# THE LATIN AMERICAN CONTRIBUTION TO A MODEL LAW OF SIMPLIFIED COMPANIES

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# I. INTRODUCTION

Economic prosperity is, in some respects, linked to continuous and positive change in corporate governance. This legislative evolution was critical for the development of small- and medium-sized business in developed countries. But in Latin America, there were no efficient regulations regarding the corporate forms available for small- and medium-sized companies. Until recently, countries like Chile and Colombia had the same legal structure and incorporation proceedings for all kinds of business vehicles, regardless of the business' size or stage of development. It is only in recent years that Latin American countries have begun to discover the benefits of simplifying legislation as it relates to companies. Chile and Colombia have gone through significant legal changes in

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the last ten years, implementing state-of-the-art legislation and technologies that not only other Latin American countries, but also international organizations, use as a model.

Currently, the state members of the Working Group I of the United Nations Commission on International Trade Law (UNCITRAL) are working to prepare standard legal procedures in relation to micro-, small-, and medium-sized enterprises (MSMEs). One of the priorities of this group is to provide model legislation for the simplified incorporation and registration of businesses of this type. In addition, this group is focused on creating legislation that will increase access to credit for MSMEs, increase the efficiency of dispute resolution in microfinance transactions, and otherwise foster a legal environment conducive to these types of enterprises.

In addition to the work being performed at UNCITRAL, the Second Pacific Rim Colloquium on Economic Development and Harmonization of Commercial Law also addressed simplified business associations. The Second Pacific Rim Colloquium provided a forum for the exchange of information and ideas on the creation of unified or harmonized legal institutions, laws and better practices to improve trade, and investments in countries within the Asian Pacific region.

In both multilateral efforts, the Colombian Simplified Corporation Law is being used as a model. The Colombian Simplified Stock Corporation (SAS) is a new and innovative corporate form that allows the creation of companies by a contract or unilateral legal act.<sup>2</sup> The SAS was introduced in the Colombian Simplified Corporation Law No. 1.258 of 2008,<sup>3</sup> which was based on:

- (1) Law No. 222 of 1995,<sup>4</sup> which created the "one-man company" capability, allowing business owners to limit their responsibility by operating not as their self, but under the regulations of a company; and
- (2) Law No. 1.014 of 2006,<sup>5</sup> that focuses on micro-business and the promotion of entrepreneurial culture. It allows a private document to create companies with one or more persons without the requirement of including a purpose clause or defining the lifetime of such an entity.

<sup>4</sup> L. 222, diciembre 20, 1995, DIARIO OFFICIAL [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley\_0222\_1995.html.

<sup>&</sup>lt;sup>1</sup> NLCIFT 12 Principles of Secured Transactions, NAT'L L. CTR. FOR INTER-AM. FREE TRADE, http://www.NatLaw.com/content/nlcift-12-principles-secured-transactions (last visited Jan. 15, 2015).

<sup>&</sup>lt;sup>2</sup> L. 1258, diciembre 5, 2008, DIARIO OFFICIAL [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley\_1258\_2008.html.

<sup>&</sup>lt;sup>3</sup> Id.

<sup>&</sup>lt;sup>5</sup> L. 1014 2006, enero 27, 2006, DIARIO OFFICIAL [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley\_1014\_2006.html.

Therefore, some of the developments this new legislation introduced to the Colombia business environment were: (1) the "one-man company" and (2) a no purpose or lifetime clause requirement in the articles of incorporation. In addition, the SAS legislation introduced a simplified incorporation and registration process, applicable only for this type of business vehicle.<sup>6</sup>

In Chile, Law No. 20.190, of 2007 provided for a new legal entity: Companies by Stocks (*Sociedades por Acciones*, SpA). This new corporate form, similar to the Colombian SAS, includes: (1) a flexible administrative structure; (2) a one-person incorporation capability; and (3) other important developments that provide incentives for small- and medium-sized entrepreneurs to become part of the formal sector, such as the capacity to buy their own stocks.

Prior to this legislation, the principal business vehicles in Chile were: (1) Limited Liability Companies (*Sociedad de Responsabilidad Limitada, Ltda.*, Law No. 3.918 of 1923);<sup>8</sup> (2) Stock Corporations (*Sociedad Anónima, S.A.*, Law No. 18.046 of 1981);<sup>9</sup> and (3) Individual Limited Liability Enterprise (*Empresa Individual de Responsabilidad Limitada, E.I.R.L.*, Law No. 19.857 of 2003).<sup>10</sup> Both local and foreign entrepreneurs can use these commercial vehicles to conduct all kinds of business. Regulated industries like banks and insurance cannot use them.

Nonetheless, it was not until the implementation of the new electronic platform for the Electronic Registration of Chilean Companies, referred to as "*Tu Empresa en un dia*" ("Your Company in One Day") that Chile became an interesting model to analyze. Law No. 20.659, of 2013<sup>11</sup> establishes a simplified regime that allows for the creation, modification, transformation, division, merger, and dissolution of the aforementioned Chilean principal commercial business vehicles, including the SpA. This model is different from the Colombian model in that in Colombia, the simplified registration process is only available for the SAS. Until recently, it was not available in an electronic format.

This Article provides information on the commercial laws in Chile as well as in Colombia and the general corporate forms available to meet the demands of small- and medium-sized enterprises. It also refers to the changes in legal institutions that provide for simplified business incorporation and registration and highlight the results in Chile.

<sup>&</sup>lt;sup>6</sup> L. 1258, diciembre 5, 2008, DIARIO OFFICIAL [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley 1258 2008.html.

<sup>&</sup>lt;sup>7</sup> Law No. 20.190, May 17, 2007, DIARIO OFICIAL [D.O.] (Chile), https://www.leychile.cl/Navegar?idNorma=261427&buscar=Sociedades+por+Acciones.

<sup>&</sup>lt;sup>8</sup> Law No. 3.918, Marzo 14, 1923, DIARIO OFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=24349.

<sup>&</sup>lt;sup>9</sup> Law No. 18046, Octubre 22, 1981, DIARIO OFFICIAL [D.O.] (Chile), https://www.leychile.cl/Navegar?idNorma=261427&buscar=Sociedades+por+Acciones.

<sup>&</sup>lt;sup>10</sup> Law No. 19857, Febrero 11, 2003, DIARIO OFFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=207588&buscar=Ley+N+19857.

Law No. 20659, Enero 8, 2013, DIARIO OFFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=1048718&buscar=Ley+N+20659.

#### II. BUSINESS VEHICLES AVAILABLE IN CHILE

In Chile, choosing from among the different business forms depends on several factors, including the investor's business strategy and the amount of available capital. The four most common forms are:

## A. Limited Liability Company (*Limitada*)

In these companies each partner's liability is limited to the amount of his capital contribution or a specified higher amount. <sup>12</sup> The purpose of this principle is that their partners can then freely determine the administration and control of these companies. There is no minimum capital requirement to start a *Limitada*.

The partners can be Chileans or foreigners and can include individuals or legal entities, but they cannot be fewer than 2 or more than 50.13 The name of the company must contain the name of one or more partners or a reference to its purpose and must include the word Limitada. Otherwise, the owners will be jointly responsible for its liabilities.<sup>1</sup>

# B. Stock Corporation (S.A.)<sup>15</sup>

A corporation is a company that: (1) is formed by a common fund of shareholders who are responsible only for their respective capital contributions; and (2) is administrated by a board of directors with at least three members who are all essentially revocable. 16 The board of directors must elect a manager and a Board Chair. The board makes decisions by majority vote. A corporation's starting capital must be fully subscribed and paid within three years. If not, its capital is automatically reduced to the amount subscribed and paid on that date. There are two types of Stock Corporations:

Public Stock Corporations: Stock Corporations whose (1) stocks are publicly traded. The Securities and Insurance Superintendency supervise these companies. They are registered within the National Securities Register. Also, they must have at least 500 shareholders or have at least ten percent of their subscribed capital held by a minimum of 100 shareholders.

<sup>12</sup> Id. art. 1.

<sup>13</sup> Id. art. 2.

Id. art. 4.

<sup>15</sup> Law No. 18.046, Octubre 22, 1981, DIARIO OFICIAL [D.O.] (Chile), http://www. leychile.cl/Navegar?idNorma=29473.

*Id.* art. 1.

Id. art. 11.

(2) <u>Closed Stock Corporations</u>: Any Stock Corporations that do not meet the requirements mentioned above. Beyond that, there is no real legal difference between a Closed Stock and a Public Stock Corporation. Thus, if a Closed Stock Corporation meets the legal requirements to become a public one, it will be subject to the registration and supervision requirements mentioned above.

# C. Individual Limited Liability Enterprise (E.I.R.L.)<sup>18</sup>

In Chile, an individual can acquire the status of a legal entity as an Individual Limited Liability Enterprise. This is a commercial legal entity with separate assets from its owner that does not require the participation of a third party. The Commercial Code regulates these companies. An *E.I.R.L.* can undertake any type of civil or commercial activity, except those reserved by law for Public Stock Corporations.<sup>19</sup> Their assets are limited to the amount specified in their deeds. The owner of an *E.I.R.L.* is liable only for personal goods up to the capital contributed to the company, but the company is liable for all its goods.

The company's name must include the name of its founder and the words *Empresa Individual de Responsabilidad Limitada*, or *E.I.R.L.*, and it may include a reference to its purpose <sup>20</sup> The company's purpose must indicate the nature of its activities and the specific sector in which it will operate. <sup>21</sup>

# D. Company by Stock (SpA)<sup>22</sup>

The Company by Stock (SpA) was recently introduced into the Chilean legal system with an aim to modernize the Chilean capital market system by, among other things, establishing a better framework for introducing venture capital into the system.<sup>23</sup>

SpAs are limited liability entities in which capital is divided into shares, but unlike Stock Corporations, there is no minimum requirement on how many shareholders the company must have.<sup>24</sup> The fundamental novelty that SpAs bring to the Chilean corporate legal structure is: (1) the almost unrestricted right

Law No. 19.857, Febrero 11, 2003, DIARIO OFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=207588.

<sup>&</sup>lt;sup>19</sup> *Id*. art. 2.

<sup>20</sup> *Id.* art. 4(b).

<sup>21</sup> *Id.* art. 4(d).

Law No. 1865 arts. 424-46, Noviembre 23, 1865, DIARIO OFICIAL [D.O.] (Chile), http://www.wipo.int/wipolex/en/text.jsp?file\_id=125935 [hereinafter Chilean CoC].

Law No. 20.190, Enero 7, 2014, DIARIO OFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=261427.

Chilean CoC, *supra* note 22, art. 424.

of the shareholders to freely establish the rights and obligations that will govern the company and the relationship among shareholders, including the means of management; (2) that a single shareholder can hold 100% of the share capital; and (3) that the SpA has the right to purchase its own shares without limitation.<sup>25</sup>

#### III. BUSINESS VEHICLES AVAILABLE IN COLOMBIA

In Colombia, there are also different types of companies. As in Chile, choosing one also depends on a number of different factors, including the investor's business strategy, liability limitations intention, number of partners or shareholders, and the amount of available capital. But unlike in Chile, in Colombia, only three types of companies are frequently used.<sup>26</sup> They are described below.

# A. Limited Liability Company (Limitada)<sup>27</sup>

As the name suggests, this type of company is similar to its Chilean counterpart, with some small differences. There is no minimum capital requirement, but if the company has gross assets equal to or greater than \$1,265,000 USD and/or gross income equal to or greater than \$759,000 USD, the Limited Liability Company will have a statutory auditor in Colombia. Another difference is that the total amount of partners cannot exceed 25.<sup>28</sup>

As for the similarities, each partner's liability is also limited to the amount of the capital contribution, or a higher amount when specified.<sup>29</sup> Like in Chile, the partners can freely determine the administration and control of these companies.<sup>30</sup> And, the name of the company must also include the word *Limitada* or the abbreviation (Ltda.). Otherwise, all partners will be jointly responsible for its liabilities.<sup>31</sup>

This information was provided by Santiago Renjifo, a Colombian attorney who works at CONFECAMARAS (www.confecamaras.org.co), the institution that puts together all the Colombian Chambers of Commerce that run the business registries of Colombia.

Id. art. 438.

These companies are regulated by the Colombian Commercial Code. L. 410, arts. 353-72, Marzo 27, 1971, DIARIO OFICIAL [D.O.] (Colom.), http://www.wipo.int/ wipolex/en/details.jsp?id=8295 [hereinafter Colombian CoC].

Id. art. 356.

Id. art. 353.

Id. art. 358.

Id. art. 357.

# B. Stock Corporation (S.A.)<sup>32</sup>

The Colombian Stock Corporation structure is also very similar to the Chilean structure, with some differences related to the categorization, number of shareholders, and the time limit on subscribing the starting capital. In Colombia, the capital must be paid within one year. <sup>33</sup>

# C. Simplified Stock Corporations (SAS) 34

These corporations are the equivalent of the Chilean SpA. Similarities include the same limited liability status, one-person incorporation, and shareholder capabilities. One difference is that the capital must be subscribed within two years in Colombia, 35 while in Chile the limit is five years if nothing is set forth in the Articles of Incorporation.

# IV. INCORPORATION PROCESS OF CHILEAN AND COLOMBIAN **COMPANIES**

The major differences between the Chilean and Colombian laws are in the countries' incorporation processes. Under the Colombian law, a company is formed only through the execution of a public deed or a private document, in addition to compliance with other requirements, all of which are only available on paper<sup>36</sup>. The process of registration of a company is done manually through the Chamber of Commerce of the county where the company will have its domicile.<sup>37</sup> Until recently, only a few Chambers of Commerce have an Electronic Registration Platform, which are only for the formation of a SAS. This changed on January 1, 2016, 38 when every Chamber of Commerce began to have an Electronic Registration Platform for SAS. For all the other types of enterprises, registration remains manual.

In Chile, the incorporation process has gone through major changes. Until 2011, the incorporation process and any amendments made to the Articles of Incorporation and By-Laws for the four corporate structures were basically the same. They required a public deed for which an abstract needed to be registered

These types of companies are regulated in Colombia by L. 1258, diciembre 5, 2008, DIARIO OFFICIAL [D.O.] (Colom.), http://www.supersociedades.gov.co/Web/Leyes /LEY%201258%20DE%202008%20SAS1.htm.

<sup>32</sup> Colombian CoC, supra note 27, arts. 373-460.

Id. art. 387.

Id. art. 9.

<sup>36</sup> Colombian CoC art. 110.

<sup>37</sup> *Id.* art. 111.

Id. Nonetheless, since there has been no amendment to the provision of art. 111 of the Colombian CoC, the electronic system will be restricted only for SAS.

with the Companies' Registry Office corresponding to their domicile. The deed had to be published once in the *Diario Oficial* (Official Gazette) within 60 days of the deed's date. The cost of the public deed procedure was generally 0.1% of the company's starting capital. The *Diario Oficial* charged a fee per letter known only at the time of its publication. Additionally, the Companies' Registry Office charged a rate of 0.2% of the starting capital. Processing took at least one month. Hereinafter, this procedure will be referred to as the *Diario Oficial Platform*.

In 2011, the Chilean government introduced new legislation that simplified and reduced the process of incorporation for these types of legal entities. Law No. 20.494 of 2011 significantly reduced the time that this process required. It also created a free, electronic version of the *Official Gazette*, reducing procedural costs.<sup>39</sup> After the implementation of this law's reforms, the incorporation process could be completed in an average of two weeks. Nonetheless, the rest of the process was still paper-based and the registries were located throughout the country with no connection between them.

It was not until 2013, with the enactment of Law No. 20.659<sup>40</sup> and the creation of the electronic platform *Registro de Empresas y Sociedades (RES)*, or *Tu Empresa en un Dia*, that Chile really became a model for this type of reform. The RES platform has been a major success in Chile. It involves not only a new process of incorporation, but also a new company registry that runs alongside the existing paper registry. During the month of July 2015, 9,025 companies were formed in Chile, of which 35.3% were formed using the paper *Diario Oficial Platform* and 64.7% were incorporated using electronic registration through the *RES*. Over the past 12 months, companies created within the *RES* totaled 60,311, 60% of the total companies formed in Chile during this time.

While the *RES* applies to most company vehicles, it is not possible to form a Stock Corporation using the *RES*. The only way to form this kind of company is through the *Diario Oficial Platform*. Considering that the only companies that can be formed through the *RES* are Individual Limited Liability Enterprises, Limited Liability Companies, and Companies by Stock, these registration statistics are impressive. The number of Individual Limited Liability Enterprises incorporated through the *RES* is 4.8 times higher than those formed through the *Diario Oficial Platform*; the number of Limited Liability Companies

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<sup>&</sup>lt;sup>39</sup> Law No. 20.494, Enero 19, 2011, DIARIO OFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=1022392.

Law No. 20.659, Enero 31, 2011, DIARIO OFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=1048718.

Tu Empresa en un Dia, www.tuempresaenundia.cl (last visited Jan. 17, 2016).

Law No. 20.659 art. 11, Enero 31, 2013, DIARIO OFICIAL [D.O.] (Chile), http://www.leychile.cl/Navegar?idNorma=1048718&buscar=20.659.

MINISTERIO DE ECONOMÍA FOMENTO Y TURISMO, DIVIS, DIVISÍON DE POLÍTICA COMERCIAL E INDUSTRIAL, CUÑAS SUBSECRETARIA DE ECONOMÍA, KATIA TRUSICH (2015), http://www.economia.gob.cl/wp-content/uploads/2015/07/Informe-Creaci%C3%B3n-de-Empresas-junio-2015.pdf.

is 1.5 times higher; and the number of Companies by Stock is 1.2 times higher.<sup>44</sup> The *RES* has thus overcome paper registration.

### A. How Does it Work?

Through the new registration system, entrepreneurs can create, edit, convert, split, merge, and dissolve companies easily, legally, and free of charge. To do this, an owner must complete an electronic form that includes all of the information about the type of company the entrepreneur seeks to create and its members. The members can register their company by Advanced Electronic Signature or Signature by Notary: 46

- (1) Advanced Electronic Signature (FEA): According to the provisions of Law No. 19.799, an Advanced Electronic Signature is one an authorized provider certifies that the holder created using the means that the holder maintains under its exclusive control. The signature must be linked only to the data to which it refers, allowing later detection of any modification. This verifies the holder's identity and prevents her from ignoring the integrity of the document and its authorship. The Advanced Electronic Signature is easy to obtain, inexpensive (about \$100 USD for 3 years), can be obtained by foreign people, and can be used for different purposes.
- (2) <u>Signature by Notary</u>: If the partners do not have an FEA, they can go to a Public Notary with a "service number" assigned by the registration website to notarize their signatures in manuscript. After this is done, the notary will "sign" in the RES website with her own FEA, for a fee of approximately \$15 USD.

Once all partners have thus signed the form, the company is legally formed and a RUT (IBS equivalent) is immediately assigned.

# **B.** Statistics

Recent statistics demonstrate the success of the new Chilean system. As shown in Table 1, from May 2013 to July 2015, there has been an increase in the

<sup>&</sup>lt;sup>44</sup> Id

Law No. 20659 art 1, Enero 8, 2013, DIARIO OFFICIAL [D.O.] (Chile).

<sup>&</sup>lt;sup>46</sup> *Id*. art. 9.

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number of companies incorporated through the RES as compared to the Diario Oficial Platform. 47

Table 1 also shows that in the last 12 months, the Diario Oficial Platform has experienced a decrease of 14.9% in total registrations while the RES platform has increased by 19%.48

Figure 1: Incorporation of Companies in Chile (May 2013 to July 2015) **RES**: Your Company in One Day

Diario Oficial: Offical Gazette

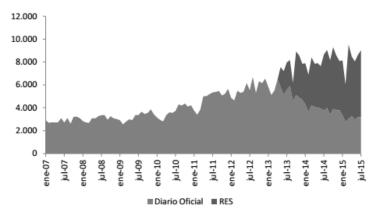
		RES	Diario Oficial	Total	
2013	May	1.733	5.820	7.553	
	Jun	2.077	5.132	7.209	
	Jul	2.381	5.594	7.975	
	Ago	2.252	5.930	8.182	
	Sep	1.575	4.595	6.170	
	Oct	3.817	5.114	8.931	
	Nov	3.674	4.899	8.573	
	Dic	3.146	4.709	7.855	
Total 2013		20.655	41.793	62.448	
2014	Ene	3.583	4.315	7.898	
	Feb	3.237	3.647	6.884	
	Mar	4.188	4.223	8.411	
	Abr	3.794	4.056	7.850	
	May	3.872	4.030	7.902	
	Jun	3.687	3.954	7.641	
	Jul	4.904	3.749	8.653	
	Ago	5.056	3.995	9.051	
	Sep	4.746	3.405	8.151	
	Oct	5.374	3.919	9.293	
	Nov	4.804	3.780	8.584	
	Dic	4.275	3.813	8.088	
Total 2014		51.520	46.886	98.406	
2015	Ene	4.791	3.358	8.149	
	Feb	3.253	2.780	6.033	
	Mar	6.481	3.048	9.529	
	Abr	5.201	3.276	8.477	
	May	5.062	2.992	8.054	
	Jun	5.432	3.178	8.610	
	Jul	5.836	3.189	9.025	
Total 2015		36.056	21.821	57.877	
Total genera		108.231	110.500	218.731	
Fuente: MINECON y Diario Oficial.					

Figure 2 shows the same results in graph form. It shows the evolution of the formation of companies in Chile. After the creation of the RES (May 1, 2013), there was a significant increase of the total number of companies created along with a shift in the registration method used, as more registrations were filed through the *RES* than the *Diario Oficial Platform*. <sup>49</sup>

Id.

<sup>47</sup> Cuñas Subsecretaria de Economía, supra note 43.

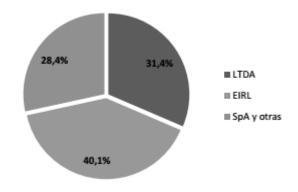
Figure 2: Incorporation of Companies in Chile (May 2013 to July 2015)



Fuente: MINECON y Diario Oficial.

Finally, during July 2015, 5,836 of the companies formed through the *RES* were: (1) Individual Limited Liability Enterprises (2,343); (2) Limited Liability Companies (1,835); or (3) Companies by Stocks and other companies (1,658). Although the graph below mentions that "other" types of companies are included with SpA statistics, the registration office reports that no other type of company has been registered within the *RES*.  $^{50}$ 

Figure 3: Companies Formed through RES in July 2015



# V. CONCLUSION

The changes that Chile has implemented since 2011 have boosted the formation of new companies. They simplified the registration process and reduced its costs, which ended unnecessary delays in the process of incorporation. The legal reforms that Chile and Colombia introduced resulted in an increase of the use of business vehicles by MSMEs, conveying more and more business people to the formal sector of their economies.

Therefore, we can conclude that a simple, electronic registration platform and business vehicles like the SAS and SpA benefit not only big companies, but also MSMEs. Nevertheless, the platform needs to be efficient, free, centralized, and accessible to everyone that needs the information. It also needs to be trustworthy and reliable, so people who want to form a company will choose the Electronic Registration Platform rather than the Diario Oficial Platform, as is happening in Chile.

