

**COLOMBIAN STYLE CORPORATIONS:
SOCIEDAD POR ACCIONES SIMPLIFICADA**

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Forming a company or legal entity in many foreign jurisdictions is usually not as easy¹ as doing so in the United States². In the United States corporations, limited liability companies and partnerships may be formed by filling in two page forms and through online filing.

In many other jurisdictions a contract should be drafted documenting the partners' or shareholders' agreement regarding the nature of their common venture, assets and how profits are to be divided. For this reason attorneys were engaged and used to get paid for doing this type of work. The separate legal entity or "company" was traditionally understood under the European Continental Legal System as a contract between partners or shareholders ("*contrato de sociedad*"³) that necessarily implied an agreement between two or more persons.⁴

Now Colombia has attempted to copy U.S. corporate law to allow an easy or "simplified" way of forming new legal persons which may be created without any agreement through a unilateral decision by a single individual. Whenever one individual creates the new legal entity allowed by law there will be no contract but a unilateral individual act.

¹ Until recently forming a legal entity (company) in Colombia required a two step process that involved executing a public deed before a public notary and registering the company with the local registrar's office (*Cámara de Comercio*). Through the public deed the partners or shareholders formally and publicly documented the main elements of their contract such as its purpose, duration, name, domicile, capital investment, management, decision making organisms, legal causes for dissolution and liquidation procedure. This same format is followed by countries like Argentina, Chile and México among many others.

² In the United States corporations are formed through a one step process by filing with the corresponding Secretary of State a Certificate of Incorporation which is a two page document to provide the name of the corporation, the name of its registered agent, the address of its registered office, the corporation's purpose (to engage un any lawful activity), the amount of total stock and the name and address of the incorporator. If you want to incorporate your company in Delaware, you fill in the form, draft a letter addressed to the Delaware Divisions of Corporations, pay a fee of \$89, and there you go, an INC. is on the way and you are officially in business! In Texas, a limited liability company may be formed by filing with the Secretary of State a two page form (certificate of formation) which provides the following information: company name, registered agent and address of registered office, whether the company will have managers and if so their names, the company's purpose and the name of the organizer.

³ Deed of partnership or partnership agreement.

⁴ The Italian Civil Code defines a partnership agreement under article 2247 as follows: *Contratto di società: Con il contratto di società due o più persone conferiscono beni o servizi per l'esercizio in comune di un'attività economica allo scopo di dividerne gli utili.*" Through the partnership agreement two or more persons provide goods or assets for the common development of an economic activity and the purpose of dividing the profits therefrom.

Recently Colombia also allowed the on-line formation of companies through the website www.crearempresa.com.co.⁵ Through this website anyone may check whether a potential company name is available, follow the necessary steps for the formation of a new company, obtain a company tax I.D. and verify the status of a specific filing.

Do you want to do business through a different legal personality? Would you like to limit your liability? Would your business profit from a name in Spanish and domicile in a South American location? Hombre, Colombia is your destination!

Colombia enacted a new law (Law 1258 of 2008⁶) pursuant to which forming a company that may be compared to a U.S. corporation may no longer require executing a public deed before a public notary⁷ and may be accomplished through a private document. The law creates the new simplified shares corporation ("*sociedad por acciones simplificada*" S.A.S.)

Main consequences of forming a S.A.S.

Whenever anyone establishes a "*sociedad por acciones simplificada*" the following legal consequences follow:

1. A new legal personality or entity is formed.⁸ The new company is an individual tax payer.
2. The "incorporator" or shareholders are entitled to limit their liability.⁹
3. A new merchant or commercial capital venture is established.¹⁰
4. Company shares may not be traded in the stock exchange.¹¹

Contents of the "document of formation"

The document through which a *sociedad por acciones simplificada* is formed may be a private document¹² and must include the following information:

1. Name, identification and domicile of all shareholders.

⁵ As of March 30, 2009 the website has not been updated to enable the online formation of an S.A.S.

⁶ Law 1258 of 2008 essentially abolishes the possibility of establishing one shareholder companies under law 1014 of 2006 and creates Colombian style corporations.

⁷ Law 1014 of 2006 eliminated the requirement of a public deed to form new legal entities such as partnerships and corporations

⁸ The new legal personality is obtained once the company is registered with the local registrar's office (*Cámara de Comercio*). See article 2, LAW 1258 of 2008.

⁹ See article 1, LAW 1258 of 2008. The limitation of liability does not apply whenever the corporation is used as an instrument of fraud or to damage third parties.

¹⁰ This means that you have created a new business that may contract as a merchant.

¹¹ See article 4, LAW 1258 of 2008.

¹² A Public Deed is still required whenever shareholders contribute immovables.

2. Name of the corporation followed by the letter S.A.S.
3. Corporation's main domicile.
4. Corporation's term, if any.¹³
5. Corporate purpose.¹⁴
6. Amount of authorized capital, number and kind of shares.
7. Corporate management and powers of the manager.
8. Appointment of at least one legal representative.

Formality required

The law requires that the agreement or unilateral decision to establish a “*sociedad por acciones simplificada*” be recorded with the local registrar's office.¹⁵ The agreement or decision to form the new company may be documented through a private document if no immovable assets are involved. Private documents are still not good enough and signatures must be acknowledged before a public notary.¹⁶

Where is a S.A.S formed?

Documents of formation are filed with the local Chamber of Commerce. (*Registro Público de Comercio*)

Who issues a certificate of formation?

An equivalent of a certificate of formation or incorporation is issued by the Chamber of Commerce and is called “*certificado de existencia y representación legal*”.¹⁷

What are the capital investment requirements?

The new law does not require that the company's capital be paid in full for the company to obtain separate legal existence from its creator. Pursuant to the new law company shares must be paid within a term of two years.¹⁸

If pursuant to the new law, the individual's asset contribution to the new legal entity is what limits its liability, the law should have required that the capital contribution be paid in full. However, company shares may be paid within a two year term. This seems problematic when the company is formed by only one person.

¹³ If no term is indicated the law provides that the term will be unlimited. See article 5, LAW 1258 of 2008.

¹⁴ If no corporate purpose is stated it is understood that the corporation may engage in any lawful activity.

¹⁵ Registro Mercantil with the Chamber of Commerce.

¹⁶ See article 5, LAW 1258 of 2008. Before the law, the incorporator or shareholders visited the Public Notary to execute the Public Deed whereby the company was formed, now they are still required to do so to acknowledge the private document through which the company is established.

¹⁷ See article 8, LAW 1258 of 2008.

¹⁸ See article 9, LAW 1258 of 2008.

When does the new legal entity come to life?

A new legal entity exists from the moment the local Chamber of Commerce registers the company. Before then the incorporator or the shareholders are jointly and severally liable for all obligations as a joint venture.

Is there a true limitation of liability?

The law provides that the “incorporator”, partners or shareholders will not be liable for the company’s obligations, whether such obligations have a commercial, labor or tax nature.¹⁹

The main purpose of the law is to enable an individual to do business through a separate legal entity and by doing so, to limit its liability to such commercial entity’s assets.

Article 42 of the law provides that whenever the corporation is used as a tool for fraud or to damage third parties, the shareholders and managers will be jointly liable for such damages. Thus, careful, there may be no limitation of liability. The law’s choice of words is poor as damages to third parties could include both contractual and tort damages. It is clear that a company shield may never be used as an instrument to conduct criminal or wrongful conduct. However, that is not what law 1258 provides.

May foreigners establish a S.A.S.?

The law is silent in this regard. However, under the Colombian constitution foreigners in Colombia have the same rights as Colombian citizens. The law does not specify whether specific residence or domicile requirements would be enforced. Thus, since whatever is not prohibited under law is permissible, foreigners without a domicile in Colombia may incorporate a Colombian S.A.S. Said foreigners would need to observe the country’s foreign investment provisions.

Who has jurisdiction to review controversial acts by an S.A.S.

In traditional democracies contractual controversies between private parties are decided by the courts. Well now in Colombia the government through the Corporation’s Superintendency²⁰ will have such powers.²¹

A closer look to the S.A.S. law

As it turns out, if more than one person is involved and the company intends to own real estate, a public deed is still required, and an attorney should be engaged to draft

¹⁹ See article 1, LAW 1258 of 2008.

²⁰ *Superintendencia de Sociedades*.

²¹ See article 42 of LAW 1258 of 2008.

your company agreement. Thus, one of the practical effects of the law is to shift work from public notaries to private counsel's offices.

Now a new legal entity in Colombia (S.A.S) may be formed in some cases without having to execute a public deed. The interested parties must still appear before the public notary to attest to the truthfulness of their signatures. Thus, still two steps are involved (act of formation and registration) as opposed to one (registration through a simple form).

A partnership or shareholder agreement is no longer required to form a company in Colombia and a new legal entity may be created by a single individual. Whether this is good or not for the country considering its culture and the way locals do business may still be too early to call.

Do I need an attorney?

If your purpose is to file a form the answer is no. If you want to do things right, the answer is, you better get a good one.