



**Superintendencia
de Sociedades**

**Institutional bypass and
third party protection**

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Introduction

‘Nothing can be so unjust as a few persons abounding in wealth to offer a portion of their excess for the formation of a company, to play with that excess, to lend the importance of their whole name and credit to the company, and then, should funds prove insufficient to answer all creditors, to retire into the security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish’.

Editorial, the Times of London, 1824

Introduction

‘Corporation: An ingenious device for obtaining individual profit without individual responsibility’.

Ambrose Bierce, *The Devil's Dictionary* (1911)

Introduction

‘If we look at a corporation as a legal person, it may not be that difficult to actually draw the transition between psychopathy in the individual to psychopathy in the corporation’.

Robert Hare in The Corporation (2003)



Introduction

Historical aversion to allow unrestricted access to legal entities with limited liability

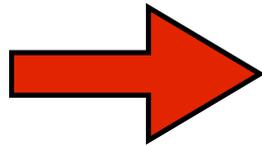
Corporate scandals, abuse of the corporate form

The flexibility required for hybrid business forms to work can rekindle these old misgivings

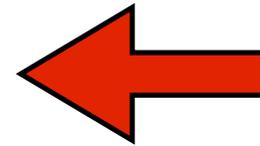
Pushback against the introduction of HBFs

Introduction

Easy access
to HBF



?



Protection
against abuse

Highly context-dependent

Level of development

Institutional infrastructure

Cultural mores

Legal system

In Theory
(ex ante vs ex post protection)

In Practice
The Colombian experience

Ex ante vs Ex post

Ex ante (rules)

- Minimum legal capital
- Public deeds
- Closed purpose clauses
- Bans and restrictions

Ex post (standards)

- Fairness reviews
- Abus de droit*
- Equal treatment rules
- Piercing the veil

Tracks the rule vs standards debate

R Gilson and A Schwartz (2012)

J Armour (2006)

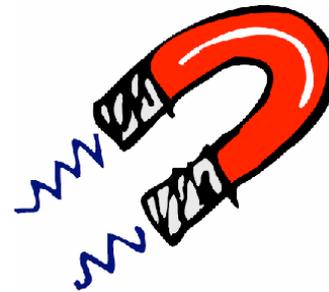
C Sunstein (1994)

Ex ante vs Ex post

	Easy access to HBFs	Protection against abuse
Ex ante rules		 
Ex post standards		

Ex ante vs Ex post

Ex post mechanisms are the superior alternative to achieve easy access to HBF and adequate protection



The catch: The institutional infrastructure required for ex post mechanisms to work is costly and cannot be developed overnight

Ex ante vs Ex post

Corporate judicial expertise

Interpreting relevant
language

Evaluating trial evidence

Inferring intended performance
from rendered performance

Industry-relevant
experience

R Gilson and A Schwartz (2012)

The catch-22: Judicial expertise cannot be developed unless individuals start relying on ex post mechanisms. Individuals will not use ex post mechanisms unless the judiciary has the relevant expertise.

The Colombian experience

The Simplified Stock Corporation Act (2008)

Easy access to limited liability for microentrepreneurs

Suppressed ex ante mechanisms

- No public deed
- Open purpose clause
- Suppression of bans and restrictions

Emphasis on ex post protection

- Piercing remedy
- Abuse of voting rights
- Corporate disputes

The Colombian experience

Latin American judiciaries

Country	Length	Cost (% claim)	Q
Argentina	590	16.50%	97.4
Brazil	616	16.50%	101.6
Mexico	415	32%	132.8
Uruguay	720	19%	136.8
Chile	480	28.60%	137.3
Ecuador	588	27.20%	159.9
Peru	468	36%	167.1
Paraguay	591	30%	177.3
Bolivia	591	33.20%	196.2
Venezuela	510	43.70%	222.9
Colombia	1346	52.60%	708.0

Lack of training and expertise
in corporate matters

Judicial system clogged by
significant backlog

Insufficient personnel,
resources

Doing Business (2011)

The Colombian experience

Institutional bypass: Combines the human and financial resources of regulators with the independence of judiciaries



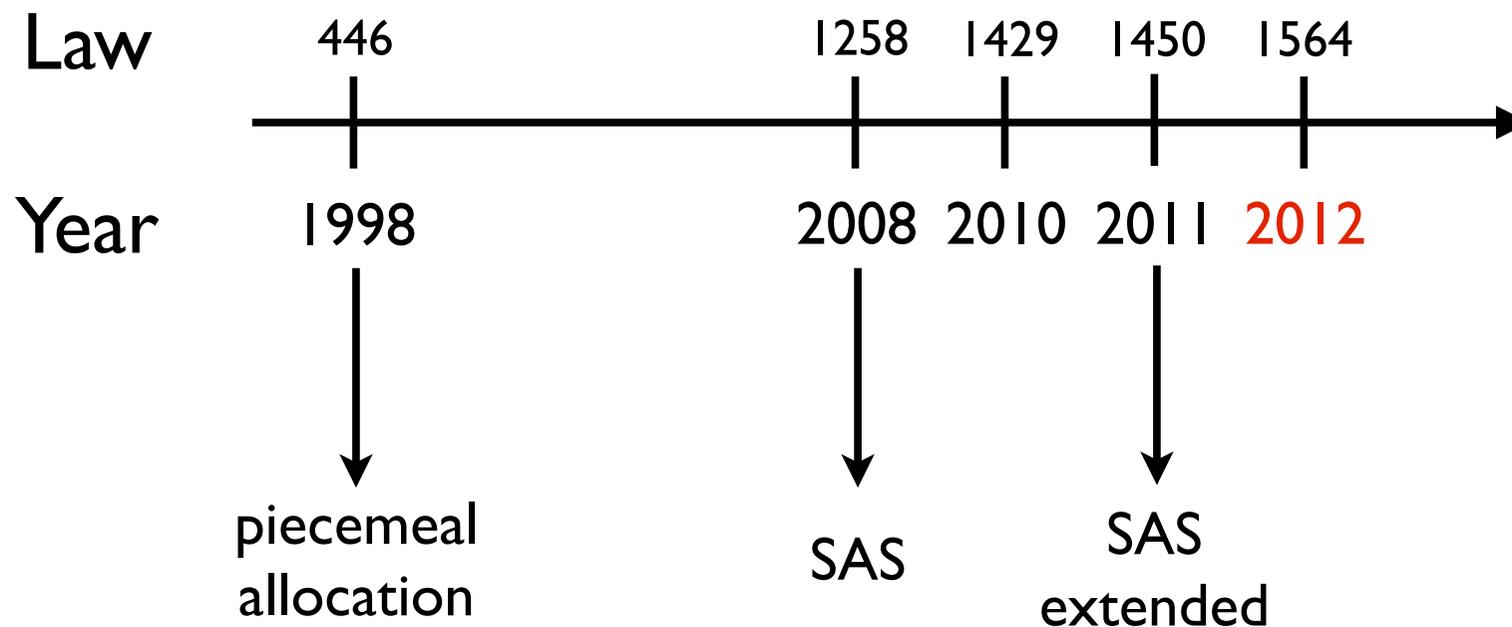
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Regulator with full judicial powers for
corporate affairs

The Colombian experience

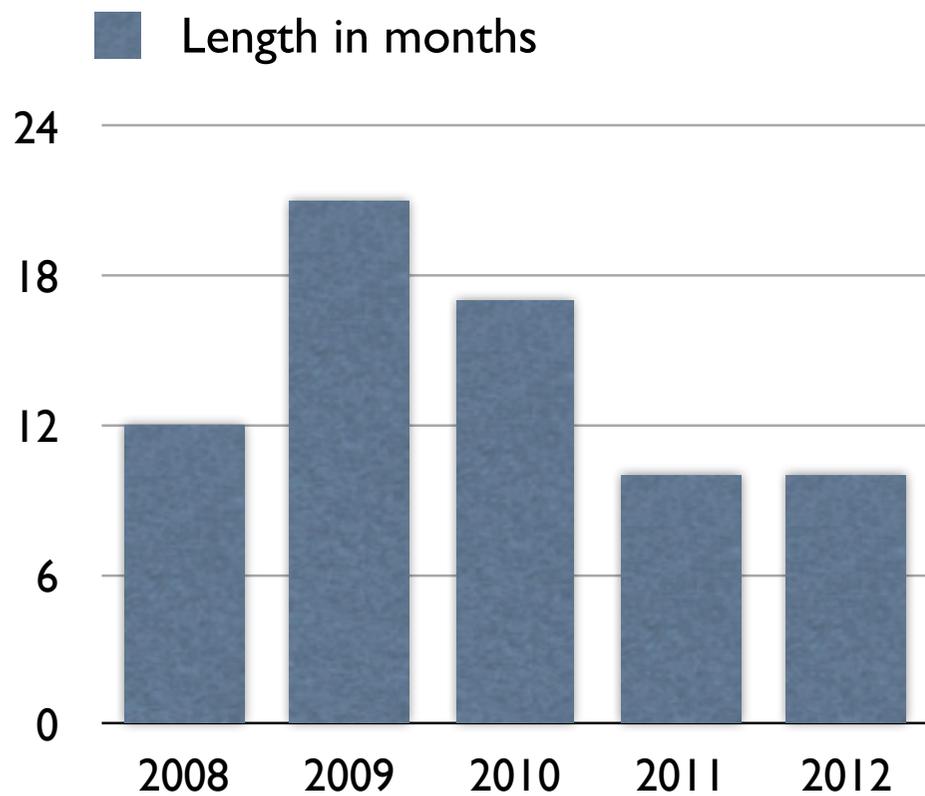


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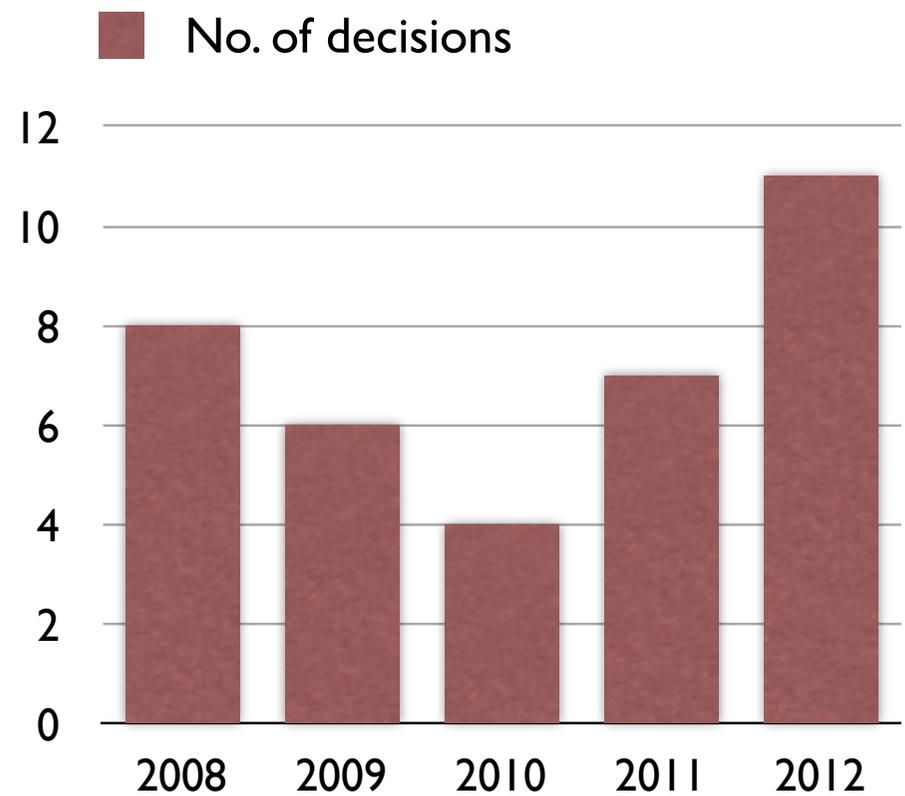


The Colombian experience

Data 2008-2012 (june)



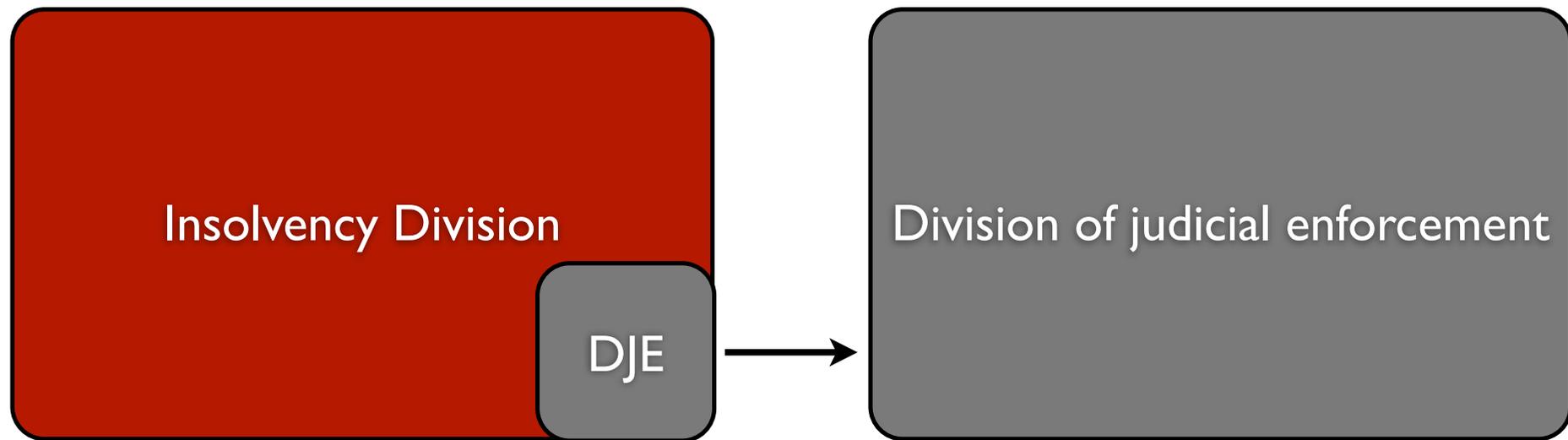
Average: **14 months**



Yearly average: **7 decisions**

The Colombian experience

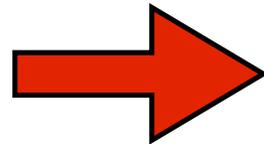
Restructuring



The Colombian experience

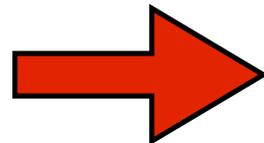
Preliminary data
2012 (july to december)

No. of decisions



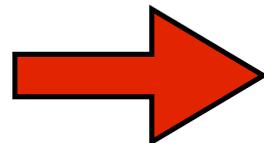
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Average length of
proceedings



4 months

Preliminary
injunctions



20

In closing

1. HBFs may require improving framework for ex post enforcement
2. Ex post enforcement must be grounded on solid infrastructure
3. Judiciaries in developing countries may not be up to the task
4. Institutional bypass (*mixed private enforcement*) can provide effective solutions

In closing

‘It doesn’t matter whether a cat is black or white, as long as it catches mice’

D. Xiaoping