



**Superintendencia  
de Sociedades**

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**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

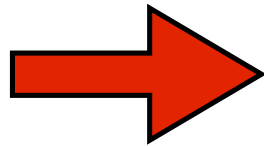
Corporate scandals, abuse of the corporate form

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

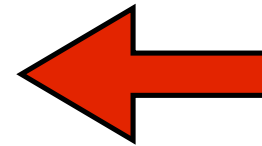
Pushback against the introduction of HBFs

# Introduction

Easy access  
to HBF



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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%	<b>97.4</b>
Brazil	616	16.50%	<b>101.6</b>
Mexico	415	32%	<b>132.8</b>
Uruguay	720	19%	<b>136.8</b>
Chile	480	28.60%	<b>137.3</b>
Ecuador	588	27.20%	<b>159.9</b>
Peru	468	36%	<b>167.1</b>
Paraguay	591	30%	<b>177.3</b>
Bolivia	591	33.20%	<b>196.2</b>
Venezuela	510	43.70%	<b>222.9</b>
Colombia	1346	52.60%	<b>708.0</b>

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



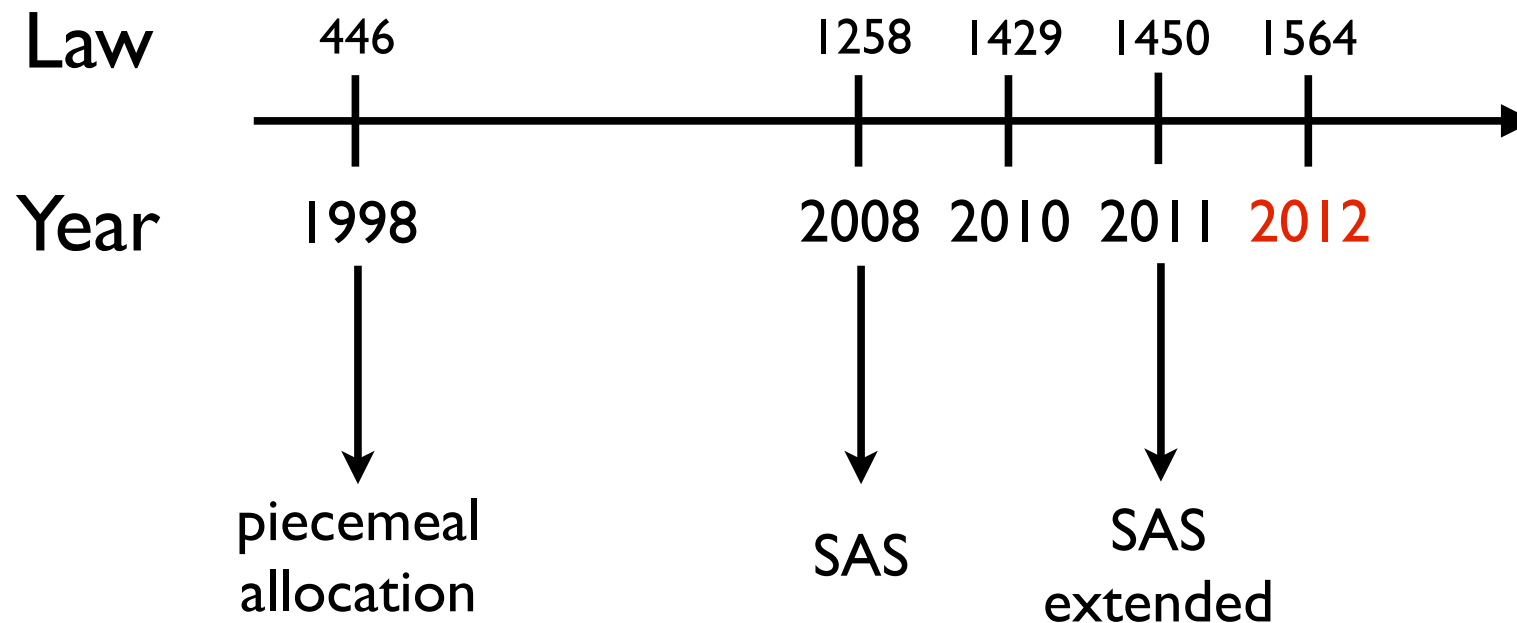
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Regulator with full judicial powers for  
corporate affairs

# The Colombian experience

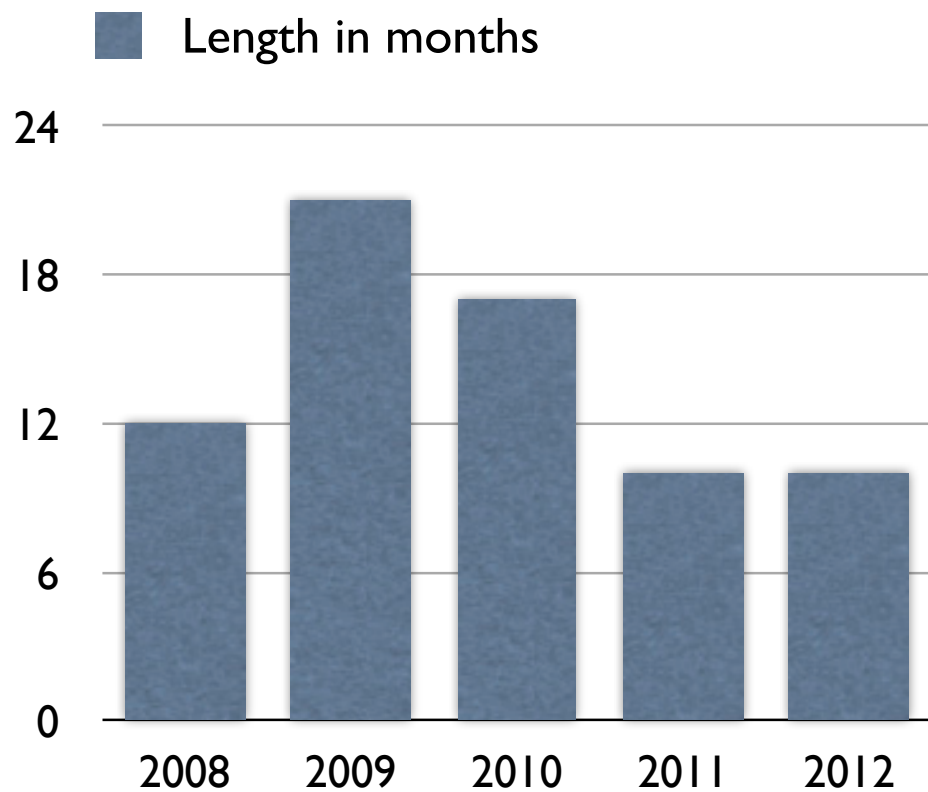


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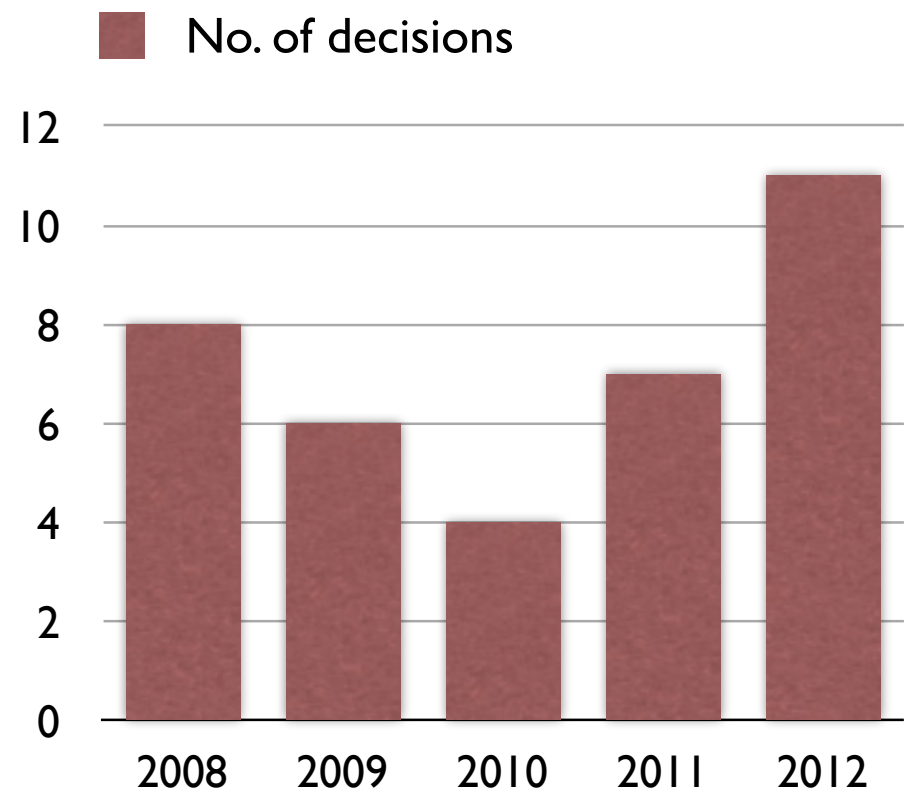


# The Colombian experience

## Data 2008-2012 (june)



Average: **14 months**

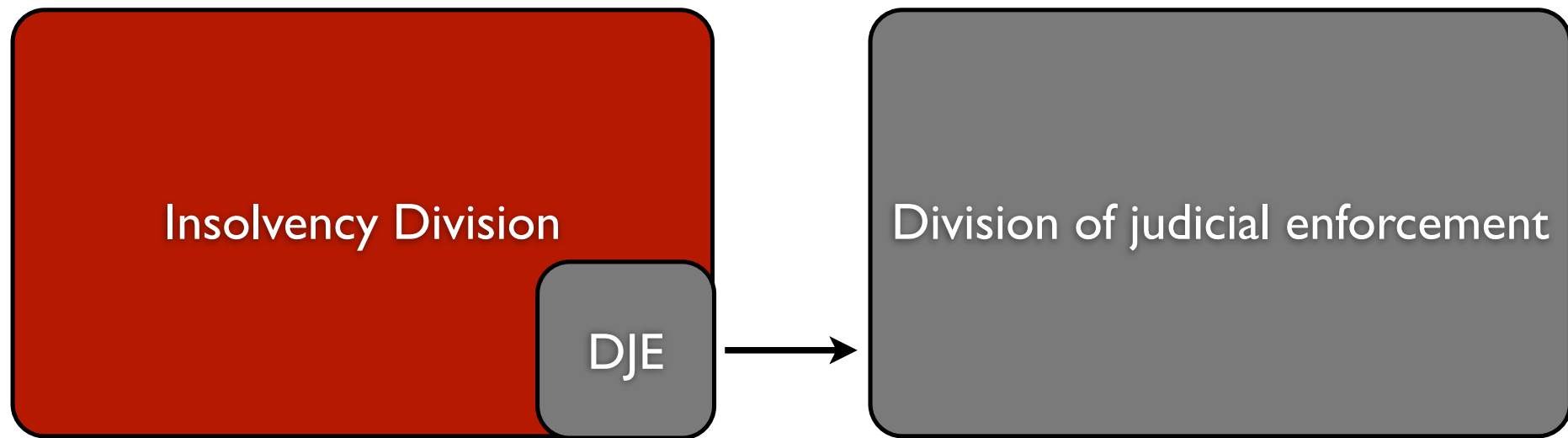


Yearly average: **7 decisions**



# The Colombian experience

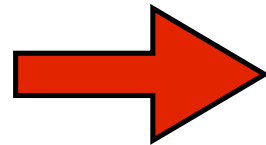
## Restructuring



# The Colombian experience

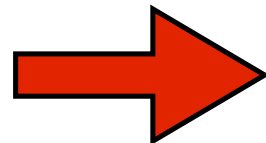
Preliminary data  
2012 (july to december)

No. of decisions



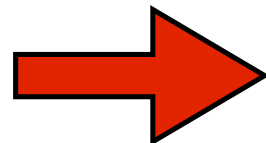
17

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