

## La sociedad por acciones simplificada: una aproximación a su régimen jurídico

*The simplified joint-stock company: an approach to its legal regime*

*A sociedade anónima simplificada: uma abordagem ao seu estatuto jurídico*

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### Resumen

En el presente trabajo abordamos el estudio del régimen jurídico de la Sociedad por Acciones Simplificada (S.A.S) y su adecuación para facilitar la constitución y el funcionamiento de las Pyme. Para ello partimos del concepto jurídico de Pyme y su importancia económica, después abordamos brevemente los principales problemas a los que se enfrenta y, por último, analizamos el régimen jurídico de la nueva S.A.S., contenido en la reforma de la Ley General de Sociedades Mercantiles.

**Palabras clave:** Pymes, Sociedad por Acciones Simplificada, Ley General de Sociedades Mercantiles.

### Abstract

In this work we approach the study of the legal regime of Simplified Joint-Stock Company (SAS by its name in Spanish) and its adaptation to facilitate the establishment and the functioning of SMEs. So we start from the legal concept of SMEs and their economic importance, then tackle briefly the main problems which it faces and, finally, we analyze the legal regime of the new SAS, content in the reform of the General Law of Mexican Companies (LGSM by its name in Spanish).

**Key words:** SMEs, simplified joint-stock company, Société par actions simplifiée, General Corporations Law, General Law of Mexican Companies.

## Resumo

Neste trabalho estudamos o regime jurídico da empresa simplificado joint estoque (S.A.S) e sua adaptação para facilitar a criação eo funcionamento das PME. Para isso, inicie o conceito jurídico das PME e da sua importância económica, então nós abordar brevemente os principais problemas que enfrenta e, por fim, analisar o regime jurídico da nova S.A.S., contida na reforma da Lei Geral das Sociedades Comerciais.

**Palavras-chave:** PME, simplificado sociedade anónima, Lei Geral das Sociedades Comerciais.

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## Introduction

In this work we approach the study of the legal regime of the Simplified Joint-Stock Company (SAS by its name in Spanish), un nuevo tipo social que fue adoptado por la reforma a la General Law of Mexican Companies (LGSM by its name in Spanish), Posted March 14, 2016 in the Official Journal of the Federation (DOF by its name in Spanish).

Despite the importance of these societies in the national development and that its constitution and operation are established in the LGSM, the problems of its constitution and the lack of support, facilities and training by the Government holds back the potential of the economic development of the country and citizens. For example, the founder or investor that starts a society is anxious for start your project and offer their products or services in the market as fast as possible, with the mindset that lost time is lost money, in such way that if the procedure to operate legally in the national market is slow or problematic, will cause in the investor disappointment and occasionally will motivate him/her to divert that capital -that our country needs so much- abroad. Another negative effect of the arduous process of incorporation of these companies is that the investor cannot hold the product or service to the consumer, not being able to get it, the consumer can choose to buy it abroad (Lira Cirilio, 2012, p. 257).

According to the Presidency of the Republic, thanks to the Simplified Joint-Stock Company, the processes of company formation for the first time are as fast as the Mexicans entrepreneurs require on the 21ST century. According to this same source, the average cost to create a company in the previous legislation was twenty thousand dollars and the process could take up to six days. Now you can create a company in 24 hours and for free. Also, in the past, was necessary to go to a notary and now the process can be done on-line. Entrepreneurs had to pay for the professional services of a lawyer or an administrator for advice and set up his company, but with the new reform this is no longer necessary; now statutes proforma and model provisions that facilitate the entrepreneurial activities of management and administration of a company are offered. Before was also required a minimum of two partners to form a society, but now you can create a company with a single partner and without minimum capital.

The aim is to allow the electronic process that is used to create a company allows also to sign up to the Tax Administration of (SAT by its name in Spanish) and the Mexican Social Security Institute (IMSS by its name in Spanish), as well as work licenses at the municipal level when activities are low-risk (Presidency, 2016, s.p).

The SAS is a type social that aims to give solution to the problems that in its constitution and operation face the small and medium-sized companies (SMEs). In order to understand the regulation of the SAS, it is first necessary to define the legal concept of SMEs, as well as the problems they face.

## Method

This study is a documentary research on the legal regime of the new S.A.S. Whenever a social type is intended for small and medium enterprises we start from the very concept of SMEs and their specific problems. In a second step we analyze the legal regime of the S.A.S. to raise its possible contribution to the solution of the problems of SMEs.

## Results

### **Concept of small and medium enterprises**

The concept of small and medium enterprises (SMEs) is more economic than legal, and is determined by the number of employees. In order to have a notion of the subject matter we adopt the definition given in section III of Article 2 of the Law for the Development of the Competitiveness of Micro, Small and Medium Enterprises, which states:

Micro, small and medium enterprises are legally constituted from the following stratification established by Public Credit and the Ministry of Finance (published in the DOF) Stratification is based on the number of workers and is divided into sectors industry, trade and services . So, microenterprise is one that has zero to ten workers in the three sectors mentioned above. Small business has at least 11 workers and up to 50 in industry and in services; and a minimum of 11 workers and a maximum of 30 in the trade sector. The median company is one that has a minimum of 51 workers and a maximum of 50 in the industrial sector; a minimum of 31 workers and up to 100 for companies in the trade sector; and a minimum of 51 workers and up to 100 for the services sector.

Such stratification includes farmers, ranchers, foresters, fishermen, farmers, miners, artisans, workers of cultural goods and providers of tourism and cultural services.

SMEs represent 99.8% of companies and 72.3% of employment opportunities in Mexico. This is considerably higher than those observed in most other member states of the Organisation for Economic Co-operation and Development (OECD) countries proportions. SMEs are vital to the Mexican economy; in addition to its magnitude in Mexico, one of its distinguishing features is the high proportion of micro enterprises (employing fewer than 10 people). These represent 96.1% of all businesses in Mexico, one of the highest proportions in the OECD countries. Therefore also they represent the majority of Mexican SMEs (OECD, 2013, pp. 15-16).

However, despite their difference in size, SMEs have a problem in common.

## **Problems facing SMEs**

### Advisory entrepreneur

The first problem is that an entrepreneur who wants to form his company is not having proper advice concerning the process of creating company and its proper functioning and development.

Counseling for founding a company should not be limited to the bureaucratic aspects of the process, but go further. The entrepreneur must obtain advice so you can make a market analysis; ie a calculation of market competition. If the entrepreneur wants to start a business selling shoes in a very competitive market, your chances of success are reduced. It is therefore desirable to receive advice to organize their resources productively.

### Procedures for constitution

In Mexico, the partners have to perform arduous paperwork and spend lots of money to form their corporation. The birth of a society begins with the filling of the application SA-1 or failing with a free writing containing the body to whom the procedure is directed, place and date of issue, the name of who performs the procedure, the address to receive notifications, the naming options requested, the requested legal status and signature of the applicant.

Parallel to this, the applicant must obtain a general statement format duties. The right to process payments must be made in a bank, but is essential before going to the offices of the Ministry of Foreign Affairs (SRE) for this authorize the name of the corporation to be constituted.

The notary public has an important role in the formation of the corporation. This notary prepares the incorporation of the company in about five days. Once drafted the charter, the notary public issues a statement of the document establishing that the applicant submit to the SAT and thus obtain the certificate of the Federal Register (RFC). Once the registration certificate in the RFC, must return to the notary who prepared the charter to transcribe in the charter, the certificate of RFC and thus terminate the constitutive document, to be signed by the partners. After the signing of the partners, the notary presents the document referred to its registration in the Public Registry of Property and Commerce (RPPC); that procedure takes one business day, provided that in the place of residence of the notary

office has RPPC. After registration in the RPPC it is considered that society is fair or legally constituted, so original certificate is given to each of the partners if requested (Lira Cyril. 2012, pp. 264-266).

#### Legal status

SMEs that adopt the corporate form do choosing any of the types of companies established in the legislation, which are basically limited liability company and corporation. What is sought in any case is to limit the liability of the partners.

However, the company form is subject to strong demands of an accounting nature and land registration. For example, the corporate type of adoption of agreements requires certain formality (publicity and notarization of agreements), which does not correspond to the form of decision-making of an SME, especially if family character, which generally does not require of such solemnity.

Moreover, these businesses requires flexibility to adapt to their needs different social types that exist in the legislation; in some cases the statutory rates set unnecessary rigidity for a small company (Valpuesta, 2014, p. 20).

#### Lack of funding sources

SMEs and family businesses do not have adequate financing instruments for its closed nature makes it difficult to access non-bank financial instruments, for example large listed companies can themselves do. In addition to this, small entrepreneurs are not experts in financial matters and financial structures are unbalanced because the cost of financing is very high. That way, the company enters into a vicious circle in which poor performance make financing less accessible, greatly affecting its proper functioning and hamper their development (Grass Gómez, 1996, p. 10).

#### Lack of professional management

In the case of SMEs can be seen, especially in newly created, which have a very weak managerial level, with little experience and managerial ability and inability to plan for a competitive future.

The performance of the management bodies usually summarized in two areas: short-term and stiffness. That is, a situational management is applied or fires off most of the time is concerned in solving the problems that arise and neglects future planning. Moreover, management aimed at solving the problems of the present is very rigid and extends to the rest of the company (Gómez Gras, 1996, p. 9).

## Discussion

### **The legal status of the simplified joint stock company**

In comparative law we found a history of a similar reform in favor of small and medium enterprises. On August 2, 1994, the German Bundestag passed a law on small joint stock companies and deregulation of the right of joint stock companies. German modification consisted rate flexibility of the corporation to make it accessible to small companies, in addition to deregulate the right of corporations to the benefit of all capital companies. The action lines of reform for small corporation were basically two: greater autonomy of partners and deletion of requirements, formalities and rules of guardianship (Escribano Gamir, 1994, pp 451-458.).

In 1994, in France the Law on Simplified Joint Stock Company (hereinafter SAS) was adopted, whose original purpose was to prevent the relocation of French businesses to create a "society of societies whose aim was none other than that of group under this social form to a structure of cooperation between enterprises ". And many subsidiaries or holding companies of French companies migrated to other countries due to the rigidity of the provisions of the corporation.

French law created a subtype of the corporation, consisting of legal shareholders with full freedom of operation. The statutory freedom is very broad in order that partners structured society according to their needs (Esteban Velasco, 1994, pp. 433-443).

However, the provisions of that law did not meet the target expected by law, so the law 99-587 of 12 July 1999 on innovation and research bases modified the S.A.S. Four basic aspects covered by the 1999 amendment: 1) establishment of the S.A.S .; 2) statutory freedom for operation of S.A.S .; 3) rights of shareholders and restrictions on shares and 4) unipersona society (Salgado, 2001, pp. 1515-1539).

### Concept

Article 260 of the GLCC renovated defines simplified joint stock company as one that is constituted by one or more individuals who are only required to pay their contributions represented equity.

In this legal concept S.A.S. We can extract features three notes: the first is that the S.A.S. unipersonalidad supports; the second is that only admits individuals; and the third is the limitation of liability to pay the contributions.

On the unipersonalidad, the GLCC established as a cause of dissolution of a corporation that the number of shareholders falls below the minimum established by this law, or the parties of interest together in one person (Article 229 F IV GLCC).

The second is the requirement that are natural persons, element that is intended to ensure that society is people. However, although it is aimed at small businesses, it should not be such exclusion.

With regard to the limitation of liability to pay the contributions, it takes advantage of one of the greatest benefits of corporations and limited liability.

### Denomination

The name is formed freely, but different from any other company and always followed by the words "simplified joint stock company" or its abbreviation "S.A.S".

It is reprehensible that has not followed the formula of Limited Liability Company (S. de RL) that supports name and company name. Recall that the name can be any word or words; company name consists of the name of one or more of the partners. (The company name will be formed with the name of one or more partners (Article 27 of the GLCC). The company name will be formed freely (Articule 87 LGSM).

Despite this negative aspect, as it is a different from the anonymous is not necessary to seek authorization from the SRE to use a particular social type designation. That way the partners save a step in the process of the constitution.



## Bylaws

According to Dávalos Torres, bylaws contain three types of requirements in their terms: personal, real and functional. The former refers to the clauses on the parties to the partnership agreement as such as well as those on society understood as a moral person. The latter deal with the subject of the contract, ie, things on which rests the contract, such as contributions, gains and losses. The latter are clauses on the structure and functioning of society (Davalos Torres, 2010, p. 124).

This is a poor legislative technique because it does not refer to the general rules of the statutes contained in Article 6 of the GLCC; Article 264 of the same law stipulates the content of the bylaws.

The bylaws must state the following requirements:

- I. Denomination;
- II. Name of shareholders;
- III. Domicile of shareholders;
- IV. Federal Register of Taxpayers of shareholders;
- V. E-mail of each shareholder;
- VI. Address of the company;
- VII. Duration of the company;
- VIII. The form and terms in which shareholders undertake to subscribe and pay for their actions;

- IX. The number, nominal value and nature of the shares into which the capital is divided;
- X. The number of votes will each shareholder by virtue of their actions;
- XI. The object of society, and
- XII. The administration form of society.

The shareholders are or subsidiary or severally liable, as appropriate, with the company for committing offenses punishable conduct.

Contracts between the sole shareholder and the company must register the company in the electronic system set up by the Ministry of Economy in accordance with Article 50a of the Commercial Code.

#### Procedure constitution

One of the main reasons, if not the most important, for the adoption of this social type is the agility in the process of setting up a company. It is also one of the advantages we highlight in this work for SMEs.

For the establishment of a simplified joint stock company, the electronic system of incorporation is in charge of the Ministry of Economy and is carried by digital means using the software program used for this purpose, whose performance and operation is governed by the general rules for this effect issued by the Secretariat.

The incorporation procedure is carried out according to the following rules:

- I. A sheet for each constitution is opened;
- II. The shareholders or selected clauses of the bylaws to make available to the Ministry of Economy through the system;
- III. A social contract of the constitution of the simplified joint stock company, electronically signed by all shareholders, for which the electronic signature certificate in effect that Section IV of Article 262 of this Act refers to is used, which is delivered is generated digitally;
- IV. The Ministry of Economy verifies that the social contract of incorporation comply with the provisions of section 264 of this Act, and if appropriate electronically send it for registration in the Public Registry of Commerce;
- V. The system generates digitally ballot registration of simplified joint stock company in the Public Registry of Commerce;
- VI. The use of public notaries is optional;
- VII. The existence of the simplified joint stock company tested social contract with the incorporation and registration ballot at the Public Registry of Commerce;
- VIII. Shareholders requesting the establishment of a simplified joint stock company will be responsible for the existence and veracity of the information provided in the system. Otherwise liable for the damages that may result, subject to administrative or criminal penalties that may be applicable, and
- IX. Other established in the rules of the electronic system of constitution.

The completion of processing by electronic means without doubt is a good measure. Avoid wasting time entrepreneurs. However, it is questionable that have not operated a reform to open this kind of mechanism constitution for the S de RL, the Limited Partnership or the Company Name Collective, which are partnerships and ideal for SMEs.

#### Legal regime of capital

The capital is integrated with the contributions of partners, which in this case are represented by shares. The capital is an accounting concept. Legally, the capital is part of the heritage. It is not a good in itself, but a legal instrument of protection for creditors of the company (Davalos Torres, 2010, p. 139). This is very important when making the distribution of power and profits in society element, which directly impacts on social functioning.

All actions outlined in section IX of Article 264 must be paid within one year from the date the company is registered in the Public Registry of Commerce.

When you have subscribed and fully paid share capital, the company must publish a notice in the electronic system set up by the Ministry of Economy in terms of the provisions of Article 50a of the Commercial Code.

#### The shareholders' meeting

The Shareholders' Meeting is the supreme body of the simplified joint stock company and is made up of all shareholders.

The resolutions of the Shareholders' Meeting approved by majority vote and meetings can be held in person or by electronic means if an information system is established in terms of the provisions of Article 89 of the Code of Commerce. In any case it should be a register of resolutions.

When the simplified joint stock company is composed of a single shareholder, this must be the supreme organ of society (Article 266 of the GLCC).

The decision of the Shareholders' Meeting is governed solely by the following provisions (Article 268 de la LGSM):

- I. Any shareholder shall be entitled to participate in company decisions;
- II. The shareholders have a say, shares of equal value and will confer the same rights;
- III. Any shareholder may submit matters for consideration by the Assembly, to be included in the agenda, as long as you ask the administrator in writing or by electronic means if an information system in accordance with the provisions agreed in Article 89 of the Code of Commerce;
- IV. The administrator sent to all shareholders the matter subject to vote in writing or by any electronic means if an information system in accordance with Article 89 of the Commercial Code is agreed, indicating the date to issue the respective vote;
- V. Shareholders express their vote on matters in writing or by electronic means if an information system in accordance with Article 89 of the Commercial Code, either in person or outside assembly agreed.

The Shareholders' Meeting is convened by the administrator of the company, by publishing a notice in the electronic system set up by the Ministry of Economy with a minimum of five working days. In the notice the agenda with the matters submitted for consideration by the Assembly and accompanying documents inserted.

If the administrator refuses to make the call, or fails to do so within the period of fifteen days of receipt of the request by a shareholder, the call can be made by the judicial authority of the domicile of the company, at the request of any shareholder.

Sold out the procedure, resolutions of the Shareholders' Meeting are considered valid and binding for all shareholders if the vote is issued by most of them, unless the right of objection under this Act is exercised.

The administration

It is up to managers management and representation of society. Social administration is generally understood broadly as comprising performing a set of acts of diverse nature, aimed at achieving the corporate purpose. In this sense it is clear that administrators are conferred powers on matters of some complexity, so the concept of management is broad and vague notion. The body dedicated to the administration of society is necessary, precisely because it conferred the management and representation of society. His performance is required for the realization of the social object, which involves an activity that usually is the exercise of a business activity, which largely depends on the work of managers. However, at the same time they must deal with the organization of society, its relationship with shareholders and the functioning of other organs of society (Sanchez Calero, 2008, p. 470).

Article 267 of the GLCC provides that the representation of the simplified joint stock company will be headed by an administrator, whose function plays a shareholder. It is highly questionable that has demanded self-organicism in this social type where the S de RL allows management by members or by outsiders.

When the simplified joint stock company is composed of a single shareholder, the latter exercises the powers of representation and acquires the position of administrator.

It is understood that the administrator, by its mere designation may celebrate or perform all acts and contracts falling within the social object or that relate directly to the existence and functioning of society.

### Suppletory

Article 273 of the GLCC expressly provides the supplementary provisions of the corporation. As not contradict this chapter are applicable to the simplified joint stock company provisions in this law governing the corporation as well as on the merger, transformation, division, dissolution and liquidation of companies.

In order to avoid difficulties in interpreting the legal rules applicable to the sole proprietorship, the second paragraph of Article 273 of the GLCC provides that in such cases all provisions that refer to "shareholders" are understood as applicable to the shareholder only. Also, those provisions relating to "social contract" are understood as referring to "constitutive act".

### Conclusion

The S.A.S. It is a new option for SMEs wishing to adopt a single corporate form. The importance of SMEs in the Mexican business community is undeniable and the problems faced, discussed here briefly, intended to be addressed by the new regulation.

For this society two basic principles of the right of Mexican societies change. The sole proprietorship is accepted and speeding up the registration formality. Regarding the first aspect, for other companies it remains a cause of extinction the sole-shareholder society. As for the second, an electronic process of constitution is created without having to intervene fedatarios. In theory, this process ensures the agility of the process of incorporation.

The regulation of corporate bodies is simple and even allows conducting electronic assemblies. It is reprehensible that has decided to establish the mandatory auto organicismo for administration, because although this society admits the sole partner, it was expected that specific control measures were envisaged administration.

After this regulation will be implemented more diligent balance on this new type of company; however, for now we can conclude that it is a useful option for Mexican SMEs.

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