THE PROJECTS OF LAW ON SIMPLIFIED CORPORATION IN BRAZIL AND THE COMPARATIVE LAW: WILL THERE BE ACCESS TO THE CAPITAL MARKETS?[1]

OS PROJETOS DE LEI DE SOCIEDADE ANÔNIMA SIMPLIFICADA NO BRASIL E O DIREITO COMPARADO: HAVERÁ ACESSO AO MERCADO DE CAPITAIS?

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ABSTRACT

The focus of this study is to analyze Projects of Law No. 4,303/2012 and No. 348/2012, which content is to institute the Special Regime for the Simplified Corporation, which brings to the discussion the possibility of rethinking the limited liability company for medium and small enterprises. The analysis will consist of investigating, also in the light of comparative law, whether the new corporate model will resolve the issue of difficult access to the capital market. The methodology used in this research is qualitative, exploratory, developed through bibliographic and documentary analysis. The bibliographic and documentary sources used consist of researching books, scientific journals, periodicals and articles taken from the internet, as well as national and comparative legislation. As a result of the research, it is concluded that the stock corporation, although simplified, tends to be expensive

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to maintain and will not allow access to the capital market, as it will be a simplified stock corporation similar to the closed corporation, which does not have access to the capital market, unless it makes it listed through a difficult and expensive process. The foreign experience proved to be quite similar, as the legislation of all the States surveyed prohibits access to the capital market to simplified corporate types. The study offers as a contribution the information that the simplified companies in the studied States (Germany, Netherlands, United States of America, France and Colombia) experience the same limitations as the Brazilian medium and small companies for access to the capital market.

KEYWORDS: Simplified corporation; Micro enterprise; Capital market; Closed corporation; Listed corporation.

RESUMO

O foco deste estudo é analisar os Projetos de Lei nº. 4.303/2012 e nº. 348/2012, cujo conteúdo é instituir o Regime Especial da Sociedade Anônima Simplificada, que traz à discussão a possibilidade de repensar a sociedade por ações para os médios e pequenos empreendimentos. A análise consistirá em investigar, também à luz do Direito comparado, se o novo modelo societário resolverá a questão da dificuldade de acesso ao mercado de capitais. A metodologia utilizada nesta pesquisa é qualitativa, de caráter exploratório, desenvolvida por meio de análise bibliográfica e documental. As fontes bibliográficas e documentais empregadas consistem na pesquisa de livros, revistas científicas e periódicos, bem como de legislação nacional e comparada. Como resultado da pesquisa, conclui-se que a sociedade por ações, ainda que simplificada, tenderá a ser cara a sua manutenção e não permitirá o acesso ao mercado de capitais, pois não passará de uma sociedade por ações simplificada similar à companhia fechada, que não tem acesso ao mercado de capitais, a não ser que venha a torná-la aberta, por intermédio de um processo difícil e dispendioso. A experiência estrangeira mostrou ser bastante parecida, pois a legislação de todos os Estados pesquisados veda aos tipos societários simplificados o acesso ao mercado de capitais. O estudo oferece como contribuição a informação de que as empresas simplificadas nos Estados estudados (Alemanha, Países Baixos, Estados Unidos da América, França e Colômbia) experimentam as mesmas limitações que as médias e pequenas empresas brasileiras para o acesso ao mercado de capitais.

PALAVRAS-CHAVE: Sociedade anônima simplificada; Microempresa; Mercado de capitais; Companhia fechada; Companhia aberta.

1 INTRODUCTION

The stock company was designed for the implementation of large enterprises. Small and medium-sized enterprises are spread throughout Brazil and comprehend a group of legal entities larger than corporations. However, for an extensive list of reasons ranging from credit power to investor protection and also by corporate limitation, these companies do not have access to the capital market where the cost of money for the maintenance and growth of their enterprise is cheaper.

Project of Law No. 4,303/2012 and No. 348/2012, proposed by Congress members Laércio Oliveira and Ana Amélia, respectively, provide the Special Regime of Simplified Corporation and bring to the discussion the possibility of rethinking the stock company for small enterprises, in line with the economic maturation of Brazil, the growing initiatives of entrepreneurship and the inclusion of small and medium entrepreneurs in the most sophisticated markets. Will this new corporate model address the difficulty of access to the capital market? Will it increase national development? Will they have access and will be well evaluated by international rating agencies? Will Brazil be inserted into international regulatory competition in the creation of attractive corporate structures?

This research aims to study small and medium-sized enterprises and their access to the capital market taking into account the proposed Special Regime of Simplified Corporations, as well as the experience of comparative law on the subject.

Initially, the Brazilian capital market is studied, with a more practical and assertive approach, showing how it works and what its actors are. In the following chapter it will be analyzed the environment in which these companies originated, what are their characteristics and how they are maturing.

Further, in the third chapter, the closed company is investigated as a representative of medium-sized companies in Brazil, which in a hybrid way unites the capital company with the society of persons and also does not have access to the capital market.

The fourth chapter covers a brief study on the projects for the establishment of the Special Regime of Simplified Corporation in Brazil, its characteristics and the proposed changes.

In the fifth chapter, the comparative Law is analyzed, focusing on the simplified societies of Germany, the Netherlands, the United States of America, France and Colombia and the contributions and experiences of each State.

The methodology used in this research is qualitative, exploratory, developed through bibliographic and documentary analysis. The bibliographic and documentary sources used consist of the research of books and scientific journals, as well as national and comparative legislation.

2 ACCESS TO THE CAPITAL MARKET IN BRAZIL

The difficulty of access to the capital market in Brazil by small and medium-sized enterprises is the main reason that led the legislator to draft a project of law for the establishment of the special regime of simplified corporations. To this purpose, it is provided herein a brief study on the capital market in Brazil and civil and tax laws.

In Brazil, companies have at their disposal ways to raise funds to develop their social activities in search of results. Companies should assess the costs and benefits for the capture of these resources, knowing that such sources are not necessarily available to all types of companies.

The first source of capital acquisition is the capital contributions of the company's partners or shareholders, as well as accrued profits. It should be noted, however, that the vast majority of companies need much more capital to implement their social object, having to resort to an additional source of resources.

The second source for obtaining resources to achieve their social activities is the raising of funds through the direct contracting of loans from the banks of the National Financial System, usually short or medium term, whether as working capital or financing of machinery and equipment, through traditional credit lines or government financing lines, such as BNDES.

In order to obtain such loans, companies have to pay interest to financial entities as remuneration of capital. The interest amount will be lower or higher, that is, directly proportional to the size of the company; their ability to pay; the niche market in which it operates; the results of its financial statements; the credit *rating granted* to it by credit rating companies; and to their financial health, among many

other indicators used by the banking market. It is important to clarify that banks are the agents that take on the risks arising from the default of companies, this is the reason why there is an oscillation in the interest rate depending on which is the company taking the resources.

The third form of obtaining resources, which always occurs through the intermediation of a financial institution, is carried out by way of the use of the capital market, in the medium and long term, through the public issuance of securities that are acquired directly by investors, called securities.

For equity companies, the capital market is a much cheaper alternative than loans granted by banks, as investors participate directly in the enterprises of the companies, becoming debenture holders (a credit relationship between the company and the investor) or shareholders (equity or equity securities, becoming the investor partner of the company, rights and corporate duties), as they assume the risks of profits or losses directly arising from the company's activities. (CVM, 2014). As mentioned, it is a risk market; investors do not have any guarantee of return on their investments, which will depend on the results of the economic venture developed by the open company. (CARVALHO, 2016).

In the capital market, the participating institutions are remunerated by commission and have as main activities the provision of services, because they structure the transactions, advise on the quotation of prices, offer liquidity, seek the investors clients at the other end and distribute the securities in the market. (CVM, 2014).

The Securities Commission conceptualizes the capital market as

> [...] a segment of the financial market in which the conditions are created for companies to capture resources directly from investors, through the issuance of financial instruments, with the main objective of financing their activities or enabling investment projects. [...] The capital market has a great importance in the development of the country, as it stimulates savings and productive investment, which is essential for the growth of any modern economic society. (CVM, 2014).

It is clearly noted in the definition adopted by the Securities Commission and an incentive to the development of the capital market for the movement of the economy aiming at national progress.

Under Law No. 6,404, of December 15, 1976 (BRAZIL, 1976), only publicly traded corporations have the power to operate in the capital market, upon registration with the Securities Commission; they are considered a fundamental instrument for the development of large enterprises and an example of a corporate model that allows the reduction of transaction costs in the capital market.

Not less important is the performance of small and medium-sized Brazilian companies, spread throughout Brazil and in much higher quantity than corporations. Unlike publicly traded companies and similar to privately held corporations, they can be considered to have very restricted access to the capital market, which entails a restriction on the cheapest resources coming from qualified investors trading on the stock exchange and over-the-counter market.

The preceding paragraph mentioned the restricted access of small and medium-sized enterprises to the capital market. This statement is due to the edition of CVM Instruction No. 480, of December 7, 2009 (CVM, 2009), in its Article 7, item VIII, which regulated the automatic waiver of registration with the Securities Commission for the issue of securities by those companies, at the suggestion of the Superintendence of Securities Registration of the Securities Commission, in favor of a more inclusive capital market in Brazil.

Subsequently, CVM Instruction No. 588, of July 13, 2017 (CVM, 2017), replaced CMV Instruction No. 480, mentioned above, and reaffirmed in its Article 1 that the instruction "[...] aims to ensure the protection of investors and enable the public raising of these companies." However, its Article 3 restricts the public offer of distribution of securities in a maximum target value of funding not exceeding R$5,000,000.00 and a funding period of not more than 180 days, which must be defined before the start of the offer, among other topics.[5]

[5] Art. 3. The public offer for the distribution of securities issued by a small business company carried out pursuant to this Statement is automatically exempted from registration with the CVM, provided that the following requirements are met: I – existence of a maximum target value of funding not exceeding R$ 5,000,000.00 (five million reais), and a funding period of not more than 180 (one hundred and eighty) days, which must be defined before the start of the offer; II – the offer must follow the procedures described in Article 5 of this Instruction; III – the investor must be guaranteed a withdrawal period of at least 7 (seven) days from the confirmation of the investment, and the investor's withdrawal is exempt from fines or penalties when requested before the end of this period; IV – the issuer must be a small business company pursuant to this Instruction; and V – the funds raised by the small business company may not be used for: a) merger, incorporation, incorporation of shares and acquisition of shares in other companies; b) acquisition of securities, convertible or not, and securities issued by other companies; or c) granting of credit to other companies.

The Corporations Law, as well as the legislative framework related to the capital market is mainly favorable to its use by the large company, because it determines rules for the protection of the big entrepreneur due to its economic relevance and also because the large company grants greater security to investors, whether qualified or not. Thus, the need to grant a greater guarantee to investors causes a plastering of legislation, with the consequent exclusion of small and medium-sized entrepreneurs in the capital market. However, there is an effort by the government to include micro-enterprises and small businesses in the capital market, despite the necessary restrictions for investors protection.

3 THE ARTICLES OF ASSOCIATION OF MICROENTERPRISE AND SMALL ENTERPRISES AND THEIR BENEFITS

In adopting the same tone used in the Securities Commission Instructions set out in the previous chapter, the Constitution of 1988 also dealt with the inclusion of microenterprise and small businesses in Article 179:

> The Federal Government, the States, the Federal District and the Municipalities will dispense micro enterprises and small businesses, thus defined in law, differentiated legal treatment, aiming to encourage them by simplifying their administrative, tax, social security and credit obligations, or by eliminating or reducing them by law. (BRAZIL, 1988).

Although the Estatute of the Micro enterprise has already been approved by Law No. 7,256, of November 27, 1984 (BRAZIL, 1984) (repealed by Law No. 9,841 of October 5, 1999 (BRAZIL, 1999) and Complementary Law No. 123, of December 14, 2006 (BRAZIL, 2006), at a time when Brazil was not yet fit for this category of legislation, it was a great advance the recognition by the State of the informal economy in making the effort to revert it to formality.

Complementary Law No. 123/2006 dealt with the broader regulation and systematization, establishing the new national statute of microenterprise and small business. The concept of micro enterprise and small business was unified at the federal, state and municipal level in its Article 3:

> For the purposes of this Complementary Law, micro-enterprises or small businesses are considered to be the business company, the simple company, the individual limited liability company and the entrepreneur referred to in Article 966 of Law No. 10,406, of January 10, 2002 (Civil Code), duly registered in the Register of Merchant Companies or in the Civil Registry of Legal Entities, as the case may be, provided that: I - in the case of the micro-enterprise, sufficiency, in each calendar year, gross revenue equal to or less than R$

> 360,000.00 (three hundred and sixty thousand reais); and II - in the case of the small company, in each calendar year, gross revenue exceeding R$ 360,000.00 (three hundred and sixty thousand reais) and equal to or less than R$ 3,600,000.00 (three million six hundred thousand reais). (BRAZIL, 2006).

Article 12 of Complementary Law No. 123/2006 instituted the Special Unified Regime for Collection of Taxes and Contributions for micro enterprises and small businesses, called Simples Nacional, which is a tax benefit and may seem advantageous in many cases due to the ease of payment of eight taxes in a single ticket, as well as the waiver of some ancillary obligations. Statistics show that micro enterprises and small enterprises account for 95% to 98% of the number of companies in Brazil, varying the sector and the branch of economic activity. (EMPRESOMETRO, 2017).

In January 2017, micro enterprises and small enterprises totaled 16,393,734 of which 6,765,711 were individual micro entrepreneurs (MEI) and 9,628,023 micro-enterprises and small enterprises. (EMPRESOMETRO, 2017).

The 2017 statistics also report that 4,959,277 micro enterprises and small enterprises joined the Simples Nacional as the tax regime for payment of taxes and contributions, and the others (4,668,746) fit the tax regimes for payment of alternative taxes, namely the regime of real profit or the regime of presumed profit. The law provides in the optional regime category for micro enterprises and small enterprises the use of the National Simple, as mentioned above, in terms of the option of the tax regime. (EMPRESOMETRO, 2017).

4 **ASPECTS OF PRIVATELY HELD CORPORATIONS**

Before starting the study on simplified corporations, it is imperative to investigate closed companies, which appear to be a step before simplified companies.

An important characteristic of the closed corporation is the non-trading of its securities in the capital market, whether on the stock exchange or on the over-the-counter market, as provided for in Article 4 of Law No. 6.404/1976, amended by Law No. 10.303/2001:

> Art. 4 […] the company is publicly or closed according to the securities of its issue whether or not they are admitted to trading on the securities market.
> §1 - Only securities issued by a company registered with the Securities Commission may be traded on the securities market.
> § 2 – No public distribution of securities will be effected on the market without prior registration with the Securities Commission.

The interpretation of the article in comment has to be doe *contrario sensu*, since the closed company is not allowed to register its shares in the Securities Commission; in addition, the degree of liquidity in the investment in closed corporations is much lower than the verified in publicly held companies. The publicly traded company, because it has the power to trade its values in the capital market, deems easier to re-make it available to raise funds and liquidate its assets. (CARVALHOSA; EIZIRIK, 2002, p. 33).

It is observed that the legal requirements for the incorporation and operation of a closed company are costly for entrepreneurs who have not structured themselves as a large company.

Law No. 10.303/2001 and the subsequent Law No. 13,818, of April 24, 2019 (BRAZIL, 2019), came to benefit closed companies through the debureaucratization of their maintenance and the consequent reduction of expense, which is consistent with their format and their lower financial and economic expression in the market This is a breakthrough and recognition by the Legislative Power of the shortcomings of the old Corporations Law, which required an urgent and necessary modification. This update promoted the inclusion of a share of smaller entrepreneurs in the stock market, with a boost to the national economy.

> Art. 294. The closed company with less than twenty (20) shareholders, with shareholders' equity of up to R$10,000,000.00 (ten million reais), may:
> I - convene general meeting by announcement delivered to all shareholders, counter-receipt, in advance provided for in Article 124; and
> II - fail to publish the documents of which Article 133 is addressed, provided that they are, by certified copies, filed in the trade register together with the minutes of the assembly that on them deliberate.
> § 1 - The company shall keep the delivery receipts of the call notices and file in the trade register, together with the minutes of the assembly, certified copy of them.
> § 2 - In the companies of which this article is treated, the payment of the participation of the directors may be made without compliance with the provisions of § 2 of Article 152, provided that it is approved by unanimity of the shareholders.
> § 3 - The provisions of this article do not apply to or affiliated to the parent company of a company.

The characteristics of the closed company still make it unaffordable to entrepreneurs due to the demands that still exist to access the level of a stock company.

The requirement of the plurality of partners is still an obstacle to the use of closed corporations, which presents characteristics of a company of people. Interestingly, the issue of Law No. 13,874, of September 20, 2019, called the Economic Freedom Law, among the various changes in the business, civil and labor areas, provided for the inclusion of a new legal standard in Article 1,052 of the Civil Code, providing the constitution of a limited company with a single partner, that is, a single-person company. It should be clarified that the mandatory plurality of shareholders in the closed company was not altered by the new legislation, and the obligation of at least two partners remains (Article 80 of Law No. 6,404/1996).

5 SIMPLIFIED CORPORATIONS – PROJECTS OF LAW IN PROGRESS

Before starting studies on simplified corporations, it is important to know the real reason that provided sufficient arguments for the drafting of special regime project of laws for simplified corporations, as a result of the dynamism and transformation of contemporary society.

The matter was dealt with in Project of Law No. 348/2012, proposed by Senator Ana Amélia (BRAZIL, 2012) and Project of Law No. 4,303/2012 (BRAZIL, 2012A), proposed by Congressman Laércio Oliveira, with the objective of instituting the Special Regime of the Simplified Corporation. Although the two projects are similar, the explanatory memorandum of the House of Representatives Project is richer in clarifications, highlighting Brazil's economic maturation, growing entrepreneurship initiatives and the inclusion of small and medium entrepreneurs in the most sophisticated markets:

> The law that is proposed is necessary and timely. Timely, because it comes at a time when Brazil flourishes as an economic powerhouse. Brazilian women and Brazilians awaken to entrepreneurship and their opportunities. Moreover, when the techniques of income distribution and mitigation of economic and social imbalances fail, and ours have failed to a large extent, the legislator must at least provide the small and medium-sized entrepreneurs with ways of entering the markets. It must work so that these entrepreneurs have a chance to benefit from their own effort, their creative genius, and the favorable macroeconomic context. The proposed law is also

> necessary because the forms of legal organization of the small and medium-sized enterprises, currently available, are unable to achieve the purposes for which they were designed. It is not a question of abolishing them; on the contrary, but only to constitute another "path" to the organisation of small and medium-sized enterprises and to promote freedom of choice. (BRAZIL, 2012A).

An important fact to consider is the prediction that the company constituted in the form of a company composed of shares under the special regime may benefit from the tax treatment given to micro enterprises and small companies (Special Unified Tax Collection Regime and Contributions Due by Micro Enterprises and Small Enterprises - Simples National) that deals with Complementary Law No. 123/2001, Article 3., § 4t, item X.

Regarding the theme of the plurality of shareholders in stock companies, this Project of Law provides the possibility for the simplified corporation to have only one shareholder in its corporate framework, consistent with the provisions of the Economic Freedom Law for Companies regulated by the Civil Code. This legal provision has already been introduced in the legal systems of several Member-States that established the simplified corporation (Article 294-A and 294-B of the Project of Law).

When dealing with the format of shareholders' equity, this Project of Law determines the limit value of R$48,000,000.00 for entry into the special regime, through the obligation to submit to the approval of shareholders representing more than half of the common shares. In the event of an increase in shareholders' equity, the stock company is excluded from the special regime in the immediately subsequent fiscal year. It is clarified that the shareholders' equity mentioned in the Project of Law reaches all the company's assets, subtracting the taxes (Article 294, §2., from the Project of Law).

As already mentioned above in the explanatory memorandum of the Project of Law, the convocation of meetings and the way of archiving of social documents will be simplified and will allow the reduction of publication expenses, through the call by means of notification delivered in person, replacing the current procedure recommended in Article 124 of the Corporations Law. Similarly, the corporate documents listed in Article 133 of the Corporations Act may be made available to shareholders via the Internet, upon disclosure on its virtual website. The computerization of the procedure represents an advance, facilitating the

communication and access of shareholders to indispensable appreciation documents, enabling storage in the worldwide network of Computers (Article 294-C, item II, of the Project of Law).

Article 294-D of the Project of Law provides the participation and exercise of the vote in the meeting in a virtual way, moving away from the difficulties and expenses of locomotion, as well as promoting a more intense participation of the shareholder who has his agenda taken over or resides far from the head office.

Not least, the Project of Law also adopts a simplification of the governing bodies, providing the composition of the board to only a single executive in place of two executives, according to the current rule of Article 143 of the Corporations Law, as well as releasing the term of management of the executive board for indefinite time, in opposition to the three-year period provided for in the present legislation.

As for internal management processes, the right of withdrawal and exclusion of a shareholder from the company by simplified shares will have greater flexibility, with the power of application or not of specific legal provisions.

Project of Law No. 348/2012, proposed by Senator Ana Amelia, which bears intense similarity to the Project of Law proposed by Congressman Laércio Oliveira, however, noticeably less beneficial to small businesses.

The points of divergence of Senator Ana Amélia's Project of Law refer to the amendment of Article 294 of the Corporations Law, without the issue of additional provisions to this article. Project of Law No. 348/2012 also provides the term of indefinite management also to the members of the Board of Directors.

The Project also differs by maintaining the limitation of twenty shareholders for the constitution and maintenance under the simplified corporation regime; similarly, there is no change in the Corporations Law in relation to shareholders' equity in an amount below R$100,000,000.00 (one hundred million reais) so that the limited liability company enjoys the use of the proposed special regime.

Last but not least, Project of Law No. 348/2012 (a) provides for a period of 121 days for reimbursement to the removing shareholder, as opposed to the 30-day period established by Project of Law No. 4,303/2012; (b) the possibility of judicial exclusion, on the initiative of any shareholder or the company itself, without the

possibility of out-of-court exclusion; and (c) the Project of Law is silent as to the insertion of the Special Regime of Simplified Corporations in the Simples Nacional.

7 THE COMPARED LAW

This chapter will investigate the institution of simplified corporations in Germany, the Netherlands, the United States of America, France and Colombia, which corporate experiences were used as inspiration for Brazilian law projects to the simplified corporation.

7.1CORPORATE RULE OF THE FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany was the forerunner State in easing company legislation. Its legislation, dated 1892, was recently amended in 2008, although there was no issue of a new corporate model, but only the introduction of some changes in corporate law. The German legislature's aim was simply to make limited companies more attractive, however, the new legislation did not provide small corporate types and micro enterprises with access to the capital market. (SMARTLAW).

The companies in focus are limited liability companies, *called GmbH* (*Gesellschaft mit beschränkter Haftung*) and *UG* (*Unternehmen Gesellchaft*), which is considered a mini *GmbH* and originated from *GmbH*. (IHK).

From a post-reform structural point of view, *conventional GmbH* must have a minimum share capital of €10,000.00, the payment of which may occur by donating other assets; and *UG*, with a share capital of only €1.00. In both types of companies the immanent liability for all members is limited to the amount of the capital actually invested and, as for the partners, they can be single-person or multi-personal. (STARTING-UP).

It is emphasized that in the *simplified UG* corporate type, it is mandatory to reinvest a quarter of its revenues in the company itself, in order to accumulate a fund for the benefit of potential creditors, which objective would be in the German experience to reduce the risk of creditors in the event of failure of companies because they cannot survive after a brief operational period. (LG2G).

7.2 THE CORPORATE RULE OF THE NETHERLANDS

The hybrid corporate type that gave rise to a simplified limited liability company was established in 1971, *called besloten vennootschap* ("BV"). In 2012, the Dutch legislature approved changes to the law of companies called BV, which made this type of corporate simpler, called the "*Flex-BV*" Law. (TAX CONSULTANTS INTERNATIONAL).

Among the main characteristics of this type of corporation it is highlighted: (i) the minimum amount of €1.00 for the payment of the share capital, which must be deposited in a provisional bank account; (ii) the obligation to set up a Board of Directors if the company has more than 50 employees; (iii) the unipersonality or multi-personality of the partners, and may consist of individuals or legal entities; (iv) the character of a company necessarily by shares, which may be transferred freely; (v) the creation of preferred shares, without voting rights, in this corporate type, which is optional; (vi) the payment of share capital in a currency other than the Euro; and (vii) the publication of an audit carried out by an independent auditor is necessary if the annual gross revenue exceeds € 12,000,000.00. (INCO BUSINESS GROUP).

The Dutch legislature used the type of stock company, establishing an extremely simple corporate type, with capital of a minimum value of €1.00, focusing on simplifying the structure and reducing corporate expenses, obviously without access to the capital market.

7.3 THE EXPERIENCE OF THE UNITED STATES OF AMERICA ON THE SUBJECT OF SIMPLIFIED COMPANIES

The U.S. corporate rule initially deals with the limited company *called LLC* (*Limited liabitlity Company*), which represents a hybrid structure for associating characteristics of capital companies, *called corporations*, with companies of persons, called *partnerships* , and emerged to assist in the expansion of the oil industry. In a short period of time this corporate type was adopted by all other Member-States. (WARDE JR.; CASTRO, 2013, p. 26).

The existing regulatory competition in the United States of America between Member- States is the main reason for the use of this type of corporate, because there is broad autonomy for State governments to legislate on corporate types. German law (the *GmbHs*) was an inspiration for this corporate type in 1977, when the State of Wyoming issued the Wyoming LLC Act (STATES OF DELAWARE), where the first *Limited Liability Company was incorporated* into the United States of America. (STATE OF DELAWARE).

The most important features of *the Limited Liability Company* are:

> (I) the limitation of liability, (ii) the right of choice for the taxation system applicable to company, (iii) the anonymity of its members (in some cases), (iv) the unipersonality (in some cases), (v) *its intuitu personae character* - the extent to which the company must become extinguished (a) with the death or (b) declaration of bankruptcy of the partner, as well as (c) for the necessary approval of the members for the entry of a new partner and, finally, (vi) the seal to operate as a listed company. (STATE OF DELAWARE).

The U.S. LLC is a typical limited company in which the partners have limited liability for the company's debts and liabilities. The hybrid nature of *the Limited Liability Company* allows taxation in two different ways, (a) taxation at the time of the distribution of profits to the partners, such as *partnerships*, or (b) taxation on the net income received by the company, such as *corporations*, and then taxation to the partners for the receipt of profits. (FERNANDO, 2022).

From the foregoing, it is inferred that the simplification of companies in the United States of America largely preferred a limited company, considered hybrid in nature, without claiming that entrepreneurs who use this type of corporate had access to the capital market.

7.4 The EXPERIENCE OF THE FRENCH REPUBLIC

The simplified share holding company (*société par actions simplifiée*) was founded in France in 1994 (Law No. 94-1 of January 3, 1994) (FRANCE, 2014), as a response to the excess formalities and restrictions of the classical corporate regime, which objective was to protect investors and minority shareholders, as well as to discourage the transfer of the head office of French companies to the Netherlands, which housed more attractive and simplified legislation, with the

consequent flight of private capital from French territory. French law, by encouraging entrepreneurship, was inspired by the *American LLC* (specifically the Member-State of Delaware), the *English LLP* and the *Dutch BV*. (WARDE JR.; CASTRO, 2013, p. 101).

The French legislature enacted legislation containing a new corporate model of hybrid and autonomous character, which relaxed the legal structure of the corporation, keeping it anonymous, to be constituted with a minimum capital of one euro, with the freedom to regulate the articles of association of the company and the functioning of the company as a whole. (FRANCE, 2014).

In 2008, Law No. 766 (*Loi de Modernisation de l'Economie - LME*), which suppressed the need for a minimum share capital for the constitution of the simplified corporation, as well as the faculty to establish a supervisory board intensifying its debureaucratization.

The main guidelines of the French simplified corporation are: (i) the limitation of shareholders' liability to the value of their respective shareholding; (ii) the application of the rules concerning corporations, when compatible with the simplified corporation regime, with some exceptions, such as the provisions that organize the management and administration of the company and the prerogatives of the members meeting at a general meeting, which do not apply to the simplified corporation; (iii) the possibility of issuing inalienable shares and (iv) the possibility of constituting the subscription of all share capital by only one partner – unipersonality – named in this case SASU; (v) the sealing of the realization of a public offering of securities or the admission of its shares in the organized over-the-counter market; (vi) the capital may be variable, in this case it may fluctuate according to the withdrawals of members or new subscriptions, up to the limit of the statutory capital. Thus, a statutory change is not necessary by collective deliberation that approves the increase or reduction of capital; and (vii) when it was created in 1994, it was not possible for the partner to contribute services (*apport en industrie*); however, as of 2009, under the LME, such a contribution became possible.

The French legislature granted contractual freedom for the board to carry out the administration in the way that is most beneficial to it and extends to other topics, such as social deliberations, social representation, the alienability of the shares and

the assumptions of dissolution and withdrawal, the extent of the freedom left to shareholders to organize not only the management of the company, but all other corporate bodies, which is very favorable to small corporations, for which a structure as bureaucratic as that of classical corporations is not necessary.

The legislation of the simplified corporation privileges the character *intuitu personae*, with clauses restricting the circulation of the shareholding participation typified in the legislation, with the penalty of nullity to the assignment carried out in disagreement with the articles of association.

The new corporate type has brought many benefits, materializing by the significant number of companies that are adopting this corporate model, annually surpassing the constitution of classic corporations and approaching the amount of constitutions of limited companies.

In short, France was forced to simplify its corporate law so as not to lose private capital to the detriment of its European neighbors, including the Netherlands. This type of corporate, due to its small size, aimed at a corporate simplification and reduction of expenses, not having the intention of access to the capital market.

7.5 THE EXPERIENCE OF COLOMBIA

In the Latin American scenario, Colombia stands out in avant-garde and successful experience with the institution of the simplified corporation. The Colombian simplified corporation was established by Law No. 1.258/2008 (COLOMBIA, 2008), which was inspired by the French experience, with the aim of "facilitating the creation and functioning of new societies, promoting business innovation and improving the competitiveness of the economic system", as Francisco Reyes Villamizar, one of the participants of the Project of Law points out.(2010, p. 1).

The legal provision granted great flexibility to this type of corporate; simplification has led to cost reduction in its establishment and maintenance of the company. Two years after the edition of the aforementioned Law, more than 54,000 simplified corporations had already been set up, surpassing all other corporate types in force in Colombia. (WARDE JR.; CASTRO, 2013, p. 105).

The simplified corporation can be used for a variety of activities, both for family businesses and for large enterprises. It should be noted that the trading of securities on the stock exchange is not allowed, as provided for in Article 4. of the aforementioned Law; however, Francisco Reyes Villamizar considers that this restriction has not diminished the huge range of commercial transactions that can be carried out by simplified stock companies:

> Pasado poco más de un año después de la expedición de la ley, se habían constituido en Colombia más de 40,000 sociedades por acciones simplificadas. En los primeros meses del año 2010, la SAS ya había superado a todas las formas asociativas tradicionales en número de nuevos registros. Las cifras consolidadas nacionales mostraban para el mes de marzo de ese año que por lo menos el 80% de las compañías inscribed en los registros mercantiles del país eran del tipo de la sociedad por acciones simplificadas. (2010, p. 1).

The main characteristics of the Colombian simplified corporation are: (i) the legal personality and liability limited to all partners, (ii) the constitution by one or more individuals or legal entities, (iii) the large margin of private autonomy, (iv) the reduction of administration and constitution costs, (v) the access to multiple financing and capitalization techniques. The emphasis of the new law is the concept of contract society, with the predominance of autonomy of will over regulatory standards, in order to facilitate the creation and functioning of societies, stimulate innovation and the development of new products and services, with the possibility of corporate reorganization and simplified statutory reforms. (VILLAMIZAR, 2010, p. 1).

It is concluded that the basic difference of the simplified corporation in relation to other corporate types is in its internal organization mode, by stimulating the financial boost of corporations and allowing a great autonomy in the organization of their powers. Despite being a corporation, there is no access to the traditional capital market.

8 FINAL CONSIDERATIONS

Small and medium-sized enterprises are widespread throughout Brazil and are a larger number of legal entities than corporations, however they are considered second-class companies in the capital market because they have no economic power

and business expressiveness. Moreover, for an extensive list of reasons ranging from credit power to investor protection and also by corporate limitation, these companies simply do not have access to the capital market where the cost of money for the maintenance and growth of their enterprise is cheaper and more attractive.

Projects of Law No. 4,303/2012 and No. 348/2012 which provided the Special Regime of Simplified Corporations bring to the discussion the possibility of rethinking the stock company for small enterprises, in line with the economic maturation of Brazil, the growing initiatives of entrepreneurship and the inclusion of small and medium entrepreneurs in the most sophisticated markets. This new corporate model does not solve the issue, as the project of special regime denied access to capital markets.

The stock company, although simplified, tends to be expensive to maintain it and will not be allowed access to the capital market, as clarified above, because it will be nothing more than a simplified stock company similar to the closed company, which does not have access to the capital market, unless it becomes listed, through a difficult and expensive process. The foreign experience proved to be very similar to the Brazilian market, because the legislation of all States surveyed seals simplified corporate types access to the capital market.

Moreover, the difficulty of access to the capital market is not only explained by not being a corporation, but also by a cultural character. Companies that have access to the capital market often do not do so effectively, so what to expect from the timid behavior of small and medium-sized enterprises, even if it is a simplified corporation? It would certainly be interesting if small and medium-sized enterprises had the capital market as a form of financing, but surely the special simplified corporation regime is not the solution.

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