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Latin American Company Law

A Comparative and Economic Development Perspective

VOLUME I

Edited by

Boris Kozolchyk

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INTER-AMERICAN FREE TRADE

CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Kozolchyk, Boris.
Latin American company law : a comparative and economic development perspective.
Volume 1 / Boris Kozolchyk and Francisco Reyes.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-61163-124-1 (alk. paper)
1. Corporation law--Economic aspects--Latin America. 2. Business enterprises--Law
and legislation--Latin America. I. Reyes, Francisco Hernando. II. Title.

KG320.K69 2011
346.8'066--dc23

2011036996

ISBN: 978-1-61163-124-1 (Volume I)

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*I dedicate these books to my grandchildren, bearers of much joy:
Sigal, Liana, Alexander, Ethan and Jacob.*

Boris Kozolchyk

In memory of my father Hernando.

Francisco Reyes

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Foreword

Francisco Reyes

Is there a subject matter that could be accurately referred to as “Latin American Company Law”? The answer will largely depend on each scholar’s semantic preferences. For some authors, there are specificities that differentiate each and every jurisdiction in this region to such an extent that it becomes impossible to formulate an all-encompassing analytical framework for the entire geographical zone. Irrespective of the academic approach, it is, however, indisputable that all of the countries whose law and practice are discussed in this book share many a feature in common. This is due to their shared cultural heritage and a common legal tradition. Such factors still today determine the configuration of the region’s institutional and legal frameworks. This assertion is undeniable both in the general field of Private Law and in the more specific area of Business Associations. Within the latter, and despite obvious differences in the configuration of each type of commercial entity, it is clear that the basic features of their regulation are by and large homogenous — at least in those countries that have embraced the ideology of free market economies. Regrettably, this homogeneity is particularly noticeable in the legal and transactional deficiencies of the representative Latin American countries discussed in this book. In fact, not only are the substantive provisions generally antiquated and obsolete, but they are also characterized by their very limited enforceability as a consequence of inefficient judiciaries. Remembering Roscoe Pound’s famous sentence on the state of the law particularly in developing nations, it can be said that in Latin America there is a significant gap between the “law in the books and the law in action.”

The colonial mostly Spanish and Portuguese heritage has shaped an important part of the legal culture in this region, typically characterized by the veneration of formalities and the overwhelming presence of regulatory provisions for all kinds of matters that should generally be subject to private ordering. Lengthy lists of commercial transactions subject to authentication and public deeds granted before notary publics speak loudly of a legal framework that creates costly and inefficient conditions for businesses. This situation is symptomatic of the prevailing tendency of Latin American legal systems to give more weight to form than substance.

It goes without saying that the reduction of sterile formalities, as well as the increase of flexibility and freedom of contract should be the guiding principles for any legal reform aimed at the modernization of the juridical context of these countries. Likewise, the effective and expeditious enforceability of agreements should be the rule and not the exception, as unfortunately it is today in all jurisdictions in this region. The lessons learned from the practical and efficiency-minded approaches undertaken in various Common Law systems may, and in fact, have been a useful point of departure for the modernization of legal rules and proceedings in other parts of the world.

Fortunately, this trend is starting to permeate the formerly-dogmatic approaches prevailing in the realm of business association law in Latin America. The inception of the new Simplified Stock Corporation in Colombia in 2008 has already changed the closely-held-entity landscape in this country by displacing backward-looking notions imbedded in traditional Company Laws in Latin America. More than 50,000 SAS (as the new type of entity is referred to by its acronym in Spanish) were created during the first two years after the enactment of the law that introduced this innovative business form. Today in Colombia, 85% of the total formalization of start-ups is made through the incorporation of simplified stock corporations. The SAS revolution has been so profound that during 2010 (the second year after the entity was legally adopted) there was an increase of more than 100% in the number of incorporations of this type of company in comparison with the previous year. At the same time, the overall number of business entities created in that same period was augmented by more than 25%. These data clearly suggest that a simple, but comprehensive, change in the legal framework can significantly contribute to the formalization of thousands of enterprises that otherwise would remain in absolute informality. Empirical observation reveals that such an overhaul in the Company Law infrastructure significantly impacts economic development. In fact, the new regularized business entities can be identified through mercantile publicity, and their degree of observance of the law, whether by paying taxes or abiding by labor regulations has risen markedly in Colombia. Above all, these new simplified corporations have access to credit and are given the opportunity to grow beyond the typically crippling micro-enterprise size.

While the Colombian SAS has revolutionized the manner in which corporations are formed and operated, other nations in the region still adhere to the Civil Law taxonomy of business associations that existed in nineteenth century codifications and statutes. Furthermore, the presence of old-fashioned legal proceedings, the existence of mandatory provisions to govern every aspect of corporate life and the minute regulation of auditors and other mandatory organs create a hostile scenario for local and foreign investment. Analyzing and recognizing these competing realities is one of the purposes of the present set of books produced by the National Law Center for Inter-American Free Trade with the help of leading comparative law scholars. Important policy formulation and drafting skills are gained by studying examples of successful modernization.

Thus, by juxtaposing the *avant-garde* and recently-modernized Colombian law with the old-fashioned systems of most other Latin American jurisdictions, a significant disparity in law-making techniques becomes evident. In fact, corporations under the new Colombian legislation are created online through digitally signed articles of incorporation, whereas in the old-fashioned regimes a protracted process plagued with formalism and distrust is required for their formation. Setting aside the episodic and isolated Colombian experiment, it is evident that the gap between modern Corporate Law and nineteenth century types of regulation is the most eloquent demonstration that legal reform is urgently required in most of these jurisdictions.

These two volumes sponsored and edited by the National Law Center for Inter-American Free Trade (NLCIFT) in cooperation with the Paul M. Hebert Law Center of Louisiana State University, are entitled *Latin American Company Law from a Comparative and Economic Development Perspective*. The title itself is consistent with the NLCIFT's mission and objective to develop the legal infrastructure to build trade capacity and promote economic development in the Americas.

The first volume of this series of publications can very well constitute a general diagnosis concerning the present state of Company Law in Latin America. The various chapters of this first volume describe some of the most relevant features of Company Law in

the region. Top scholars from all major jurisdictions in the area offer a description of the basic elements that make up the corporate environment in the area. The authors provide wide-ranging information pertaining to the different forms of business associations in the region's major jurisdictions. The analysis ranges from the general aspects of Company Law, to the regulations applicable to microfinance, trading of securities, capital markets, and arbitration proceedings. The main aspects of Commercial, Corporate and Financial Law are analyzed from a general perspective, and there is detailed explanation of certain key institutions. The first volume also offers a description of some alternative dispute mechanisms in vogue in Latin America—such as arbitration. This important reference to procedural aspects of Corporate Law is a useful complement to the substantive matters that are carefully addressed in other chapters of the book.

Another useful feature of this text relates to frequent references made to European and U.S. Law, which provide an interesting background for the comparison of legal institutions. In fact, Spanish Law professors have written three chapters of this first volume, which are aimed at describing relevant legal institutions that exist in their country of origin. Their contribution is of significant importance since they provide a comparative perspective to the analysis of certain key institutions of Company Law.

My special gratitude goes to Dr. Boris Kozolchyk, President of the NLCIFT and Dr. John J. Costonis, Chancellor Emeritus of the Paul M. Hebert Law Center of Louisiana State University, without whom this publication would not have been possible. A similar expression of gratitude should also be addressed to Professor Olivier Moreteau, Director of the Center for Civil Law Studies of LSU for his generous and permanent support.

This book is intended to help lawyers and businesspersons who are interested in doing business throughout the Americas, and who would want to know what is required for the operation of corporations and other business associations in these countries' jurisdictions. It is also aimed at scholars and law students interested in learning about the complex and subtle differences that exist in the regulation of business entities in different parts of the world. The information provided here includes not only applicable Comparative Law, but also socio-cultural dynamics and attitudes that have a significant impact on the manner in which businesses are run and regulated.

It is my expectation that the appearance of this book will provide much needed access to reliable information concerning crucial aspects of Company Law in Latin America. I also hope that the publication of this text will spark a renewed interest in this nearly uncharted area of the law, in a manner in which new and more comprehensive exploration on these matters could also be available in the near future.

November, 2012