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Modernizing Latin American Company Law: Creating an All-Purpose Vehicle for Closely Held Business Entities—The New Simplified Stock Corporation*

Francisco Reyes**

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* In the original: *Sociedad por Acciones Simplificada* or SAS

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I. INTRODUCTION

The wave of corporate governance reforms that has permeated all of the systems of Latin America has not significantly impacted the legislation applicable to closely held companies. This appears to be a misdirected approach since the region's economic reality is characterized by family control and concentrated ownership. Surprisingly, most legal reforms in this field have targeted agency problems more commonly arising in the context of dispersed equity ownership models. Corporate governance reforms such as mandatory independent directors, auditing committees, and certification of financial statements have become commonplace in securities regulations across the region.¹ Albeit important in improving the legal framework of listed companies, most of these legal reforms disregard the basic underlying agency problem between controlling shareholders and their minority counterparts. Regulatory provisions for non-listed firms impose severe restrictions on private ordering and prevent parties from contracting around cumbersome imperative norms. In fact, provisions concerning all aspects of corporate governance, minority shareholders' rights, structural changes, mergers, dissolution, and liquidation are overwhelming.² These suboptimal anachronistic approaches are justified on the grounds of public policy and defended at any cost by local legal operators.

Company law in most Latin American jurisdictions continues to follow the taxonomy of business associations inherited from the nineteenth century's French codification movement. The point of

1. See Colombian Law 964 of 2005 on Securities Regulation; Argentina, Decree 677 of 2001; Brazil, Law No. 10.303 of 2001; Chile, and Law 18.046 of 1981.

2. See Section 224 of Law 6404 of the Brazilian Corporation Law of 1976 and Section 1.036 of the Brazilian Civil Code (Law 10.406 of January 10 of 2002); Sections 223 and 240 of the Mexican General Law of Commercial Companies (Law of August 4th of 1934) (LGSM); Sections 83, 110 of Law 19.550 of 1972 of Argentina; and Sections 158 and 173 of the Commercial Code of Colombia (Decree 410 of 1971), which provide, for example, the following:

Partners' board meetings or assembly shall approve with the quorum provided by the by-laws for mergers, or otherwise an early dissolution, the respective undertaking which should cover: 1. The reason for the proposed merger and the manner in which it will take place; 2. Data and figures, taken from the accounting books of the parties involved, which would have served as the basis to determine the conditions of the merger; 3. Breakdown and evaluation of the assets and liabilities of the companies to be absorbed and those of the absorbing concern; 4. An annex explaining the methods for the appraisal and exchange of interests, quotas or shares the transaction will involve; 5. Certified copies of the general financial statements of the contracting parties.

(Colombian Commercial Code of 1971).

departure for these systems can be found in the *Code Civil* and *Code de Commerce* of 1804 and 1807, in which the basic types of companies were included. With the exception of the closely held company (*sociedad de responsabilidad limitada*), the basic business forms already existed in those codes.³ Accordingly, most countries in the region have regulated four basic types of business associations: (1) Stock corporations (*sociedades anónimas*); (2) Partnerships (*sociedades colectivas*); (3) Limited partnerships (*sociedades en comandita*); and (4) Closely held companies (*sociedades de responsabilidad limitada*).⁴ Such business forms generally lack the necessary flexibility to cope with new economic realities due to obsolescence and rigidity. New hybrid business forms, such as the US LLC and LLP appear to be an appealing solution to deal with closely held firms in the region. However, attempts to undertake legal reform in this field must follow a structural transplant approach; namely, it cannot be restricted to the simple adoption of substantive law provisions.

This article is intended to provide an analytical framework for the adoption of a hybrid business form as a model law for closely held firms in Latin America. It is suggested that the advantages of flexibility and freedom of contract make such business forms especially suitable for family-owned firms, start-ups, professional undertakings, and all sorts of small and medium firms within this region.

The introduction, in December 2008, of the *Sociedad por Acciones Simplificada* or SAS (Colombian Simplified Stock Corporation) is an example of a successful, efficiency-minded lawmaking effort in a Civil Law jurisdiction.⁵ The SAS is aimed at providing its users with flexibility in its organization and capitalization, complete freedom of contract, and full-fledged limited liability.⁶ The Colombian example proves that even in the absence of competition for corporate charters, it is possible to undertake structural transplants of company law with extraordinary results. The enthusiasm with which entrepreneurs have greeted the new legal development is reflected in the high number of

3. The "SRL" was introduced in Brazil after the Portuguese "sociedade por quotas" of 1905. The same type of business entity was brought to other Latin American countries after the enactment of the Spanish statute of 1927.

4. For a detailed analysis of the main traits of Latin American business forms, see José W. Fernández et al., *Corporate Caveat Emptor: Minority Shareholder Rights in Mexico, Chile, Brazil, Venezuela and Argentina*, 32 U. MIAMI INTER-AM. L. REV. 157 (2001).

5. See Portafolio Economic Journal, *Ventajas de las SAS seducen a empresarios; 82% de las empresas creadas en septiembre fue bajo esta modalidad*, Bogotá, Feb. 10, 2010, available at <http://www.portafolio.com.co/archivo/documento/DR-4389> (showing that during the last several months, most business people preferred the simplified stock corporation to set up their new companies in Colombia).

6. See Colombian Law 1258 of 2008, Article 1.

SAS formations that occurred after its inception. Within the first twenty-four months after the statute was passed, more than 54,000 simplified stock corporations were created, outnumbering every other form of business association.⁷

II. PROPOSALS FOR LATIN AMERICAN COMPANY LAW REFORM

A. *Publicly Held Corporations*

As a general rule, economic growth can be assessed through the measurement of capital market development and the creation of new businesses. However, Robert Cooter has written that a vigorous stock market is not necessarily an essential factor for the economic development of poor countries.⁸ Using specific examples from economies in transition such as India and China, the author points to the significant growth attained in those countries within the last decade. In determining the manner in which financing has taken place in these jurisdictions, he has noted the relative absence of highly operational systems for publicly traded stocks.⁹

A brief review of statistical data regarding stock exchanges in Latin America reveals how the stock markets are comparatively depressed as compared with those existing in developed economies (see Table 1). The amount of IPOs and other public offerings is limited, the market capitalization of listed companies is relatively small as a percentage of gross domestic product ("GDP") (see Table 2), and the number of issuers of securities is small.

Under the international benchmark method, a comparison is made between GDPs for the six largest economies in Latin America and market capitalization in each of their national stock exchanges.

7. See Report on SAS, National Confederation of Chambers of Commerce, CONFECAMARAS, (November 15, 2010) (on file with author).

8. Robert D. Cooter and Hans Bernd Schaefer, *Solomon's Knot, How Law can End the Poverty of Nations*, Draft, February 2009, at 262.

9. *Id.*

Table 1: Number of Listed Corporation Per Million Inhabitants

Position	Country	Number of listed companies	Population	No. of listed corporations per million inhabitants
1.	Chile	246	16.134.219	15,24709687
2.	Perú	221	28.302.603	8,691780046
3.	Argentina	106	40.927.301	6,010657776
4.	Colombia	94	44.593.035	5,516556565
5.	México	335	107.449.525	2,289447068
6.	Brazil	350	190.078.227	1,294203991

Table 2: Percentage of GDP Made Up by Market Capitalization

Position	Country	Number of listed companies	GDP in US\$ (2006)	Market Cap in US\$ (2006)	% of GDP made up by market cap
1.	Chile	246	146.437.000.000	174.000.000.000	119%
2.	Brazil	350	1.067.472.000.000	710.000.000.000	67%
3.	Perú	221	92.416.000.000	40.000.000.000	43%
4.	México	335	839.182.000.000	348.000.000.000	41%
5.	Colombia	94	153.405.000.000	56.000.000.000	37%
6.	Argentina	106	214.241.000.000	51.000.000.000	24%

There appears to be an unfortunate coincidence between the wave of corporate-governance reform and the significant decrease in the number of listed firms in all major Latin American jurisdictions (see Table 3, showing the number of firms listed in Latin American domestic stock exchanges). Aside from other macroeconomic factors, a hypothesis can be ventured regarding the increasing costs of compliance (mostly due to multiple requirements of a formalistic nature) without a consistent impact on investor confidence. Therefore, the cost of capital may not have been reduced for publicly held firms.

Table 3: *Number of Firms Listed in Latin American Domestic Stock Exchanges*

Source: Augusto de la Torre, *Latin American Capital Markets*, The World Bank, 2007

These data suggest that a listing may not entail a significant reduction in the cost of capital or, worse yet, other factors such as tax evasion (which would have to be reduced after listing due to higher disclosure requirements) represent a negative incentive to list a corporation in a Latin American stock market. Furthermore, the analysis of these and other variables may suggest the reasonableness of shifting the corporate-law agenda towards the improvement of the legal framework for closely held corporations instead of devoting additional resources to the development of a publicly held corporation, the future of which is at best uncertain.

B. Closely Held Corporations

As a general rule, there is no significant innovation regarding closely held corporation statutes in the Latin American region. Outmoded notions such as the lack of single-member companies, a strict *ultra vires* doctrine, a fixed term of duration, the existence of several formalistic prohibitions supposedly aimed at the protection of shareholders, and a plethora of regulatory provisions better suited for publicly held entities than for small and medium family businesses, are only a few of the features characterizing an anachronistic regime that needs to be reformed.

Probably, the Colombian system in which corporate-law reform has been underway for the last fifteen years, could be a good example of a

shifting from the rigidities of an *ancien régime*¹⁰ such as the one described above to a reform agenda prioritizing flexibility, contractual freedom and limited liability. The goals advanced in the recent 2008 act introducing the simplified stock corporation (*sociedad por acciones simplificada*) match the contemporary policy agenda which gives prevalence to the so-called hybrid business forms, also known as unincorporations.¹¹ The adaptability of hybrid business forms which can be used as all-purpose vehicles has led to their introduction in Common Law and Civil Law jurisdictions around the world.¹²

III. THE MODEL ACT ON SIMPLIFIED STOCK CORPORATIONS FOR LATIN AMERICA

The case for developing new business forms is a strong one in Latin America. Family-owned businesses and closely held companies abound in the region, creating significant demand for entities that allow parties to engage in extensive private ordering. Existing business forms have proven to be inflexible to suit the needs of family-owned and multi-owner firms. However, most Latin American legislators—much like some of their European counterparts—have been reluctant to develop new hybrid vehicles. Increasing entrepreneurial demand for reform has only recently spurred several initiatives within the region. Such statutory enhancements are currently being outmatched by the introduction of a new business form: the *Sociedad por Acciones Simplificada* (SAS) or Simplified Stock Corporation.¹³ Even though it draws upon the French *Société par Actions Simplifiée*, this entity closely resembles the hybrid business entities that have been set in place in the United States and the United Kingdom during the last several years. By providing a mixture of corporate and partnership-like components, the SAS allows for significant contractual flexibility, while still preserving the benefits of limited liability and asset partitioning.

10. Since the enactment of Law 222 of 1995 (Official Gazette N. 42.156 of December 20th of 1995), concepts such as the single member enterprise were introduced in that countries' legislation. Additional statutes such as Laws 1014 of 2006 (Official Gazette N.46.164 of January 27th of 2006), 1258 of 2008 (Official Gazette N.47.194 of December 5th of 2008) and 1429 of 2010 (Official Gazette N.47.937 of December 29th of 2010) have continued the flexibilization process.

11. See draft legislation for the Colombian SAS, prepared by the author in 2006 and that gave rise to the Colombian law on simplified stock corporations, see Official Gazette N.111, Bogotá, April 11, 2007, at 1-6.

12. See Joseph A. McCahery and Erik Vermeulen, *Corporate Governance and Innovation: Venture Capital, Joint Venture and Family Businesses*, 1, 54 (European Corporate Governance Institute, Working Paper No. 65, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894785.

13. See Colombian Law 1258 of 2008.

The basic framework for the SAS's Model Act is based upon the following five pillars: (i) Full-fledged limited liability; (ii) Simple incorporation requirements; (iii) Contractual flexibility; (iv) Simple organizational structure; and (v) Fiscal transparency.¹⁴

The Model Act on Simplified Stock Corporations for Latin America—crafted after the Colombian example—is not intended to serve as a partial amendment to be introduced to traditional business forms regulated in national codes and statutes.¹⁵ Instead, it is recommended that its enactment take place on a separate legislation that could be linked to the existing system.¹⁶ In this manner, the SAS should have to compete with other types of business forms.

A. *Flexibility to Regulate Shareholder Relationships*

Under the simplified stock corporation model, shareholders acquire broad flexibility to freely regulate their relationships pursuant to a set of enabling provisions containing off-the-rack housekeeping rules that parties can opt out of and replace for tailor-made provisions, if needed.¹⁷ Therefore, shareholder protection can be achieved through devices of a contractual nature. In this manner, the antagonism between majority and minority shareholders may be ameliorated through *ex ante* negotiations. Agency costs can also be reduced as shareholders are able to satisfy their contracting interests, by setting up specific provisions on the corporate documents. For this purpose, the model act not only proposes enabling provisions but also enhances the enforceability of shareholders' agreements. Through the latter device, it is possible to reach certain equilibrium between stockholders by means of sophisticated mechanisms in which rights and obligations can be crafted to carefully determine *a priori* expectations of all corporate participants. Therefore, clauses setting up drag along or tag along rights, put and call options and buy-out agreements can be included in shareholders agreements. Following the

14. See MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION, et seq., *infra* Annex.

15. Such as Commercial Codes and Corporate Law statutes existing in different countries in this region.

16. See Joseph A. McCahery and Eric P.M. Vermeulen, McCahery, Joseph A., Vermeulen, Erik P. M., Hisatake, Masato and Saito, Jun, *The New Company Law—What Matters in an Innovative Economy?* (September 2006). ECGI—Law Working Paper No. 75/2006 at 20.

17. See e.g., MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION, § 17, *infra* Annex (stating that “Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws. In the absence of specific provisions to this effect, the shareholders’ assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders’ assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative”).

incomplete contracts theory, this enhanced freedom of contract complemented by gap-filling through an efficient adjudication process is intended to provide an improved conflict-resolution scenario for shareholders.¹⁸

B. *Introduction of Specific Performance*

In accordance with the theory of *structural transplants*,¹⁹ the remedy of specific performance is introduced to allow for the adequate enforcement of these agreements in the event of default. Furthermore, the Model Act incorporates a comprehensive regulation on the *abus de droit* (abuse of rights) theory, which is extrapolated from the French jurisprudence on Corporate Law.²⁰

Under this theory, shareholders have the ability to bring judicial actions or arbitration complaints, not only on the grounds of abuses of controlling shareholders, but also concerning the same conduct where it has been deployed by minority shareholders, and also in the event of an abuse in symmetrical block shareholdings (i.e., dual ownership on a 50%-50% distribution).²¹ The abuse-of-right action may give rise to damages for the aggrieved party, as well as rescission of the abusive act. Fiduciary duties of care and loyalty can also be applicable to the officers and directors of the SAS. To complete the scenario of corporate-law protections, the Model Act allows for the application of the shadow director doctrine, by means of which any person who intrudes in a positive management activity, without being a legally appointed manager or director, can be disciplined under fiduciary duties as if she were acting in such managerial capacity.²²

18. See William Bratton et al., *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross-Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 273-74 (1999).

19. Such a concept implies that it is not sufficient for the importation of a rule to merely incorporate into the borrowing country the substantive principles or provisions that work properly in the foreign lending jurisdiction. Along with such substantive norms it is also necessary to incorporate the rules (procedural or otherwise) and factors that cause such provisions to operate properly, including all circumstances that determine its efficiency and enforceability. See Katharina Pistor & Chenggang Xu, *Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory*, in GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 77 (Curtis J. Milhaupt ed., 2003).

20. ALEXIS CONSTANTIN, *Droit des Sociétés, Droit común et droit spécial des sociétés*, 2^a edición, Paris, Dalloz, 2005, at 85.

21. *Id.*

22. See MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION, § 27, 1, *infra* Annex ("Any individual or legal entity who is not a manager or director of a simplified stock corporation that engages in any trade or activity related to the management, direction or operation of such corporation shall be subject to the same liabilities applicable to directors and officers of the corporation.")

C. *Piercing the Corporate Veil to Extend Liability to Controlling Shareholder*

Even if limited liability is one of the main features of the SAS, the Model Act provides for piercing the corporate veil in order to extend liability to controlling shareholders in the event of fraud or abuse.²³ Such a procedure has to be brought before a specialized jurisdiction or an arbitration panel that will guarantee a more technical and expedited resolution for aggrieved creditors, as compared to the ordinary systems of adjudication which are handled before civil courts.²⁴

The SAS is as useful for local businessmen as it is for foreign investors. The Model Act seeks to remedy the legislative void existing throughout the region concerning hybrid business forms, as well as reducing transaction costs and providing entrepreneurs with enough flexibility to allow for private ordering in a multi-functional business form, suitable for all kinds of undertakings.²⁵

IV. SPECIFIC ASPECTS OF THE SAS MODEL ACT

The enabling nature of most of the SAS provisions is particularly relevant, due to the parties' ability to freely draft any clauses that may allow them to neutralize the sort of agency problems that usually characterize non-listed firms.²⁶ By exercising this significant contractual freedom, shareholders can stay away from standardized corporate contracts. In this manner, creativity and innovation concerning new corporate structures may be fostered.

A. *Nature and Legal Personality*

In the first place, the SAS is a business entity that may be created either by the execution of a contract or through the subscription of an

23. See MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION, § 41, *infra* Annex ("The corporate veil may be pierced whenever the simplified stock corporation is used for the purpose of committing fraud. Accordingly, joint and several liability may be imposed upon shareholders, directors and managers in case of fraud or any other wrongful act perpetrated in the name of the corporation.").

24. See Colombian Law 1258 of 2008, article 40, regarding arbitration and specialized procedures for the Simplified Stock Corporation of Colombia.

25. For example, MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION, § 5, 5 [hereinafter MODEL ACT] allows for incorporators to state in the entity's by laws that corporation may engage in any lawful business, unless a restricted purpose has been set forth by the parties.

26. See, for example, MODEL ACT, *supra* note 25, §§ 6, 7, according to which, the parties enjoy considerable leeway to stipulate any provisions for the management of the business and for the conduct of its affairs, provided that at least one legal representative is appointed to conduct the affairs of the corporation in relation with third parties.

incorporation document by the sole shareholder.²⁷ This feature is intended to provide investors with a high level of flexibility. The business entity is suitable either for the formation of small, single member corporations or large, multi-owner enterprises including entities forming part of corporate groups. The SAS can be used in any venture, irrespective of the number of shareholders that concur to incorporate it or who subscribe shares at a subsequent stage.²⁸ In fact, neither the entrance nor the exit of stockholders can affect the continuity of the corporate entity, as long as one person remains as a shareholder. In this way, the antiquated rules setting forth minimum and maximum numbers of shareholders are surpassed completely.

The legal personification of the SAS is produced once the document of incorporation (private or public deed) is filed before the Mercantile Registry. Registration of the simplified corporation has a “constitutive” nature, since it determines the regularity of the business association, the benefits arising from asset partitioning, and limited liability. The SAS is designed to be registered online. Therefore, notarizations and other annoying formalities are altogether surpassed in the SAS scheme.

It is necessary to emphasize that the SAS is not conceived to be listed in a stock market. The SAS is a business association type designed to structure closely held companies. The broad contractual flexibility that allows providing for rules concerning the squeeze out of shareholders, stocks with multiple voting rights, severe restrictions on stock transfers, among others, may be incompatible with the investor protection guidelines that are mandated for listed companies. For the same reasons, the French SAS statute does not allow the possibility of raising resources originating from private savings in the stock market (*appellation publique à l'épargne*).²⁹

B. Incorporation and Proof of Existence

The Model Act indicates how the SAS may arise out of a contract or a unilateral act.³⁰ This approach is intended to supersede the old-fashioned discussion, so frequent in Latin America and even in Continental European countries, concerning the so-called one-person corporation. This significant improvement is immensely useful for structuring corporate groups where total corporate control may be centralized in a single parent corporation.

27. See MODEL ACT, *supra* note 5, § 5; see also *id.*, *infra* Annex.

28. *Id.*

29. See DOMINIQUE VIDAL, DROIT DES SOCIÉTÉS 585 (Paris, L.G.D.J. 2006).

30. See MODEL ACT, *supra* note 25, §§ 5 & 6; see also *id.*, *infra* Annex.

Among other things, the Model Act intends to reduce administrative and bureaucratic procedures and formalities necessary for the incorporation of a company. The corresponding provisions are aimed at reducing entry barriers in order to facilitate the creation of new businesses and mitigate the impact of transaction costs.³¹ Accordingly, the required procedure to set up a SAS has been reduced to the filing of the formation document in the country's mercantile registry. Section 5 of the Model Act states that a simplified stock corporation "will be formed by contract or by the individual will of a single shareholder, provided that a written document is granted."³² Pursuant to the same provision, the formation document "shall be registered before the Mercantile Registry."³³

The SAS Model Act authorizes the parties to set up an unrestricted corporate purpose. (I would say "any lawful purpose.")³⁴ This approach is found to be more convenient due to efficiency considerations. Such a characteristic determines a meaningful difference in the economic conception of the stock corporation. Within the unrestricted purpose clause system, managers obtain a higher degree of discretionary authority to run the corporation. There is no need to amend the corporation's by-laws every time that a new, different business opportunity arises.

It is true that broadening the scope of business activities that the corporation can carry on ameliorates the impact of the *ultra vires* theory which has permeated most Latin American jurisdictions. Indeed, the traditional "specialty theory," by means of which the partners have to define *ex* restricted objects in the foundational documents, has also led to complicated and protracted litigation. The corollary of such specialty theory is closely linked with "ultra vires" concerns, for any act beyond the corporation's objects is deemed to be null and void. This legal consequence arises from the lack of legal capacity to undertake any activity beyond the purpose clause. As it is obvious within the SAS, parties can opt out this default provision and set up a restricted-purpose clause in the corporate by-laws, defining the specific corporation's main economic activities that, in turn, will determine the entity's legal capacity.³⁵

31. *Id.* (This flows naturally from the previous sentence so whatever the professor is citing to in the previous citation—it will be the same citation for this one.)

32. *See id.*

33. *Id.*

34. *See* MODEL ACT, *supra* note 25, § 5(5); *see also id.*, *infra* Annex.

35. *See id.* §§ 5 & 6.

C. *Capital Contributions and Shares*

One of the most relevant aspects of the new statute has to do with the great flexibility afforded to entrepreneurs that intend to make cash contributions to the firm. The SAS can be funded through a variety of channels, which surpass even the financing mechanisms available for traditional stock corporations. Even if the SAS cannot undertake public issuances of shares due to its nature as an archetypical closely held entity, the flexibility of its capital structure facilitates the process of raising resources from private actors.

Section 10 of the SAS Model Act allows entrepreneurs to freely allocate numerical values to the firm's authorized, subscribed, and paid-in capital.³⁶ Furthermore, it allows for payment of the firm's subscribed capital to take place up to two years after the shares have been initially subscribed.³⁷ Firms can also issue classes of shares with varying rights.³⁸ Section 9 allows for capital subscription and payment to be carried out under "terms and conditions different to those set forth under the Commercial Code."³⁹ Under Section 10 of the SAS Model Act, firms can also issue "preferred shares with or without vote." This opens up myriad possibilities for entrepreneurs, who have traditionally been unable to freely determine the rights carried by shares that are issued in closely held firms.⁴⁰

In granting ample flexibility for firms to issue different classes of shares, the SAS Model Act not only favors capital-raising processes but perhaps more importantly, facilitates the administration of corporate affairs by entrepreneurs.

D. *Company Organization*

Simplifying the operation and organic structure is an important goal of hybrid business forms. Attaining such a goal ameliorates the costs associated with the company's operation. Accordingly, one of the principal aspects of the SAS legal regime is the creation of a flexible regime, which allows entrepreneurs to opt out of otherwise mandatory provisions.⁴¹ The enabling character of this regulation also gives way to an enormous freedom of organization for the shareholders. Périn holds that within the regulation of the French Simplified Stock Corporation the combination of freedom of contract with the elements of stock

36. See MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION, § 9, *infra* Annex.

37. *Id.*

38. See *id.* § 10.

39. See *id.*

40. See *id.* at § 11.

41. See MODEL ACT, *supra* note 25, § 5, see also *id.*, *infra* Annex.

corporations constitutes an unprecedented privilege in that country's legal system.⁴² For any economic agent, the election of the SAS as a business structure corresponds to the desire of increasing the organization's efficiency by making it suitable to shareholders' necessities.⁴³

The SAS Model Act confers entrepreneurs with complete freedom over the company's internal organization structure. This is meant to lighten the firm's bureaucratic burden by reducing to a minimum its mandatory organs. Section 17 of the Model Act establishes in a very clear fashion that the SAS's structure may be freely defined in its by-laws, to wit: "Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws."⁴⁴ In the absence of specific by-law provisions, "the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative."⁴⁵

In this manner, the SAS's shareholders' assembly maintains a preponderant role that is reflected in the great variety of powers attributed to it. Therefore, most significant corporate transactions must be authorized by the shareholders duly gathered in the assembly or by the sole shareholder. Specifically, the Model Act, in its Section 37, confers upon the assembly the power to consider and approve the "financial statements and annual accounts" of the company.⁴⁶ These documents must be submitted to the business entity's highest organ by the corporation's legal representative before the corresponding shareholders' assembly meeting. The same Section adds that when dealing with corporations with a single shareholder, she will approve all the company's accounts and will leave a record of such approval in the company minutes dutifully filed in the corporate books.⁴⁷

The by-laws may also create other organs such as the board of directors to carry on part of the activities usually performed by the assembly.

As the corporation's main governing body, the assembly draws the firm's policies, adopts structural decisions (conversions, mergers, split-up, winding up, etc.), approves financial statements, distributes profits

42. Pierre-Louis Périn, *La Société par Actions Simplifiée: Etudes-Formules* 11 (Joly Editions 3d ed. 2008).

43. *Id.*

44. See MODEL ACT, *supra* note 25, § 18, see also *id.*, *infra* Annex.

45. See *id.* § 17.

46. See *id.* § 37.

47. *Id.*

and creates reserves.⁴⁸ As it is the general approach in the Model Act, the cited part of Section 14 is in part a default rule, subject to the parties' will. Therefore, it is viable to allocate some of the corporate powers assigned to the assembly in a different fashion.

E. Meetings of the Shareholders' Assembly

The rules for the operation of the shareholders' assembly also contain meaningful modifications to traditional approaches, as once again the Model Act aspires to decrease unnecessary formalism. To this effect, the proposed changes simplify the existing rules for calling meetings of shareholders, as well as the provisions that govern quorum, majorities, actions without a meeting, etc. This is a very significant change since it removes a series of requirements based on old-fashioned standards, which traditionally paved the way for innumerable lawsuits originating in these purely formalistic aspects.

In order to facilitate the decision-making processes in the SAS, and bearing in mind that it is a useful instrument for foreign investment, the Model Act allows shareholders' assemblies to meet at any specific location, irrespective of its main domicile.⁴⁹ Another manner in which the Model Act seeks to facilitate the operation of shareholders' meetings is through the creation of alternative mechanisms for the adoption of decisions and the simplification of existing mechanisms for this same purpose.⁵⁰ In any event, due to the fact that these rules are enabling rather than mandatory, it will always be possible to stipulate different requirements for actions without a meeting to be effectuated.⁵¹ Regarding notice of meetings, the parties can set up alternative mechanisms and define, within reasonable limits, the term between the delivery of such notice and the date when the meeting will be held. Section 19 of the cited Act allows for meetings "through any available technological devices or by written consent."⁵² A provision like this clearly foresees the applicability of any available technological means of communication. The utilization of these devices will only increase through time, as local economies and jurisdictions become more

48. See MODEL ACT, *supra* note 25, § 20, *see also id.*, *infra* Annex.

49. See *id.* § 18.

50. See *id.* § 19.

51. See CLAUDE PENHOAT, DROIT DES SOCIÉTÉS 303 (AENGDE 5th ed. 1998). Claude Penhoat suggests diverse forms of deliberations within the French SAS structure, including vote cast directly by shareholders who attend the meeting, vote by correspondence, vote by proxy, and any other technique. The same author adds that quorum and majority conditions are freely defined in the by-laws, except for some decisions requiring unanimity. *Id.*

52. See MODEL ACT, *supra* note 25, § 19, *see also id.*, *infra* Annex.

integrated and intertwined. The SAS Model Act also allows for the shareholders to define in the by-laws the corporate organ that will be entitled to formulate the respective notice.⁵³

The mechanism regarding the waiver of notice to shareholders' meetings constitutes a great innovation in the simplified stock corporation. Under the general regime, omitting the notice of meeting or formulating it inadequately has the potential to disrupt the firm's internal affairs. In practice, the shareholders of a closely held corporation (which are often member of the same family) will not observe the full formalities required for calling meeting of the shareholders' assembly. However, this will not have any adverse effects for the shareholders, as they will in practice have full knowledge of the dealings undertaken in the assembly. Accordingly, it is reasonable to allow them to validate the formerly incurable breach of the formalities for calling meetings of shareholders, through the waiver-of-notice mechanism. So, if for example, after an assembly meeting in which there was a sufficient quorum (though not a universal one) and decisions were taken with the proper majorities, it was established that the absentee shareholders were not dutifully called, this breach in the formalities for calling the meeting can be cured though a simple letter addressed to the corporation's legal representative. For this effect, the only requirement needed is the submission of a written document to the company before, during, or after the corresponding session.

In the same path of creating a more effective and balanced regime for the SAS than the one that exists for other business forms, the Model Act proposes the creation of an implicit validation system for assembly decisions in cases where the notice of meeting given to all or some of the shareholders present at the assembly has been irregular or nonexistent.⁵⁴ In fact, even if they were not summoned to the assembly, the law presumes that those shareholders attending the corresponding meeting have waived their right of notice. Nevertheless, Section 21 of the SAS Model Act allows present shareholders to demand an appropriate advance notice before the meeting takes place.⁵⁵ The provision states that "the attendees in a given shareholders' assembly will be deemed to have waived the right of being convened, unless such shareholders make a statement to the contrary before the meeting takes place."⁵⁶

In summary, the rigidity of the current regulations in Latin American jurisdictions is attenuated in this subject matter by the

53. *See id.* § 20.

54. *See id.* § 21.

55. *Id.*

56. *Id.*

introduction of innovative legal rules facilitating shareholders' effective communication and, furthermore, by allowing entrepreneurs to dispense with unnecessary nullifications and other legal sanctions when no damage exists because of such omission.

V. EMPIRICAL DEMONSTRATION CONCERNING THE COLOMBIAN SAS

The enactment of Colombian Law 1258 of 2008 (Official Gazette N.47.194 of December 5th of 2008), by means of which the Simplified Stock Corporations (SAS by its acronym in Spanish) was created, has been by far the most successful company-law reform in the last several decades.⁵⁷ The implementation of the SAS has given rise to a certain degree of competition among the different types of business associations that exist in the country's commercial legislation. The inception of the new business form allows entrepreneurs to choose between a traditional legal regime characterized by old-fashioned, backward regulations and the new modern corporate type of entity. Certainly, the new business vehicle, which is useful for all purposes, has represented, since the law was enacted, a gradual wither away from the Colombian business-association types existing prior to Law 1258 of 2008. The comparative inferiority of traditional business association types formerly used to structure closely held companies makes their future use unnecessary, given the undeniable practical advantages offered by the SAS. This assertion is evident in light of the exponential growth of the simplified stock corporation in Colombia.⁵⁸

The reaction of the business community to the new regulation on Simplified Stock Corporations has surpassed all expectations.⁵⁹ As the graph below shows, the SAS has acquired a level of significant importance within local business associations. The data not only show the impressive acceptance of the SAS during this period, but also the progress made by this company type *vis-à-vis* the previously existing ones. As a result, while in December 2008 the percentage of SAS only reached 7.42% of the total number of business associations registrations, by August 2010, this company type represented 81.3% of all registered companies. This trend has been consistent during 2010. As Table 4

57. Certainly, previous reforms such as the one introduced by Law 222 of 1995 had a more restricted impact than the SAS. This law constituted only a "patch up" reform to traditional corporate rules contained in the Colombian Commercial Code. Such approach limited the scope of legislative changes that otherwise could have been made under a more progressive orientation.

58. See Portafolio Economic Journal, *Editorial*, Bogota, Feb. 3, 2011, available at <http://www.portafolio.co/archivo/buscar?producto=portafolio&q=febrero+3+de+2011>.

59. Data for this section (consolidated for the entire country) has been obtained directly from the Confederation of Colombian Chambers of Commerce, CONFECAMARAS.

reflects the percentage of SAS during the first eight months of this year, the percentage of simplified stock corporations has ranged between 70% and 82% of the total amount of new registrations.

Before the enactment of the SAS statute, entrepreneurs were bound to use the traditional types of business associations regulated under the Commercial Code. These business forms were the general partnership, the limited liability company, the limited partnership, and the stock corporation. The statistics show the downfall of these *traditional* entities, as well as the rise of the SAS. In particular, it is observed that since April 2009, the Simplified Stock Corporation became the favorite company type in Colombia, surpassing even the limited liability company. The latter was, since its inception in 1937 and until that moment, the most widely used company type in Colombia.

Table 4: Evolution of the SAS Compared to Other Company Types (2008-2010)

VI. CONCLUSION

Understanding the underlying economic model in Latin American countries allows for the determination of the most frequent agency problems present in business corporations in the region. Taking into account the high degree of concentrated ownership that prevails across Latin American countries, solutions should be devised in order to

counteract the potentiality for oppression of minority shareholders at the hands of block-holders.

The theory of structural transplants is useful for the introduction of a system that is based upon two pillars. The first pillar is composed of enabling statutes that allow parties to opt out of default legal provisions. Private ordering facilitates the creation of tailor-made rules appropriate for closely held entities. Such freedom of contract contributes to achieving a higher degree of completeness in the corporate contract. The second pillar concerns procedural provisions that are intended to increase the degree of enforcement intensity so that gap-filling by arbitrators, judicial authorities and other entities is facilitated.

The Model Act on Simplified Stock Corporations for Latin America is an attempt to incorporate modern trends into legal systems characterized by a formalistic and backward structure in which regulatory provisions prevail to an overwhelming extent. The extremely successful, empirically measured result of Colombian Law 1258 of 2008 (with more than 54,000 Simplified Stock Corporations created in a short term) clearly suggests that businesspeople prefer flexibility to old-fashioned, misguided paternalism. The widespread adoption of the Model Act would not only allow for a certain degree of convergence in countries that require a higher level of legal integration, but also could foster innovation and foreign investment.

Annex
Model Act on the Simplified Stock Corporation (MASSC)

Chapter I
General Provisions

Section 1. Nature.—The simplified stock corporation is a for profit legal entity by shares, the nature of which will always be commercial irrespective of the activities set forth in its purpose clause.

Section 2. Limited Liability.—The simplified stock corporation may be formed by one or more persons or legal entities.

Shareholders will only be responsible for providing the capital contributions promised to the simplified stock corporation.

Except as set forth in Section 41 of this Act, shareholders will not be held liable for any obligations incurred by the simplified stock corporation, including, but not limited to, labor and tax obligations.

There shall be no labor relationship between a simplified stock corporation and its shareholders, unless an explicit agreement has been executed to that effect.

Section 3. Legal Personality.—Upon the filing of the formation document before the *Mercantile Registry* [include the name of corresponding company registrar's office], the simplified stock corporation will form a legal entity separate and distinct from its shareholders.

Section 4. Inability to Become a Listed Entity.—The shares of stock and other securities issued by a simplified stock corporation shall be registered within a stock exchange, nor traded in any securities market.

Chapter II
Formation and Proof of Existence

Section 5. Contents of the Formation Document.—A simplified stock corporation will be formed by contract or by the individual will of a single shareholder, provided that a written document is granted. The formation document shall be registered before the *Mercantile Registry* [include the name of corresponding company registrar's office], and shall set forth:

- (1) The name and address of each shareholder;
- (2) The name of the corporation followed by the words "simplified stock corporation" or the abbreviation "S.A.S.";
- (3) The corporation's domicile;

- (4) If the simplified stock corporation is to have a specific date of dissolution, the date in which the corporation is to dissolve;
- (5) A clear and complete description of the main business activities to be included within the purpose clause, unless it is stated that the corporation may engage in any lawful business;
- (6) The authorized, subscribed and paid-in capital, along with the number of shares to be issued, the different classes of shares, their par value, and the terms and conditions in which the payment will be made;
- (7) Any provisions for the management of the business and for the conduct of the affairs of the corporation, along with the names and powers of each manager. A simplified stock corporation shall have at least one legal representative in charge of managing the affairs of the corporation in relation with third parties.

No additional formalities of any nature shall be required for the formation of the simplified stock corporation.

Section 6. Attestation.—The *Mercantile Registrar* [include the name of corresponding company registrar's office] shall attest to the legality of the provisions set forth in the formation document and any amendments thereof.

The Registrar shall only deny registration where the requirements provided under Section 5 have not been met. The decision rendered by the Registrar shall be issued within three days after the relevant filing has been made. Any decision denying registration will only be subject to a rehearing conducted by the Registrar.

Upon the approval of a formation document by the Mercantile Registrar, challenges will not be heard against the existence of the simplified stock corporation and the contents of the formation document will constitute the simplified stock corporation's by-laws.

Section 7. Assimilation to Partnership.—Where a formation document has not been duly approved by the *Mercantile Registrar* [include the name of corresponding company registrar's office], the purported corporation will be assimilated to a partnership. Accordingly, partners will be jointly and severally liable for all obligations in which the partnership is engaged. If the partnership has only one member, such member will be held liable for all obligations in which the partnership is engaged.

Section 8. Proof of Existence.—The certificate issued by the *Mercantile Registrar* [include the name of corresponding company registrar's office] is conclusive evidence as regards the existence of the

simplified stock corporation and the provisions set forth in the formation document.

Chapter III

Special Rules Regarding Subscribed, Paid-in Capital and Shares of Stock

Section 9. Capital Subscription and Payment.—Capital subscription and payment may be carried out under terms and conditions different to those set forth under the *Commercial Code or corporate statute [include the name of the relevant Code, Decree, Law or Statute]*. In any event, payment of subscribed capital shall be made within a period of two years to be counted from the date in which the shares were subscribed. The rules for subscription and payment may be freely set forth in the by-laws.

Section 10. Classes of Shares.—The simplified stock corporation may issue different classes or series of shares, including preferred shares with or without vote. Shares may be issued for any consideration whatsoever, including in-kind contributions or in exchange for labor, pursuant to the terms and conditions contained in the by-laws.

Any special rights granted to the holders of any class or series of shares shall be described or affixed upon the back of the stock certificates.

Section 11. Voting Rights.—The by-laws shall depict in full detail the voting rights corresponding to each class of shares. Such document shall also determine whether each share will grant its holder single or multiple voting rights.

Section 12. Share Transfers to a Trust.—Any shares issued by a simplified stock corporation may be transferred to a trust provided that an annotation is made in the corporate ledger concerning the trustee company, the beneficial owners and the percentage of beneficial rights.

Section 13. Limitation on the Transferability of Shares.—The by-laws may contain a provision whereby the shares may not be transferred for a period not to exceed ten years, to be counted from the moment in which the shares were issued. Such term can only be extended by consent of all the holders of outstanding shares.

Any such limitation on share transferability shall be described or affixed upon the back of the stock certificate.

Section 14. Authorization for the Transfer of Shares.—The by-laws may contain provisions whereby any transfer of shares or of any given class of shares will be subject to the previous authorization of the shareholders' assembly, which shall be granted by majority vote or by any supermajority included in the by-laws.

Section 15. Breach of Restrictions on Negotiation of Shares.—

Any transfer of shares carried out in a manner inconsistent with the rules set forth in the by-laws shall be null and void.

Section 16. Change of Control in a Corporate Shareholder.—

The by-laws may impose upon an incorporated shareholder the duty to notify the simplified stock corporation's legal representative about any transaction that may cause a change in control regarding such shareholder.

Where a change in control has taken place, the shareholders' assembly, by majority decision, shall be entitled to exclude the corresponding incorporated shareholder.

Aside from the possibility of being excluded, any breach of the duty to inform changes in control may subject the concerned shareholder to a penalty consisting of a 20% reduction of the fair market value of the shares, upon reimbursement.

In the event set forth in this article, all decisions concerning the exclusion of shareholders, as well as the determination of any penalties, shall require an approval rendered by the shareholders' assembly by majority vote. The votes of the concerned shareholder shall not be taken into account for the adoption of these decisions.

Chapter IV

Organization of the Simplified Stock Corporation

Section 17. Organization.—Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws. In the absence of specific provisions to this effect, the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative.

Where the number of shareholders has been reduced to one, the subsisting shareholder shall be entitled to exercise the powers afforded to all existing corporate organs.

Section 18. Meetings.—Meetings of shareholders may be held at any place designated by the shareholders, whether it is the corporate domicile or not. For these meetings, the regular quorum provided in the by-laws will suffice, pursuant to Section 22 hereof.

Section 19. Meetings by Technological Devices or by Written Consent.—Meetings of shareholders may be held through any available technological device, or by written consent. The minutes of such meetings shall be drafted and included within the corporate records no later than 30 days after the meeting has taken place. These minutes shall

be signed by the legal representative or, in her absence, by any shareholder that participated in the meeting.

Section 20. Notice of Meeting.—In the absence of stipulation to the contrary, the legal representative shall convene the shareholders' assembly by written notice addressed to each shareholder. Such notice shall be made at least five days in advance to the meeting. The agenda shall in all cases be included within any notice of meeting.

Whenever the shareholders' assembly is called upon to approve financial statements, the conversion of the corporation into another business form, or mergers or split-off proceedings, shareholders will be entitled to exercise information rights concerning any documents relevant to the proposed transaction. Information rights may be exercised during the five days prior to the meeting, unless a longer term has been provided for in the by-laws.

Any notice of meeting may determine the date in which the Second Call Meeting will take place, in case the quorum is insufficient to hold the first meeting. The date for the second meeting may not be held prior to ten days following the first meeting, nor after thirty days from that same moment.

Section 21. Waiver of Notice.—Shareholders may, at any moment, submit written waivers of notice whereby they forego their right to be convened to a meeting of the shareholders' assembly. Shareholders may also waive, in writing, any information rights granted under Section 20.

In any given shareholders assembly and even in the absence of a notice of meeting, the attendees will be deemed to have waived their right of being summoned, unless such shareholders make a statement to the contrary before the meeting takes place.

Section 22. Quorum and Majorities.—Unless otherwise specified in the by-laws, quorum to a shareholders' meeting will be constituted by a majority of shares, whether present in person or represented by proxy.

Decisions of the assembly shall be taken by the affirmative vote of the majority of shares present (in person or represented by proxy), unless the by-laws contain supermajority provisions.

The sole shareholder of a simplified stock corporation may adopt any and all decisions within the powers granted to the shareholders' assembly. The sole shareholder will keep a record of such decisions in the corporate books.

Section 23. Vote Splitting.—Shareholders may split their votes during cumulative voting proceedings for the election of directors or the members of any other corporate organ.

Section 24. Shareholders' Agreements.—Agreements entered into between shareholders concerning the acquisition or sale of shares,

preemptive rights or rights of first refusal, the exercise of voting rights, voting by proxy, or any other valid matter, shall be binding upon the simplified stock corporation, provided that such agreements have been filed with the corporation's legal representative. Shareholders' agreements shall be valid for any period of time determined in the agreement, not exceeding 10 years, upon the terms and conditions stated therein. Such 10 year term may only be extended by unanimous consent.

Shareholders that have executed an agreement shall appoint a person who will represent them for the purposes of receiving information and providing it whenever it is requested. The simplified stock corporation's legal representative may request, in writing, to such representative, clarification as regards any provision set forth in the agreement. The response shall be provided also in writing within the five days following the request.

Subsection 1.—The President of the shareholders' assembly, or of the concerned corporate organs, shall exclude any votes cast in a manner inconsistent with the terms set forth under a duly filed shareholders' agreement.

Subsection 2.—Pursuant to the conditions set forth in the agreement, any shareholder shall be entitled to demand, before a court with jurisdiction over the corporation, the specific performance of any obligation arising under such agreement.

Section 25. Board of Directors.—The simplified stock corporation is not required to have a board of directors, unless such board is mandated in the by-laws. In the absence of a provision requiring the operation of a board of directors, the legal representative appointed by the shareholders' assembly shall be entitled to exercise any and all powers concerning the management and legal representation of the simplified stock corporation.

If a board of directors has been included in the formation document, such board will be created with one or more directors, for each of whom an alternate director may also be appointed. All directors may be appointed either by majority vote, cumulative voting, or by any other mechanism set forth in the by-laws. The rules regarding the operation of the board of directors may be freely established in the by-laws. In the absence of a specific provision in the by-laws, the board will be governed under the relevant statutory provisions.

Section 26. Legal Representation.—The legal representation of the simplified stock corporation will be carried out by an individual or legal entity appointed in the manner provided in the by-laws. The legal representative may undertake and execute any and all acts and contracts included within the purpose clause, as well as those which are directly related to the operation and existence of the corporation.

The legal representative shall not be required to remain at the place where the business has its main domicile.

Section 27. Liability of Directors and Managers.—All *Commercial Code* [include the name of the relevant Code, Decree, Law or Statute] provisions relating to the liability of directors and managers may also be applicable to the legal representative, the board of directors, and the managers and officers of the simplified stock corporation, unless such provision is opted out of in the by-laws.

Subsection 1.—Any individual or legal entity who is not a manager or director of a simplified stock corporation that engages in any trade or activity related to the management, direction or operation of such corporation shall be subject to the same liabilities applicable to directors and officers of the corporation.

Subsection 2.—Whenever a simplified stock corporation or any of its managers or directors grants apparent authority to an individual or legal entity to the extent that it may be reasonably believed that such individual or legal entity has sufficient powers to represent the corporation, the company will be legally bound by any transaction entered into with third parties acting in good faith.

Section 28. Auditing Organs.—A simplified stock corporation shall not, in any case, be legally mandated to establish or provide for internal auditing organs [include the name of corresponding auditing entity, e.g., fiscal auditor, auditing committee, etc.].

Chapter V

By-Law Amendments and Corporate Restructurings

Section 29. By-law Amendments.—Amendments to the corporate by-laws shall be approved by majority vote. Decisions to this effect will be recorded in a private document to be filed with the *Mercantile Registry* [include the name of corresponding company registrar's office].

Section 30. Corporate Restructurings.—The statutory provisions governing conversion into another form, mergers and split-off proceedings for business associations will be applicable to the simplified stock corporation. Dissenters' rights and appraisal remedies shall also be applicable.

For the purpose of exercising dissenters' rights and appraisal remedies, a corporate restructuring will be considered detrimental to the economic interests of a shareholder, *inter alia*, whenever:

- (1) The dissenting shareholder's percentage in the subscribed paid-in capital of the simplified stock corporation has been reduced;
- (2) The corporation's equity value has been diminished, or
- (3) The free transferability of shares has been constrained.

Section 31. Conversion into Another Business Form.—Any existing business entity may be converted into a simplified stock corporation by unanimous decision rendered by the holders of all issued rights or shares in such business form. The decision to convert into a simplified stock corporation shall be registered before the *Mercantile Registry* [include the name of corresponding company registrar's office].

A simplified stock corporation may be converted into any other business form governed under the *Commercial Code* [include the name of the relevant Code, Decree, Law or Statute] provided that unanimous decision is rendered by the holders of all issued and outstanding shares in the corporation.

Section 32. Substantial Sale of Assets.—Whenever a simplified stock corporation purports to sell or convey assets and liabilities amounting to 60% or more of its equity value, such sale or conveyance will be considered to be a substantial sale of assets.

Substantial sales of assets shall require majority shareholder approval. Whenever a substantial sale of assets is detrimental to the interests of one or more shareholders, it shall give rise to the application of dissenters' rights and appraisal remedies.

Section 33. Short-form Merger.—In any case in which at least 90% of the outstanding shares of a simplified stock corporation is owned by another legal entity, such entity may absorb the simplified stock corporation by the sole decision of the boards of directors or legal representatives of all entities directly involved in the merger.

Short-form mergers may be executed by private document duly registered before the *Mercantile Registry* [include the name of corresponding company registrar's office].

Chapter VI

Dissolution and Winding Up

Section 34. Dissolution and Winding Up.—The simplified stock corporation shall be dissolved and wound up whenever:

- (1) An expiration date has been included in the formation document and such term has elapsed, provided that a determination to extend it has not been approved by the shareholders, before or after such expiration has taken place;
- (2) For legal or other reasons, the corporation is absolutely unable to carry out the business activities provided under the purpose clause;
- (3) Compulsory liquidation proceedings have been initiated;
- (4) An event of dissolution set forth in the by-laws has taken place;

- (5) A majority shareholder decision has been rendered or such decision has been made by the will of the sole shareholder, and
- (6) A decision to that effect has been rendered by any authority with jurisdiction over the corporation.

Whenever the duration term has elapsed, the corporation shall be dissolved automatically. In all other cases, the decision to dissolve the simplified stock corporation shall be filed before the *Mercantile Registry* [include the name of corresponding company registrar's office].

Section 35. Curing Events of Dissolution.—Events of dissolution may be cured by adopting any and all measures available to that effect, provided that such measures are adopted within one year, following the date in which the shareholders' assembly acknowledged the event of dissolution.

Events of dissolution consisting of the reduction of the minimum number of shareholders, partners or members in any business form governed under the *Commercial Code* [include the name of the relevant Code, Decree, Law or Statute] may be cured by conversion into a simplified stock corporation, provided that unanimous decision is rendered by the holders of all issued shares or rights, or by the will of the subsisting shareholder, partner or member.

Section 36. Winding Up.—The simplified stock corporation shall be wound up in accordance with the rules that govern such proceeding for stock corporations. The legal representative shall act as liquidator, unless shareholders appoint any other person to wind up the company.

Chapter VII

Miscellaneous Provisions

Section 37. Financial Statements.—The legal representative shall submit financial statements and annual accounts to the shareholders' assembly for approval.

In the event that there is a single shareholder in a simplified stock corporation, such person shall approve all financial statements and annual accounts and will record such approvals in minutes within the corporate books.

Section 38. Shareholder Exclusion.—The by-laws may contain causes by virtue of which shareholders may be excluded from the simplified stock corporation. Excluded shareholders shall be entitled to receive a fair market value for their shares of stock.

Shareholder exclusion shall require majority shareholder approval, unless a different procedure has been laid down in the by-laws.

Section 39. Conflict Resolution.—Any conflict of any nature whatsoever, excluding criminal matters, that arises between shareholders, managers or the corporation may be subject to arbitration proceedings or to any other alternative dispute resolution procedure. In the absence of arbitration, the same disputes will be resolved by *(include specialized judicial or quasi-judicial tribunal)*.

The decisions rendered by the tribunal are final and shall not be subject to appeals before any court.

Section 40. Special Provisions.—The legal mechanisms set forth under Sections 13, 14, 38 and 39 may be included, amended or suppressed from the by-laws only by unanimous decision rendered by the holders of all issued and outstanding shares.

Section 41. Piercing the Corporate Veil.—The corporate veil may be pierced whenever the simplified stock corporation is used for the purpose of committing fraud. Accordingly, joint and several liability may be imposed upon shareholders, directors and managers in case of fraud or any other wrongful act perpetrated in the name of the corporation.

Section 42. Abuse of Rights.—Shareholders shall exercise their voting rights in the interest of the simplified stock corporation. Votes cast with the purpose of inflicting harm or damages upon other shareholders or the corporation, or with the intent of unduly extracting private gains for personal benefit or for the benefit of a third party shall constitute an abuse of rights. Any shareholder who acts abusively may be held liable for all damages caused, irrespective of the judge's ability to set aside the decision rendered by the shareholders' assembly. A suit for damages and nullification may be brought in case of:

- (1) Abuse of majority;
- (2) Abuse of minority; and
- (3) Abusive deadlock caused by one faction under equal division of shares between two factions.

Section 43. Cross-References.—The simplified stock corporation shall be governed:

- (1) By this Law;
- (2) By the formation document, as amended from time to time; or
- (3) By statutory provisions contained in the *Commercial Code* *[include the name of the relevant Code, Decree, Law or Statute]* governing stock corporations.

Promulgation.—This Act shall be effective as of the date of its promulgation, and it repeals any and all statutes, acts, codes, decrees, or provisions of any nature that are inconsistent with this Act.