact, there is a tendency towards the unification of private law. Most transactions and contracts are made with the participation of market enterprises or economic operators. It must be understood that an “economic operator” may be an association, a foundation or a trust, which may operate without a direct view of profit, or may be non-profit or profit organizations. All of them must abide by the market rules, and also by the regulatory statutes, even though they apply mutatis mutandis.

It should also be considered that, according to this point of view, the laws generated by the State and the new laws arise from the debate among three parties: the consumer, the enterprise (in a general sense, including individual businessmen that act on their own name or through representatives, the civil, commercial or social organizations that administer assets, and the State itself acting as an entrepreneur) and the State. It should also be taken into account that when we refer to “enterprise” we cannot disregard all those that have a civil, mutual, social, cooperative or charitable purpose, which undoubtedly play an important role in our societies and administer small, medium or large funds.

Internationalization should also be taken into account due to the creation and increasing development of international contracts and globalization, which is a status defined by what it is not rather than by what it is. On the other hand, the need for social awareness emerges as an important issue in these times where there are few people with big

33. JAVIER JUSTE MENCIA, LIMITACIONES AL PODER DE REPRESENTACIÓN DEL FACTOR EN EL GIRO O TRÁFICO DEL ESTABLECIMIENTO. ACTUACIÓN DEL ADMINISTRADOR SOCIETARIO EN CALIDAD DE FACTOR.
34. JORGE OVIEDO ALBAN, ESTUDIOS DE DERECHO MERCANTIL INTERNACIONAL 67 (shows approximations to the definition of international contract).
35. KENICHI OHMAE, EL PRÓXIMO ESCENARIO GLOBAL 23.
fortunes and millions of persons that are socially excluded and live in extreme marginal conditions. It applies to the social responsibility that for-profit organizations must have and is reflected by a "social balance."

The right of association is transferred to the acts when an organization of persons and assets that can be lawfully managed is created. An organizational business, thus, shall have, even though it had a minimum activity and risk, an independent action to manage its assets, i.e. an administrative function that includes the possibility of adopting different forms contemplated by the laws of obligations and the real property laws. "Organization form" is a term that indicates the existence of a "system."

There are "systems" which are complex, multiple or plurilateral which arise in the contractual field (examples are franchises and credit cards) which serve an exchange purpose; and there are other improved systems that allow the independent legal self-management of assets, and thus, fulfill a role of actors or operators in the general, civil, commercial, or socioeconomic markets.

There are multiple forms of organizational business or systems that appear every day for different purposes, such as groups, corporations, partnerships, consortiums, civil societies, condominiums, and joint ventures.

If the core of the organizational business administration phenomenon is the joint action of individuals through a "system," a better effect can be obtained by providing it with controlled freedom adjusted to these modalities, thus creating a flexible organizational method which will guarantee that entrepreneurial activity will be developed adequately in the global economy.

Considering that the law is a subsystem of the whole social system, and considering that we still have unfair or unequal societies in Latin America, it is necessary to follow a continuous improvement policy. The main source of law in our Roman-Germanic system is the law, and therefore, it is necessary that laws, which shall be the main source of judicial decisions, are clear, coherent and consistent.

We believe that we have reached a full understanding of the organizational entities. As Arendt stated:

36. José Miguel Embid Irujo, PERFIL JURÍDICO DE LA RESPONSABILIDAD SOCIAL CORPORATIVA.
37. Regarding sources of law, see, among others, Alf Ross, SOBRE EL DERECHO Y LA JUSTICIA 75.
The understanding, insofar as it is different from the correct information and scientific knowledge, is a complicated process which never leads to univocal results. It is a never ending activity, which is always different, and therefore, we accept reality, and come to terms with it, i.e. we try to be in harmony with the world.\textsuperscript{38}

We know that the “legal personality” is an intellectual construction that is deeply rooted in some legal experts. Even though it is an intuitive concept, it is only acceptable for language practical purposes. The philosopher we are quoting is still developing her assertions with memorable ideas: “Sciences can only clarify, but never prove or deny, the preliminary uncritical comprehension from which they start.” No problem can be solved if it is debated at the same level of comprehension in which it has been formulated (Einstein). The upgrade allows us to find solutions which are both valid and durable, which are the aim of any legal system.

According to the Argentine laws in force, the asset self-management legal systems could be expressed in the following manner:

1. Legal Facts.
2. Legal Acts.
3. Contracts.
5. Legal “Systems” intended to facilitate business activities or that are instruments or vehicles to develop the same.
6. Other Legal Systems.

All of the above are variations that arise from the law; the law creates and establishes them, and allows them to choose the opportunity in which they are going to be used by applying the freedom of intention.

An instance of asset self-management could be found, to a lesser extent, in the case of co-ownership or common ownership, but they are always legal mechanisms that allow the administration and management of assets or property. The self-management of assets would be present in a certain “business” or set of acts and contracts having lesser autonomous management (condominiums); it could also adopt more complex forms in order to be considered a legal active market operator (example in Argentina: an administration trust). All these legal organizations have a higher or lesser degree of autonomy in the management of their assets. Said assets support, and at the same time

\textsuperscript{38} Hanna Arendt, \textit{De la Historia a la Acción} 29.
provide the legal qualification for, all the acts performed by such organizational structure.

The nineteenth century law was structured on the basis of certain "patches," by building up concepts of genre and species, sentences and structures to regulate human conduct. Each new legal figure brought about several effects, and its inclusion was not always "clean," that is to say, the preceding system was not remodeled in order to strike any contradictions, redundancies or inconsistencies.

A critical analysis of certain constructions of private or common law can lead us to "unfold" certain structures. To do that, however, it is necessary to carry on a deconstruction to be able to construct anew mechanisms or devices that are adequate for the twenty-first century.

We are inescapably facing complexities with "integralities" or "systems" in all fields of knowledge.\(^{39}\)

Our proposal is based on the assumption that there is an implied category of centers or "systems" which are susceptible of being defined by law but for which there are no clear legal definitions. Apart from contracts, and on the basis of legal acts or contracts themselves, asset self-management systems can be created, and collective business, organizations, groupings and networks can be allowed. Some of them are "legal persons" and some not. Such systems could be defined as asset self-management legal organizations or systems. But such denomination should not be derived from court interpretation or the opinion of legal scholars.

A law must be passed to regulate the civil, commercial or social market operators who are, together with the individual entrepreneurs, the necessary counterparties of consumers, whose rights have largely evolved. They could be defined as "asset self-management legal systems" or given any other name that may appear to be more adequate. And such systems, in order to be internally and externally operated directly or indirectly by human beings, deserve a new coherent, consistent, clear and updated legislative regulation that answers the needs posed by the new century. Legislators sometimes create unorthodox legal mechanisms to include in the legislation the new ventures that entrepreneurs generate almost on a daily basis.

What do corporations and associations, groups and collaborative or cooperative business have in common? They are all legal organizational systems, a genre that can start to be defined by resorting to its active systemic structuring nature. All of the legal systems are related to the freedom of an individual to join others to develop jointly certain activities. The plain right to associate, with only one restriction—the

\(^{39}\) BERTALANFFY, supra note 29, at 3.
illegal association—should be a full and unrestricted guarantee not conditioned on fulfillment of a “useful purpose” or “[the pursuit of] the common welfare” (Argentine Constitution and Civil Code). The human right of association, in any form freely chosen (i.e., the right to select and carry on a human group), is part of the general freedom of action and choice of persons.

In the Argentine legal system, the right of association is not sufficiently and explicitly stated in the Constitution and the substantive law. The Supreme Court clarified the issue in its ruling in the ALITT Case, and also stated that its exercise is ample. However, it should not be forgotten that judicial cases are mere legal precedents that solve an issue but are not obviously considered as legislation in force.

With the two examples of substantive law and legal-scholar opinions stated here, it is clear that:

1. The legal personality system is, nowadays in Latin America, a linguistic habit rather than a precise legal regulation.

2. There are numerous legal organizational systems, whether collective or not, which are fit to be used for the administration of assets individually and with a certain degree of autonomy. It would be convenient to structure the same using uniform theories for national and international business.

3. It would be convenient, especially for national and international business, to have flexible systems such as joint ventures, the Small Business Act proposed in Europe, some American legislation such as the Delaware acts, simple systems such as the Japanese Limited Liability Partnership Act (N° 40 of 2005), or the Cooperative Consortia of Argentina or the Colombian Simplified Corporations.
7. BIBLIOGRAPHY

- Acuerdo sobre Arbitraje Comercial Internacional del MERCOSUR (ley argentina 25.223).


- Basedow, Jurgen, Diego P. Fernández Arroyo y José A. Moreno Rodríguez (coordinadores), “¿Cómo se codifica el derecho comercial hoy?,” por La Ley Paraguaya, CEDEP, Thomson, año 2010, Asunción, Paraguay.


• Embid Irujo, José Miguel, “Perfil jurídico de la responsabilidad social corporativa,” Revista Valenciana de Economía y hacienda, ISSN 15774163 numero 12, Valencia 2004.


• Etchevery, Raúl Aníbal, “Necesidad de una reforma de los Códigos Civil, de Comercio y leyes complementarias para darles claridad, organicidad y sistema coherente a los entes de organización y autogestión civiles, comerciales y sociales,” La Ley, 8/04/2009.


