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Family Businesses, Choices of Legal Entity

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FAMILY BUSINESSES, CHOICES OF LEGAL ENTITY. A COMPARATIVE STUDY BETWEEN ARGENTINA AND THE UNITED STATES OF AMERICA.

by

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(Under the direction of Prof. Charles O'Kelley)

ABSTRACT

There is not a "best" choice of legal entity for Family Business in the USA and in Argentina. The different legal choices provide with "better" or "worse" options of legal entity according with the entrepreneurs' expectations and concerns. However, some legislation in the USA has recognized the special characteristics of Family Businesses, and allows more possibilities of customization of the governance structure and succession planning of such businesses. Argentina's law should follow that path

INDEX WORDS: Family Business, Close Corporations, LLC (USA), SRL, SA (Argentina).

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CHAPTER I

INTRODUCTION

In the United States, family enterprises constitute 95 per cent of the businesses, and they represent more than 50 per cent of the gross national product.[1] In Argentina more than 80 per cent of the business are family businesses.[2] A family business is popularly defined as "any company where founders or descendants continue to hold positions in top management, on the board, or among the company's largest stockholders"[3]. Business Week magazine published a comprehensive article on November 2003, highlighting the good performance of family business and showing interesting figures[4]. The family businesses studied by BusinesWeek had higher annual shareholder return, higher return on assets, and higher annual revenue growth and income growth, compared with non-family companies[5]. The article listed a number of factors that influenced the good performance of family businesses[6]. Those factors included: the motivation provided by a legacy, the possibility to react faster than corporate bureaucracies by taking quick decisions, the breeding of loyalty among employees, and

[1] DONALD KELLEY, FAMILY BUSINESS ORGANIZATIONS (1990), §1.01.
[2] ROBERTO D. BLOCH, LAS PEQUENAS Y MEDIANAS EMPRESAS. LA EXPERIENCIA EN ITALIA Y EN LA ARGENTINA[SMALL AND MEDIUM SIZE BUSINESSES. THE EXPERIENCE IN ITALY AND IN ARGENTINA] 42 (2002).
[3] *Family, Inc.,* Business Week, Nov. 3, 2003 at 100.
[4] *Id.*
[5] *Id.,* at 102.
[6] *Id*., at 104-110

higher levels of reinvestment in the company.[7] Despite the fact that the article focused on big companies[8], smaller family companies tend to share those advantages, too.

Although family businesses may be small, medium or big size companies, it is true that most small and medium size businesses are family owned[9]. Small businesses represent the biggest source of employment in USA and in Argentina. In the United States, small businesses employ more than half of the private-sector employees.[10] In Argentina, businesses with less than 40 people employ 46 per cent of the private-sector workforce.[11] Small businesses are mostly family businesses, so family businesses are essential to the Economies of both countries. For all these reasons, the Law must provide tools that help Family Businesses to optimize their performance.

Most small sized family businesses are part of what is known as "closely held" businesses. Closely held firms combine: "(1) owner's direct participation in management; (2) restricted transferability of management rights; and (3) a lack of a public market for the firm's shares"[12]. These characteristics together with the specific characteristics of family business presented below, give rise to the different expectations and concerns of the founders that this thesis explores in Part II.

Some entrepreneurs seek for advice about the choices of legal entity and they begin their ventures with a legal organization from the start-up[13]. Others, wait until the

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[7] *Id.*
[8] *Id*., at 111. The article focused on the 177 family companies found on the Standard & Poor's 500-stock index, as of July, 2003.
[9] A. BAKR IBRAHIM & WILLIAM H. ELLIS, FAMILY BUSINESS MANAGEMENT. CONCEPTS AND PRACTICE 3 (1994)
[10] Clare Ansberry, Small Companies Slowly Build Momentum in the Job Market, WALL ST. J., Dec. 4, 2003, at A1.
[11] BLOCH, *supra* note 2 at 44.
[12] LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES §10.01 279 (2d ed. 2002).
[13] Susan R. Jones, Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice, 4 Clinical L. Rev. 195, 208 (1997).

net income of the business exceeds his or hers living expenses to give their business a legal entity[14]. "Every year a million new businesses are established. Perhaps one-third of these are started with the help of a lawyer"[15].

Part III of this thesis studies the choices of legal entity available to family businesses in Argentina and in USA. Argentine Law and American Law provide family businesses with different choices of legal entity. In both countries entrepreneurs have options of business' legal entity with or without limited liability. For different reasons, discussed below, limited liability is preferred for family businesses' founders. This thesis presents a comparative study of the different choices of legal entity with limited liability for family businesses in Argentina and in the USA.

In Argentina, entrepreneurs may organize a SRL or "Sociedad de Responsabilidad Limitada", or they may organize a SA, "Sociedad Anonima"[16]. In the USA, more choices are available. Founders of family small business may choose between a closely-held Corporation, Limited Liability Company (LLC) or Limited Liability Partnership (LLP), with their variations. This thesis centers the analysis on the LLC and corporation in USA, and their analogous SRL and SA, in Argentina.

The limited-liability choices for legal entity of family businesses in both countries present different approaches regarding: Decision-Making, Business Management, Conflict-Resolution and Business Succession Planning. This thesis presents and analyzes those different approaches. As conclusion the analysis shows that there is not a "best" choice of legal entity for family business in the USA or in Argentina. The different legal

[14] ROBERT P. HESS, DESK BOOK FOR SETTING UP A CLOSELY HELD CORPORATION 5 (2d ed. 1985).
[15] Jones, *supra* note 13, at 216.
[16] Law No. 19550, April 3, 1972, B.O. April 10, 1984.

choices available provide with “better” or “worse” options of legal entity according with the founders’ expectations and concerns. However, legislation in the USA has recognized the special characteristics of family businesses and allows more possibilities of customization of the rules than Argentina’s law. This last issue constitutes an interesting point for future legislative action in Argentina.

CHAPTER II

EXPECTATIONS AND CONCERNS OF THE FAMILY BUSINESS' FOUNDER/ FOUNDERS

As said, this thesis focuses in non-publicly held businesses controlled by the members of a family. Family businesses share all general characteristics of closely held businesses: performance based on the efforts of the founder, limited marketability and lack of formality in arrangements between owner and key personnel, among others.[17]

However, family businesses have also specific characteristics, which make their management and growth distinguishable from those of other small and medium business. A family business implies an overlap of a "family system" and a "business system"[18]. The two systems function following different principles. The "family system" operates on emotion-based bonds, unconditional acceptance, tolerance towards mistakes, equality rules, lifetime relationships and generational and birth order authority[19]. On the other hand, the "business system" operates on basis of objective rational-based bonds, performance-based evaluations, recording of mistakes, competence and performance rule and power and role authority[20]. Those differences may provoke problems to arise.[21] Also, normally there is no market for the ownership interests of these businesses. Generally, these enterprises lack liquidity for the investments and they lack the kind of control of

[17] KELLY, *supra* note 1, at 1-2.
[18] Michael D. Allen, *Motivating the Business Owner to Act*, SG020 ALI-ABA, 793 (2001).
[19] *Id.*
[20] *Id.*
[21] *Id.*

performance and management that markets provide for publicly held business.[22] At the same time these characteristics provide a big strength, because "that common bond of family gives that business the ability to plan for the long run, rather than trying to satisfy the short terms needs of faceless investors[23].

A. Expectations:

1. Limited Liability

In partnerships and in individual owner's informal firms, the law provides for the owner's personal or "vicarious" liability towards contract creditors and tort creditors. This rule enables businesspersons to take loss-avoidance measures, but it also imposes an important risk to their personal patrimony[24]. Finding a way to declare the business' liability limited to the company's assets becomes highly attractive for family businesses. [25]. With limited liability, the personal assets of the entrepreneur are protected from the company's debts and other obligations.[26] The limited liability enterprise becomes the sole responsible for business liabilities such as damage claims. Liabilities may include situations of employee negligence, creditor's claims in excess of business' assets and, in the case of professionals, malpractice claims by clients or patients[27]. Members or shareholders of family companies with limited liability are not responsible for such liabilities, unless creditors are able to show that the business form was organized to set up a sham to defraud creditors or unless they expressly accept such liability.[28] Only under

[22] CHARLES R. O'KELLEY & ROBERT THOMPSON, CORPORATION AND OTHER BUSINESS ASSOCIATIONS 381 (4th ed. 2003).
[23] Edward F. Koren, *Non-tax Considerations in Family Business Succession Planning*, SH005 ALI-ABA 1, 13 (Aug. 2002).
[24] RIBSTEIN, *supra* note 12, at 278.
[25] *Id.*
[26] HESS, *supra* note 14, at 13.
[27] Id.
[28] Id. at 12.

extraordinary circumstances the law allows the application of "piercing the corporate veil" and it brings back the vicarious liability of members or shareholders[29].

2. Decision-making control

The founders of the family businesses tend to develop a strong sense of identification with the company[30]. The company becomes their alter ego, a projection of themselves. [31] Most family businesses constitute the founders' life work and they normally find it difficult to imagine a life separate from the business[32]. Also, they may find their self-esteem tied to their position on the firms[33]. The founders feel that to be in charge of the family business provides them with social significance and social recognition. [34]

However, the business needs to be prepared for the unexpected. Extraordinary situations, such as sudden disability or death of the founders themselves or other key executives of the family firm are possible[35]. Even before the founder is ready for starting the process of transferring control of the business, "contingency plans" are recommended to take care of these situations.

3. Managerial control

Communication problems exist in most family businesses[36]. Personality traits of founders and children strongly influence the business performance[37]. Founders may expect members of the younger generation to devote their lives to the "welfare of the

[29] O'KELLEY & THOMPSON, *supra* note 22, at 501.
[30] KELLEY, *supra* note 1, at §1.06
[31] *Id*.
[32] *Id*.
[33] Allen, *supra* note 18, at 801
[34] *Id*.
[35] Shel Horowitz, *Succession Can Cause an Identity Crisis*, Related Matters (UMAS AMHERST FAMILY BUSINESS CENTER), at http://www.umass.edu/fambiz/succession_identity_crisis.htm (last visited Feb. 9, 2004).
[36] KELLEY, *supra* note 1 at §1.07
[37] *Id*.

business"[38]. Children may not be interested in the business or even if they are active in the company's management, they may face psychological restraints in challenging founders' decisions and actions.[39]

Problems may arise also when the sustainability of the business calls for changes, for example the need of new management styles, which may seem as a "menace" by the founder[40]. Family business owners expect to retain managerial control of the business for as long as possible. But as it will be shown in the following section, transfer of managerial control is one of the key aspects for a successful succession planning for the family businesses.

B. Concerns

1. Succession planning

Although it is not a concern entrepreneurs face at the start-up stage, studies show that almost 80 per cent of family businesses' founders hope the business to continue into the following generations[41]. That hope is shared by 70 per cent of the founders' children [42]. However only 35 per cent of family businesses survive to the second generation and less than 20 per cent survive to the third.[43] Family business owners may face at one moment or another, the crucial decision of whether they should sell the business or retain it for eventual transfer to family members.[44]

Family businesses' owners have the possibility to plan for their own succession. Succession planning for the family business involves "the transfer by sale or gift of

[38] *Id.*
[39] *Id.*
[40] Shel Horowitz, *Sustaining the Family Business, Related Matters* (UMASS AMHERST FAMILY BUSINESS CENTER), Winter 2004, at http://www.umass.edu/fambiz (last visited Feb. 9, 2004)
[41] Allen, *supra* note 18, at 798
[42] *Id.*
[43] KELLEY, *supra* note 1, at 1-2.
[44] Koren, *supra* note 23, at 40.

interests in such entity by one or more of its owners, during lifetime or upon death, to satisfy objectives of the entity and/or the owners"[45]

Reality demonstrates that this planning is not generalized, as a scholar stated "there is a natural instinct to avoid consideration of the consequences that flow from death"[46]. Objective studies showed that "only about a quarter of family businesses have a management succession plan and less than 30% have a buy/sell agreement that ensued family succession"[47].

In spite of that natural tendency to avoid the issue, every founder of a family business should consider taking some steps in estate planning[48]. Those steps would not only help to minimize taxes (probably the principal concern of the businesspeople), but also this planning would help to "insure the continuity of the business, minimize expenses of administration, and facilitate transfer of the business ownership"[49].

Estate planning may merely involve transfer of the founder's wealth, but family business succession planning involves much more. As said, founders of family business generally expect the business to pass to the next generation. But before that happens, "transfer of control" of the business comes into place. In this process, the goals of the founder have to be pared with the goals of the other family members[50].

The instructor of a course of study on Continuing Legal Education developed by the American Law Institute and the American Bar Association in July 2001

[45] *Id*. at 402.
[46] HESS, *supra* note 14, at 117.
[47] Koren, *supra* note 23, at 7, citing studies by Coopers & Lybrand (1993) and Arthur Anderson/ Mass Mutual (1997).
[48] HESS, *supra* note 14, al 116
[49] *Id*.
[50] Koren, *supra* note 23, at 35.

recommended the transfer of control of the family business to be gradual[51]. This would involve that the founder: "(1) identify one or more successor candidates with a sustained record of performance; (2) place candidates in positions of managerial control to test their abilities;(3) provide the candidates specialized training in how to run the company; (4) gradually delegate more and more day-to-day management authority to them while retaining ultimate control; (5) subject big decisions to collaboration between the owner and successor candidates; (6) appoint the most proven successor as President while the owner continues as Chairman; and (7) finally, when the successor is prepared to take full control and the owner is ready to retire, transfer full control to the successor"[52]. The reunion of competent advisors: attorney, accountant, insurance advisor, financial advisor, business appraiser, is also recommended together with the involvement on the process of the potential successors and the key employees who may be concerned with the ownership transition[53].

It is also fundamental to highlight that the succession process of a family business requires a realistic assessment of family conflicts and emotional issues and members' willingness to accept change and to overcome conflicts between intra-family goals and relationships combined with the needs of the business as a viable ongoing entity.[54] "Succession planning must integrate current tax, business and liquidity considerations with family relationship issues to achieve an overall plan that is workable both for current operational needs, as well as for the long range estate planning goals of the client and the

[51] Allen, *supra* note 18, at 816
[52] *Id*.
[53] Koren, *supra* note 23, at 21-34.
[54] *Id*., at 1-5.

financial success of the business"[55]. The succession plan has to articulate the rights and duties of those successors who remain in the business and has to provide for a method of exit for those heirs who are not willing to stay (for example a buy-out). [56] Provisions regarding the rights of in-laws or the case of divorces should be considered too[57].

2. Costs

Entrepreneurs want to create the business and operate it with "minimal paperwork, expense and aggravation"[58]. But tailoring the businesses' own sets of contractual terms necessarily involve expenses for legal drafting[59]. Lawyers have to take into account the relation of such costs and the business' economic movement. Legal costs cannot exceed the entrepreneur's benefit from this activity.[60]

For reasons of costs many small emergent family businesses do not have explicit contracts. The parties of family businesses may decide consciously or unconsciously to rely on default rules and judicial intervention as conflict-resolution means[61]. Statutory standard forms help small informal firms facing eventual conflicts by settling default general principles, for example voting rules.[62] Also, statutory standard rules save the costs of learning about the specific contracted terms of the business[63]. These standard rules generate "network benefits, such as judicial precedents, customs and practices that

[55] Koren, *supra* note 23, at 10.
[56] *Id*., at 11.
[57] Beck Law Offices, *Legal Tips for Family Owned Businesses*, 1 (2001), at htpp://www.becklaw.net/Pages/articles/BU/BU_6.html (Last visited Feb. 18, 2004)
[58] Bay Financial Newsletter, *Why Entity Planning is important to you*, 1 at htpp://www.bfa.online.com/news019.html (Last visited Feb.18, 2004).
[59] Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 Bus. Law. 1, 2 (Nov. 1995).
[60] *Id.*
[61] Larry E. Ribstein, *Statutory Forms for Closely held Firms: Theories and Evidence from LLCs*, 73 Wash. U. L. Q. 369, 374 (Summer. 1995).
[62] *Id.*
[63] *Id.*

help in interpreting the terms"[64] of the business' organization. This "network benefits" are useful not only for the entrepreneurs themselves, but also for third parties which are doing business with the particular small business[65]. However, potential problems are real in family businesses. If they may be anticipated and avoided, the costs of ex ante legal work will always be well spent.

[64] *Id.* at 378.
[65] *Id*. at 377.

CHAPTER III

CHOICES IN USA REGARDING ENTITIES WITH LIMITED LIABILITY

States' statutes provide entrepreneurs with "standard forms" of business organization, but firms can contract around many of the applicable statutory provisions[66]. Statutes allow firms to adopt the particular structures that entrepreneurs see as more adequate to their expectations. Also, statues help to develop a body of interpretative judicial opinions and lawyer's customs, which help to fill gaps in the statute or in the business' contract.[67]

A. Choice of state of incorporation or registration.

A firm whose business is located in one state may choose to organize under the rules on another state; states normally enforce the rules of the other statues, under the "Internal Affairs Doctrine"[68].

Some jurisdictions are preferred by businesses looking to incorporate because their courts have developed judicial rules and precedents that give predictability to eventual conflicts.[69] Delaware and Pennsylvania are listed as the most preferred states. Not surprisingly those are the two states with the highest ratios of corporate franchise tax revenue to total tax revenues. State official and private professionals are highly motivated there to keep their states in those high "rakings"[70] and they act accordingly updating the state's regulation for the benefit of the companies.

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[66] Ribstein, *supra* note 59, at 3.
[67] *Id*.
[68] *Id*.
[69] O'KELLEY & THOMPSON, *supra* note 22, at 141.
[70] Carol R. Goforth, The Rise of the Limited Liability Company: Evidence of a Race Between the States, But Heading Where?, 45 Syracuse L. Rev. 1193, 1262 (1995).

However, to incorporate in a state different from the one where the business exists brings increased costs[71]. The non-residence state charges fees and the residence state also does so, even sometimes the residence-state charges penalties for foreign firms operating in their territory[72]. For these reasons, most family business start-ups lack incentives to file for registration or incorporation in another state, specially given the fact that they can contract around the default provisions of their own state of residence[73].

B. Choices of legal entity.

Family closely held business benefit from the existence of jurisdictional competition among the states, because that increases the legal choices available for meeting their specific needs. In the same sense, each state provides a variety of business' forms and structures.

There are different types of business organization that may be appropriate for family held businesses. Legal and Tax advisors may help entrepreneurs to choose the rules that better suit their particular businesses. For doing so, they should take into account the applicable default rules, the possibility of tailoring legal rules to meet the entrepreneur's expectations and concerns and the implied costs. [74] The design of the business' legal entity should consider, not only the initial or actual needs of the business, but also the possibility of expansion. As the founders have in mind building a legacy for their descendents, the legal entity selected should allow the business to grow over time[75].

[71] Ribstein, *supra* note 61, at 398
[72] *Id.*
[73] *Id.*, at 397.
[74] Ribstein, *supra* note 59, at 3.
[75] Brian Ziegler, *Building an Organization*, Iowa Business Network (Indian Hills Community College) at htpp://www.iabusnet.org/templates/main/articleprint.cfm?ID=23 (last visited Feb. 9, 2004).

1. LLC (Limited Liability Company).

a) Governance structure (customization of decision-making, business-management, conflict-resolution).

LLC structure gives investors much flexibility in tailoring the organization of their businesses. This business type combines corporate-type limited liability with partnership-type flexibility and tax advantages[76]. When they first appeared in the U.S., the LLCs were called by euphemisms such as: "the best of both worlds"[77] and "the better alternative"[78] and "Lawyer's Likely Choice"[79].

Currently all US states, with the exception of Massachusetts, allow the formation of the LLC with only one person (or "member")[80]. There is not a maximum in the number of members of the LLC, however it is recommended to maintain the number low to allow good communication and consensus among members.[81]

All 51 US jurisdictions have LLC statutes, but those statutes are not homogeneous[82]. The states' acts are patterned following language borrowed from both corporate statutes and partnership statutes[83]. Because there is not total uniformity among the states' LLC statutes, and as a means to help to homogenize such rules, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Limited

[76] O'KELLEY & THOMPSON, *supra* note 22, at 470.
[77] Marybeth Bosko, *Comment. The Best of Both Worlds: The Limited Liability Company*, 54 Ohio St. L. J. 175 (1993).
[78] Richard M. Horwood & Jeffrey A. Hechtman, *The Better Alternative: The Limited Liability Company*, 20 J. of Real Est. Tax'n 348 (1993).
[79] Peter A. Karl III, *Twenty Questions on Selection of a Legal Entity*, 7 at htpp://www.nysscpa.org/cpajournal/1999/0899/features/F40899.HTM (Last visited Feb. 18, 2004).
[80] Nolo.com- Law For all, *LLC Basics*, at htpp://www.bplan.com/c/print.cfm?i=80,1 (last visited Feb. 18, 2004).
[81] *Id.*
[82] O'KELLEY & THOMPSON, *supra* note 22, at 466
[83] *Id.*

Liability Company Act (ULLCA)[84]. This thesis includes the different provisions of the ULLCA regarding the respective analyzed aspects of the LLC.

Despite of some differences among the different states' legislation, there are common characteristics of the LLCs. The entrepreneurs form the LLC by filing an organizational document (normally named "articles of organization")[85]. Also it is normally drafted a document settling the rules for the day-to-day managing of the business ("operating agreement")[86]. Normally the rules require the name of the LLC to include the denomination "LLC", "LC" or "L.L.C.", or similar[87].

The LLC may have multiple classes of members with different rights and preferences[88]. Assets may pass in and out an LLC relatively freely[89]. For that reason LLCs are easily convertible in another type of entity if desired[90].

Of course, limited liability of the members for the business' debts is the rule, unless otherwise agreed[91].

Most LLCs statutes provide as default rule for the firms to be managed by the members[92]. Also, default rules provide for equal rights for all members and decision by majority[93]. However, the articles of organization or the operating agreement may establish a centralized management to be conducted by one or more members, or by non-

[84] O'KELLEY & TOMPSON, *supra* note 22, at 52.
[85] Jonathan Gworek and Jeffrey Steele, *Organizing the emerging business*, SUAEM MA-CLE 2-1 (Main Handbook) (2001).
[86] RIBSTEIN, *supra* note 12, at 348.
[87] ULLCA §105.
[88] Gworek and Steele, *supra* note 85, 2-1.
[89] *Id*.
[90] *Id*.
[91] ULLCA §303.
[92] Gworek and Steele, *supra* note 85, 2-1.
[93] ULLCA § 404(a).

member managers. [94] In those cases, only managers take managing decisions and only they act as agents of the LLC[95]. Exceptions exist related to amendment of the articles of incorporation, admission of new members, new contributions of members, dissolution of the company, merger and disposal of all company's assets [96].

Most LLCs statutes provide for "fiduciary duties" of managers, specifically "duty of care" and "duty of loyalty"[97]. The "duty of care" is sometimes defined as "a duty to avoid willful or reckless conduct" and in other cases as the duty to act "as a prudent person in similar circumstances with a right to rely reasonably on reports of others"[98]. The "duty of loyalty" generally comprises the duty to avoid self-dealing and to avoid usurpation of business' opportunities[99].

LLCs' members make contributions to the firm's capital. Such contributions may include property, cash or obligations to perform services[100]. As said before, members may be divided in different classes with different rights as to distributions and voting rights[101]. Many statutes provide per-capita allocation among partners as default rule[102]. Other statutes provide pro-rata allocation of financial rights according to the contributions to the firm[103]. However, members may contract around and relate their financial rights to their contributions to the firm[104].

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[94] RIBSTEIN, *supra* note 12, at 364.
[95] *Id.*
[96] ULLCA § 404(b) and (c).
[97] Ribstein, *supra* note 59, at 16. ULLCA §409.
[98] *Id.*
[99] *Id.*at 18.
[100] RIBSTEIN, *supra* note 12, at 360. ULLCA §401.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] Id., at 363.

Lack of liquidity is a general problem in LLCs, as it is in all closely held businesses[105]. Oppression of minority interest holders by majority interest holders is another common problem[106]. Contracting around these risks is highly recommended as a means to avoid future conflicts[107].

Distributions of profits are normally members' decision[108]. Distribution made prior to the members' withdrawal or dissolution is called "interim distribution"[109]. Most statutes provide for vicarious liability of the members in the case of distributions made to them by an insolvent LLC[110].

b) Business succession planning.

Default rules provide that LLC's financial rights are freely transferable in the absence of contrary agreement[111]. Under the same default rules management rights may only be transferred with the consent of the other partners[112].

Many LLCs address restrictions of ownership transfers in their operating agreements, for example by giving the other members the right to buy-out the transferring members before they sell their interests to third parties[113].

Members may dissociate from the LLC because of voluntary withdrawal, bankruptcy, expulsion, determination of incapability or, of course, death[114]. Dissociated

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[105] *Id*.
[106] *Id.*
[107] *Id*. at 480.
[108] ULLCA §405(a); §404 (c) (6).
[109] RIBSTEIN, *supra* note 12, at 364.
[110] Ribstein, *supra* note 59, at 12. ULLCA §406, §407.
[111] *Id*., at 14. ULLCA §502.
[112] *Id.* ULLCA §503.
[113] Cohen & Co., *All in the Family? Not Quite*, at htpp://www.business-survival.com/articles/startrun/AllinFamily.html (last visited Feb. 9, 2004).
[114] Ribstein, *supra* note 59, at 25. ULLCA §601.

members usually have the right to be paid for the value of their interest[115]. Successors-in-interest of a member dissociated by death, are not automatically included in the LLC as members[116]. Unless agreement in the contrary, the remaining members have a default right to veto admission of a new member[117].

Regarding dissolution, most state statutes establish that members should decide whether the LLC would continue its existence in the event of the death, resignation of retirement of one or more of its members[118]. The default rule is normally that LLCs lack continuity of life as an intrinsic characteristic[119].

c) Costs.

At the beginning of their existence, the IRS required the LLCs to have non-corporate governance characteristics to receive partnership-like tax benefits[120]. Later, federal law permitted non-corporate or pass-thought tax treatment to any non-publicly held entity without regard to governance characteristics[121]. This measure allowed LLC members "to make special allocations of income and loss and the ability to avoid taxation at the entity level"[122]. After the IRS established in 1997 the "check the box" rule, and allowed non-publicly held unincorporated firms to be taxed as partnerships, the use of the LLC legal entity increased[123].

A recognized scholar also suggested that "forming a partnership or LLC rather than a corporation arguable reduces the firm's exposures to antitrust, securities,

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[115] *Id.* ULLCA §701.
[116] *Id.*
[117] *Id.*
[118] Goforth, *supra* note 70, at 1211.
[119] *Id.*
[120] O'KELLEY & THOMPSON, supra note 22, at 466.
[121] *Id.*
[122] Goforth, *supra* note 70, at 1214.
[123] O'KELLEY & THOMPSON, supra note 22, at 384.

employment discrimination, or other regulation"[124]. Another author considers the LLC to be a better choice of legal entity for small businesses because "you have lower level ongoing legal costs, you don't need shareholders or directors meetings, and there is only a single layer of taxes when you sell the assets of the business. It's worth the several thousand dollars per year of extra payroll taxes it may cost"[125].

LLCs' statutes provide parties with broad freedom of contract within the limits settled by their mandatory provisions[126]. For this reason, to form the LLC may imply high costs of legal drafting. Given that the LLCs default rules are very flexible, it is crucial for members to state in the LLC's "operating agreement" their rights, responsibilities, percentage interest in the business, share of profits and ex ante solutions for situations as the death or separation of a partner, or causes for dissolution, among others. In spite of possible higher legal costs, contracting in LLCs is very important also because precedents and default rules are not so well developed for this type of business entities as they are developed for other types of businesses' legal entity[127].

2. Closely Held Corporations.

To study the corporate form for family business we should also consider that states' corporation laws are competing sets of standard form rules. For that reason, this thesis focuses on the corporate rules of the MBCA and the rules of Delaware. The MBCA (Model Business Corporation Act) was developed and updated by American Bar Association, Section of Business Law, Committee on Corporate Law[128]. Delaware

[124] Larry E. Ribstein, *Limited Liability Unlimited*, 24 Del. J. Corp. L. 407, 431 (1999).
[125] Shel Horowitz, *What's the Best Corporate Structure for Your Company?*, Related Matters (UMASS AMHERST FAMILY BUSINESS CENTER), at http://www.umass.edu/fambiz/mass_biz_trust.htm (last visited Feb. 9, 2004).
[126] Larry E. Ribstein, *supra* note 124.
[127] *Id*. at 468.
[128] O'KELLEY & THOMPSON, *supra* note 22, at 141.

General Corporation Law (Delaware G.C.L) is a very comprehensive body of legislation developed by Delaware's legislature with the input from its highly specialized courts[129].

a) Governance structure (Customization of decision-making, business-management, conflict-resolution).

The corporate form presents many advantages for doing business. Corporate shareholders are liable only to the amount of to their investments on the business (unless they expressly agree different terms)[130]. Besides limited liability, corporations continue its own living regardless of changes of ownership[131]. Other forms of business form may terminate upon one of the partner's death, corporations don't. Corporations allow easy transfers of ownership via transfers of stock and they give flexibility for founder's estate planning[132]. Also corporations are the most generalized legal entity form for businesses that want to raise investment capital and potentially become public in a future[133].

In spite of the possibility of contracting around in some cases, corporations posses "continuity of life" and "free transferability of interests", as essential characteristics[134]. Corporations continue their existence regardless of the death, retirement or resignation of one or more of their shareholders[135]. Closely held corporations are considered more flexible than LLCs in terms of exit strategy[136].

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[129] *Id*.
[130] RIBSTEIN, *supra* note 12, at 278.
[131] HESS, *supra* note 14, at 4
[132] *Id*.
[133] Tim Berry, *Legal Entities, Licenses and Permits*, at htpp://www.bplan.com/c/print.cfm?I=6, 1 (Last visited Feb. 18, 2004).
[134] Goforth, *supra* note 70, at 1206.
[135] *Id*., at 1211.
[136] Gworek and Steele, supra note 85, at 2-1

Stockholders may exchange their stock for stock of an acquiring corporation, or they can frame their exit as stock sale building the operation as capital gain[137].

However, corporate default rules may be unsuited to family business, whose owners may prefer simpler partnership-type governance rules with direct member participation in management and lower costs[138]. Another factor not benefiting the use of corporation form for small family business is that entrepreneurs in corporations are subject to double taxation (at the firm level and at distribution level)[139].

Corporations have as another essential characteristic "centralization of management"[140]. They are managed by or under the direction of the Board of Directors[141]. Board members determine basic corporate policies and also take fundamental decisions, as the declaration of dividends[142]. Directors' power is exercised collectively and by majority rule[143]. The Board appoints and monitors corporate officers, who act as the corporation agents [144]. Shareholders elect the Board of Directors. After the Board takes the action, shareholders approve decisions such as fundamental changes in the corporation's governing rules or structure, mergers, sale of all assets and dissolution[145]. Shareholders don't have liability to the corporation beyond the amount paid for the shares and they normally also lack the authority to bind the corporation[146]. Shareholders "vote, sell and sue". They normally have one

[137] *Id*.
[138] RIBSTEIN, *supra* note 12, at 278.
[139] Ribstein, *supra* note 124, at 404. See "c) Costs" below.
[140] O'KELLEY & THOMPSON, *supra* note 22, at 136
[141] *Id*.
[142] DEL.CGL. §141 (a) MBCA §8.01.
[143] O'KELLEY & THOMPSON, *supra* note 22, at 136.
[144] *Id*.
[145] *Id.*, at 138.
[146] *Id*.

vote per share[147] and they are generally able to sell their shares. However, this basic right is usually limited in closely held firms[148].

States statutes allow shareholders in closely held corporations to restrict or eliminate the directors' discretion[149]. MBCA allows shareholders to modify norms in the articles of incorporation and in separate shareholders' agreements[150]. This norm allows the elimination of the Board altogether with the transfer of a corporate power to one or more shareholders[151]. MBCA also allows agreements which establish who will be officers or directors. These agreements are normally valid for 10 years, unless otherwise provided[152]. They have to be adopted by unanimity and noted on the shares (but omission of this requirement does not invalidate agreement)[153]. Delaware GCL contains a chapter named "Close corporations, special provisions"[154]. A business may adopt this status if it is composed by not more of 30 people and if the business does not make public offering[155]. The agreement has to be taken by a majority of stock if it restricts or interferes with the discretion of the Board of Directors, but the agreement has to be taken by unanimity and inserted in the certificate of incorporation if it involves the elimination of the Board[156].

[147] *Id.*
[148] *Id.* at 137.
[149] *Id.*, at 388. DEL. GCL §141 (a) and MBCA § 8.01.
[150] *Id.* MBCA §7.32.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* DEL GCL §341-356
[155] *Id.*
[156] *Id.*

b) Business succession planning (transfer of shares, special provisions for "family corporations")

Normally the death of disability of a shareholder does not affect the corporation, which has "continuity of life". A corporation normally can be dissolved only via a Board's resolution approved by majority of shareholder's vote[157]. As said, shareholders can normally transfer their ownership rights, together with their management rights[158]. However, if the subsisting shareholders do not get along with the successors of the retiring shareholder, problems normally arise[159]. To avoid these problems, closely held family corporations should consider "succession planning"[160].

"Buy-sell" agreements provide for the obligation or option to buy or sell the interest in the business at determined price, time and under certain terms[161]. They tend to establish provisions at the outset, giving surviving shareholders the right to buy-out the dead shareholder's successors. This agreement may give these rights to one party or to all[162]. There are different types of these agreements[163]. "Redemption" means "entity purchase" of the interest[164]. "Cross-purchase" agreements give the right to buy to the other shareholders[165]. A hybrid combine the two models, for example providing for entity purchase if the interest is not fully purchase by the other

[157] RIBSTEIN, *supra* note 12, at 280. DEL. G.C.L. §275
[158] HESS, *supra* note 14, at 21-22
[159] *Id*.
[160] Michael R. Flyer & Mary Ann Mancini, American Law Institute, *Planning for Business Ownership and Succession*,SE77 ALI-ABA 399, 401 (June, 2001).
[161]Roland P. Weiss, *Buy-Sell Agreements*, Related Matters 1 (UMAS AMHERST FAMILY BUSINESS CENTER), at http://www.umass.edu/fambiz/buy_sell_agreements.htm(last visited Feb. 9, 2004).
[162] *Id*., at 3.
[163] *Id*., at 3.
[164] Flyer & Mancini, *supra* note 160, at 421.
[165] *Id*.

parties[166]. "Buy-sell" agreements may be coordinated with "transfer restrictions"[167]. During the planning of these provisions, funding, price and tax considerations come into place[168]. Regarding funding, normally the provision states a combination of insurance, savings or installment purchases[169]. The price is established by different valuation formulas, the possibility of the owner not reviewing that price may bring eventual problems[170]. A combination of these formulas with some type of insurance to cover the repurchase of shares may be a good option, too[171].

Another aspect that should be taken into account regarding succession is that some successors, especially in the third of fourth generation situations, may not feel emotional bonds to the company[172]. This persons face the problem of lack of liquidity of their shares and, as they normally are not actively involved in the life of the business, they may feel that the company reinvests on their profits in itself and it does not provide them with "fair" dividends[173]. Some mechanisms may be needed to increase the liquidity of the parts of these shareholders, one example could be the business to provide them with loans as a means of access to family resources[174].

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[166] *Id.*
[167] Weiss, *supra* note 162, at 1.
[168] *Id.*, at 5
[169] *Id.*
[170] *Id*., at 6.
[171] Richard Monks, *Your Family Business*, 1 at htpp://www.richardmonks.com/FAMBSNS.htm (Last visited Feb. 18, 2004).
[172] FRED NEUBAUER & ALDEN G. LANK, THE FAMILY BUSINESS. ITS GOVERNANCE FOR SUSTAINABILITY 253 (1998).
[173] *Id.*
[174] *Id.* at 254.

b) Costs

Corporations do not have pass-trough tax treatment from the IRS[175]. Corporations are subject to entity taxation, that means that the corporation will be taxed at its income level, and at the same time the dividends distributed to shareholders will be taxed, too[176]. The same would happen at the time of liquidation "if the corporation has accumulated or current earnings and profits"[177]. Shareholders are not allowed to deduct corporate losses against personal income[178]. All this increases the costs for family business' owners. The only exception to this rule is Subchapter S of the Internal Revenue Code, specifically created for small business[179]. This option allows family held corporations to avoid extra taxation, but imposes limitations, as such the requirement that the corporation have only one class of shares, restriction on who may be a shareholder and a maximum number of shareholders to thirty-five[180].

Some of the preferred states for incorporation, especially Delaware, do not have attractive tax structures for business[181]. However, those states posses other means to avoid transaction costs (such as provisions which reduce the cost for merger and acquisitions), which allow them to keep their levels of preference among corporations' start-ups[182]. The main concern regarding costs in the corporate form is the operating costs of maintaining the structure itself. Corporations should hold directors' meetings, annual shareholders' meetings and keep minutes of the decisions reached in them; also corporations should maintain detailed financial records and tidy

[175] Ribstein, *supra* note 59, at 2.
[176] *Id*.
[177] Karl III, *supra* note 79, at 3.
[178] *Id*.
[179] Goforth, *supra* note 70, at 1218.
[180] *Id*.
[181] *Id.*, at 1265
[182] *Id*.

accountant and banking records[183]. These formalities are many times forgotten in family corporations, and that disregard may bring severe consequences for the shareholders, even reaching in the worst scenario to the application of the theory of "Piercing the Corporate Veil" by a judicial court[184].

[183] Nolo.com-Law for all, *Corporation Basics*, at htpp://www.bplan.com/c/print.cfm?i=79, 2 (Last visited Feb. 18, 2004).
[184] Edward Brodsky & M. Patricia Adamski, *Law of Corp. Offs. & Dirs.: Rts., Duties & Liabs.s 20:9 Piercing the corporate veil*, 1 (2003)

CHAPTER IV

CHOICES IN ARGENTINA REGARDING ENTITIES WITH LIMITED LIABILITY

A. Choices of legal entity.

Argentina posses a federal system, the Law 19550,[185] part of the Commercial Code, which regulates commercial entities[186]. In Argentina there is not a specific regulation for family enterprises; they may adopt any of the available legal entities for commercial businesses[187]. At the same time, Argentina's options for legal entity of commercial business are organized as *numerus clausus*, this means that parties cannot create new types of legal entity and they must comply with the requirements imposed by law to each of the types[188]. One important issue to state is that Argentina's Law does not authorize the organization of business entities with less of two partners, members or shareholders[189]. Single owner enterprises are necessarily sole proprietorships under Argentina's Law[190]. The compulsory plurality of parties shall be maintained along all the life of the business entity[191]. The reduction to the number of parties to one causes dissolution of the business entity[192]. However, the law gives the remaining partner, member or shareholder three months to incorporate another

[185] Law No. 19550, April 3, 1972, [A.D.L.A. XLIV-B] 1310.
[186] As a Civil Law country, Argentina's legislation is organized in codes at the federal level. To issue these laws is a power of the national Congress according to the national constitution.
[187] MARIANO GAGLIARDO, SOCIEDADES DE FAMILIA Y CUESTIONES PATRIMONIALES 13 (1999).
[188] *Id,.* at 29.
[189] JORGE OSVALDO ZUNINO, REGIMEN DE SOCIEDADES COMERCIALES 83 (10th ed. 1992). (Citing Law No. 19550, §1).
[190] *Id.*
[191] *Id.*
[192] *Id.,* at 145 (Citing Law No. 19550 §94(8))

party and avoid dissolution[193]. During this period, the benefit of limited liability of the firm is suspended[194]. The choices of legal entity with limited liability in Argentina available for family businesses are two: the SRL (Sociedad de Responsabilidad Limitada), similar to the American LLC, and the SA (Sociedad Anonima), analogous to the American Corporation. Partnerships cannot acquire limited liability status under Argentina's law[195]. The entrepreneurs organize the firm by means of a contract or agreement (articles of organization) and an "estatuto" (bylaws)[196]. The parties have some level of contractual freedom to agree on the set of rules that will preside their relationship, but strong restrictions exist to that autonomy. This is particularly true for limited liability business organizations. Argentina's legal system is very concern with the misuse of business legal entity as a means to commit fraud[197]. For that reason, the theory of "piercing the corporate veil" is specifically stated in Law 19550[198]. There are also other aspects of Law involved in the life of family business, the regulation on matrimonial property and wills and estates, are examples of other areas of Law related to the life of family business[199].

1. SRL (Sociedad de Responsabilidad Limitada).

a) Governance structure (possibilities of customization on decision-making, business-management, conflict-resolution).

The SRL is a type of legal entity specially delineated for small businesses[200]. The number of members must be at least 2 and must not exceed 50. Members are treated as

[193] *Id.*
[194] *Id.*
[195] *Id.* at 89 (Citing Law No. 19550, §11).
[196] Id. at 159.
[197] GAGLIARDO, *supra* note 187, at 13.
[198] ZUNINO, supra note 189, at 114 (citing Law No. 19550, §54).
[199] GAGLIARDO, *supra* note 188, at 13.
[200] ZUNINO, *supra* note 189, at 169.

partners for tax purposes[201]. As said, commercial business entities shall not have less than two partners or members under Argentina's Law. Since the 40s, there have been many attempts by legal scholars to include the one member LLC in Law No. 19550[202]. However, all of them failed[203]. The maximum number is also a compulsory requirement, if the number of members increases during the life of the business (because of the incorporation of a founder's heirs for example), the law provides mechanisms of co-ownership of quotas[204] or unification of legal status,[205] or transformation of entity type[206].

Entrepreneurs may organize a SRL by celebrating a contract or "articles of organization" and registering it at "Registro Publico de Comercio"[207] at the government agency in charge of business organizations (in Buenos Aires City, Inspeccion General de Justicia, office of the Inspector General of Justice, hereinafter IGJ)[208]. A notice of the organization of the SRL has to be published at the official national register, the "Boletin Oficial"[209]. The name of the business must include the denomination SRL on it[210].

The capital of the SRL is divided in units named "quotas"[211]. Each quota has equal par value[212]. The quotas are freely transmissible unless contrary disposition on the agreement[213].

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[201] *Id*., at 170 (citing Law No. 19550, §146).
[202] Eduardo Torrego, Sociedad de Responsabilidad Limitada. Sociedad Unipersonal, [1991-A] L.L. 965.
[203] *Id*.
[204] ZUNINO, *supra* note 189, at 170. (Citing Law No. 19550, §156).
[205] *Id.* (Citing Law No. 19550 § 209).
[206] *Id.* (Citing Law No. 19550 §74 et seq.).
[207] "Commercial registry (of documents in order that they become enforceable against third parties).
[208] Each province has its own registering office; many of them function in lower level Judicial Courts. Definition from CABANELLA DE LAS CUEVAS GUILLERMO AND HOAGUE ELEANOR C. DICCIONARIO JURIDICO 554 (1993)
[209] ZUNINO, *supra* note 189, at 171. (Citing Law No. 19550, §149) and 88-9 (Citing Law No. 19550, §10).
[210] *Id*. (citing Law No. 19550, §147).
[211] Torrego, *supra* note 202, at 965.
[212] ZUNINO, *supra* note 189, at 171 (citing Law No. 19550, §148).
[213] *Id.*, at 174 (citing Law No. 19550, §152).

The "Gerencia" ("management") is in charge of the management and representation of the SRL[214]. One or more managers, members or non-members as determined in the contract, manage the business affairs of the SRL for the time period agreed by the members in the articles of organization[215]. Managers have the same duties as Directors of the 'Sociedad Anonima"[216]. They cannot compete directly with the SRL unless they obtain express and unanimous authorization of the other members[217].

The default decision-making process of distribution of profits, share transfers, appointments of managers and amendments to the company's contract or organizational documents, requires a general consultation to all members and a written manifestation of their will[218]. SRLs of a small size may adopt provisions around this default decision-making process[219].

Meetings of members are required to approve the annual financial statements of SRL with a capital of a substantial size, settled by law[220]. Members, also called "Quota-holders" may meet with the frequency stated in the SRL agreement[221]. Their approval may be required with respect of the annual financial statements, distribution of profits, quota transfers, changes in the appointment of a manager, and amendments to the SRL agreement.[222] Each quota gives one vote[223]. The constitutive agreement of the SRL may establish the majority required to its amendment[224]. This has to be at least one vote more

[214] *Id.*, at 178 (citing Law No. 19550, §157).
[215] *Id.*
[216] *Id.* See infra "2. SA (Sociedad Anonima)"
[217] *Id.*
[218] *Id.* at 179 (citing Law No. 19550, §159).
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] PRICE WATERHOUSE, DOING BUSINESS IN ARGENTINA 28 (1987)
[223] ZUNINO, *supra* note 189, at 181 (citing Law No. 19550, §161).
[224] *Id.* at 180 (citing Law No. 19550, §160).

than those that represent half of the social capital[225]. In the absence of a specific agreement the law requires two thirds of the social capital to amend the constitutive agreement[226]. If one of the business' members posses more than half of the capital, it is required also the vote of another members to approve the decision[227]. Decisions should be registered in a book of minutes[228].

A syndic or surveillance committee is optional[229]. If it is organized its duties are the same such as the ones for this surveillance body for the SA[230].

The law gives the right of buy-out for the members who voted against an amendment of the social object or an agreement that burdens their duties[231]. In the case of an increase of the social capital, all members (even those who voted against the measure) have the right to subscribe quotas proportional to their actual participation in the business' capital[232].

b) Business succession planning (possibilities of customization on transfers of stock and incorporation of heirs).

In the case of death of one of the members, his heirs may be incorporated to the SRL as members, if the SRL contract so provides. But before that, the legal proceeding of the succession by inheritance determining the identity of the heirs of the decedent member has to be completed.[233]. The death of a member does not produce the dissolution

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[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*, at 181 (Citing Law No. 19550 §162)
[229] *Id.* at 179 (citing Law 19550, §158)
[230] *Id.* See infra 2.a), Governance Structure of the "Sociedad Anonima".
[231] *Id.*
[232] *Id.*
[233] Perciavalle Marcelo L., *Transmision Hereditaria de Acciones y Cuotas Sociales*, Revista Doctrinaria Societaria de ERREPAR 1(Sep. 2001), at htpp: www.legalmania.com/derecho/transmision_hereditaria.htm (Last visited Feb. 20, 2004).

of the SRL, unless it reduces the number of members to one, in which case the procedures explained supra apply.[234].

The successors may transmit the quotas unless there are limitations in the agreement[235]. In those cases, the surviving members have the right to acquire the quotas at the same price agreed between the heirs and the offering third party[236].

The SRL contract may impose limitations on the transfer of quotas. The agreement may limit the transferability of the quotas, buy it may not forbid it[237]. Common limitations are to require the consent of the other quota holders or a majority of them ("consent limitations"), or to set a right of preference in their favor ("preference limitations")[238]. In the case of a limitation of the transfer of quotas, the agreement must determine the procedures for the non-transferring members approval or for the buy-out[239]. The maximum term for the other members to manifest their will of proceed with the buy-out is 30 days[240]. This regulation tends to prevent that the remaining members try to keep the heirs "captive" by postponing indefinitely the manifestation of their will to buy-out the inherited quotas[241]. The Law No. 19550 provides a judicial appeal for the case of conflict regarding the price or other matters related to the buy-out[242].

c) Costs.

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[234] *Id.*, at 142 (citing Law 19550, §90).
[235] *Id*.
[236] *Id.* (Citing Law No. 19550 §155)
[237] ZUNINO, *supra* note 189, at 174 (citing Law No. 19550, §153).
[238] ABA, DOING BUSINESS IN ARGENTINA 19 (2000) (explaining Law No. 19550 §152, §153 and §155).
[239] *Id*.
[240] Diego G. Luengo, Ejecucion Forzada de Cuotas Sociales en Sociedades de Responsabilidad Limitada que Poseen Limitaciones a las Transferencias de sus Partes de Capital, [1999] L.L. Litoral 771, 773.
[241] *Id*.
[242] *Id*.

The registering fee that IGJ charges are $100 (100 PESOS of Argentina) plus $30 (30 PESOS of Argentina)[243]. The "urgent" registration (on the same day) costs $282 (282 PESOS of Argentina)[244]. Other costs are the publication in the "boletin oficial" (approximately $350 PESOS of Argentina, related to the length of the text to be published) and the professional fees of the lawyer and the "escribano" (notary). Lawyers and notaries" charge between $200 and $500 PESOS of Argentina as professional fees. Escribanos charge also around $350 PESOS for conducting process of registration. The legalization of signatures and copies is around 50 PESOS. The total cost of constitution of a SRL is between 1100 and 1700 PESOS of Argentina[245].

The cost advantage of the SRL relates to the flexibility this type of legal entity has. Lack of close government supervision of the operation of the business once it is formally constituted and the lack of formalities for the calling of members meeting help to maintain the operating costs of the SRL relatively low.

2. SA (Sociedad Anonima).

a) Governance structure (not customization of decision-making, little customization on business-management and conflict resolution).

The "Sociedad Anonima" (hereinafter SA) is the Argentine equivalent to the American Corporation. Act 19.550, regulates the name, object, duration, capital, election and governance of the SA[246]. The minimum number of shareholders of a SA is two (as

[243] The national currency of Argentina is the peso ($). Its ratio with the USA dollar as February 2004, is 1 US$ = 2,95 PESOS.
[244] *Id.*
[245] Professional fees vary upon time and may vary according to the states amount of the business' capital. The stated costs are valid as March 2004 for a company having up to $8000 (PESOS of Argentina) in capital, according to an Argentine notary consulted directly by the author.
[246] ZUNINO, *supra* note 189, at 182.

for all business legal entities), but there is no maximum number of shareholders[247]. As a matter off act, the SA was conceived as a means to provide legal entity to the big enterprises, where the shareholders are mere "investors" and they are not involved in the everyday management of the business[248]. However, sociological reasons caused a considerable amount of smaller close-type of business to adopt the SA as legal entity[249]. For historical unjustified motives Argentina's society considers the SA as a more "prestigious" and "serious" form of legal entity for commercial endeavors[250]. According to the statistical data published by the IGJ, in Buenos Aires City in the year 2000, 4501 SRLs were created; and in the same period 7064 SAs were incorporated[251]. In 2001, IGJ registered 3956 SRLs, and 5126 SAs[252]. And in the year 2002, IGJ registered 4244 SRLs and 5306 SAs[253].

Law No. 19550 somehow distinguishes publicly held SAs and closely held SAs[254], establishing broader requirements of government supervision for publicly held SAs[255]. There are not specific regulations for closely held business, but there are some specific regulations for publicly held businesses. This part does not include the specific regulations for publicly held businesses, only the regulations common to all SAs, which are the ones that apply to family businesses as closely held SAs.

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[247] PRICE, *supra* note 222, 24.
[248] *Id.*
[249] Walter Octavio Moretti, *Sociedades Anonimas de Familia y la extension del usufructo de acciones*, [2002] L.L.Gran Cuyo 454.
[250] *Id.*
[251] IGJ website, at htpp://www.jus.gov.ar/minjus/ssjyal/IGJ/Tramites_ante_IGJ/ boletin_estadistico.htm (Last visited Feb 20, 2004).
[252] *Id.*
[253] *Id.*
[254] Ivan Bakmas, *Sociedades Anonimas Cerradas*, [1997-B] L.L. 1212, 1223.
[255] ZUNINO, *supra* note 189, at 259 (Citing Law No. 19550 §299).

The organization and structure of the SA is very formal. The constitutive agreement must be written in an "escritura publica"[256] and it must contain the denomination "Sociedad Anonima" or "SA"[257]. This document has to be published at the "Boletin Oficial". Shareholders approve the "estatuto" (constitutive agreement) in an inaugural meeting. In the same meeting they elect the "Directorio" (Board of Directors) and they subscribe and pay the capital[258]. They also elect a "sindicatura" (Corporate Comptroller) and they may elect a "comite de vigilancia (Surveillance Committee). All records are submitted to the IGJ for official registering[259]. Small businesses may avoid organizing these two corporate governance bodies.

Shares with a determined par value represent the SA's capital[260]. There is a minimum capital to constitute a SA, 25 per cent of the capital should be paid at the moment of incorporation and the rest in two years[261]. Limited liability to the acquired shares is characteristic[262]. The "estatuto" may establish different classes of shares with different rights, but all shares must have the same par value and all the shares belonging to one class must have the same rights[263]. A share is a unit, not divisible[264]. In the case of two or more owners, the rules of co-ownership apply[265]. Dividends are to be paid once a year and a shareholders' meeting must approve their distribution[266].

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[256] "Legal instrument entered into before an escribano". An "escribano" is a "special notary who witnesses documents, but does not act as judicial assistant". Definitions from CABANELLA DE LAS CUEVAS & HOAGUE, *supra* note 208, at 241-242.
[257] ZUNINO, *supra* note 189, at 184 (Citing Law NO. 19550 §164).
[258] PRICE WATERHOUSE, *supra* note 222, at 22
[259] *Id*.
[260] ZUNINO, *supra* note 189, at 184 (Citing Law NO. 19550 §163).
[261] ABA, *supra* note 238, at 20.
[262] *Id.*
[263] ZUNINO, *supra* note 189, at 184 , at 208 (Citing Law No. 19550 §207).
[264] *Id*., at 211 (Citing Law No. 19550 §209).
[265] *Id.*
[266] *Id*., at 225 (Citing Law No. 19550 §234).

The Law provides for a required legal reserve of 20 per cent of the capital, formed by setting aside 5 percent of the firm's profits each year[267].

The "asamblea" (shareholders' meeting) expresses the social will of the SA, it is considered "sovereign" because the Board must obey the decisions taken in it according to the law and to the "estatuto"[268]. The minority shareholders dissatisfied with a decision taken in "asamblea" may look for its judicial nullity based on a violation of the law or of the "estatuto"[269]. The minority shareholders have an appraisal right for the case that the majority approves a fundamental change in the conditions under which they joined the SA[270]. Because of that right this minority shareholders may demand the payment of their shares according to the values stated in the last approved balance sheet[271].

There are two types of "asamblea", "ordinary" or "extraordinary". Their difference consists in the substance of the decisions to be taken in them. The "asamblea ordinaria" considers the approval of the accountancy results, distribution of dividends, election and liability of directors, syndics and members of the surveillance committee, increases of capital (if previously authorized in the "estatuto"[272]) and any other issue related to the management of the business included in the notice[273]. The "asamblea extaordinaria" decides the amendment of the "estatuto", all other cases of capital increase, capital reduction, repurchase of shares by the firm, merger, transformation and dissolution of the SA, issuance of debentures and bonds, and suspension of the right of

[267] ABA, *supra* note 238, at 20.
[268] ZUNINO, *supra* note 189, at 224 (Citing Law No. 19559 §233).
[269] *Id*., at 237 (Citing Law No. 19550 §251).
[270] *Id*., at 232 (Citing Law No. 19550 §245).
[271] PRICE WATERHOUSE, *supra* note 222, at 25.
[272] *Id*., at 197 (Citing Law No. 19550 §188).
[273] *Id*., at 224-5 (Citing Law No. 19550 §234).

"preference" in the issuance of new shares[274]. These extraordinary assemblies may be called at any moment that they are needed[275]. The Board or the "sindico" in the cases provided at the law annually within four months after the financial year ended calls the "asamblea ordinaria"[276]. A group of shareholders representing at least 5 % of the capital may require an "asamblea", too[277]. The notice should be published in the "Boletin Oficial" for 5 days with an anticipation of between 10 and 30 days previous to the meeting's date[278]. As said, Argentina does not have special provisions for family business. This brings serious problems for the family SAs. A clear example is the notice for shareholders' meetings[279]. The law provides for such meetings to be noticed in a publication at the "Boletin Oficial"[280]. This is a wise protection for the general public interest in publicly held business, but family SAs do not normally publish the convocation in the "Boletin Oficial", their day-to-day life is spontaneous and the meeting normally unanimous[281]. However, the cited provision has been used as a means to avoid the presence in the shareholders' meeting of some shareholders who do not take part of the management[282]. By publishing the meeting at the "Boletin Oficial" the management obeyed the law and "got rid" of the "annoying presence" of minority shareholders in the meeting.[283] Shareholders may be present at the meeting or they may be represented by

[274] *Id*., at 225 (Citing Law 19550 §235).
[275] JORGE OSVALDO PEREZ, MANUAL DE DERECHO Y DE LA EMPRESA 386-7 (1999).
[276] *Id*., at 226 (Citing Law No. 19550 §236).
[277] *Id*.
[278] *Id.*, at 226 (Citing Law 19550 §237).
[279] Graciela Medina, Ejercicio de los Derecho Societarios por el Poseedor Hereditario, [1991-E] L.L. 107.
[280] *Id*.
[281] *Id*.
[282] *Id*., at 108.
[283] *Id*.

proxy, but the law does not allow the proxy to be given to a Director, manager or syndic[284].

The "Directorio" or Board of Directors manages the SA[285]. Their term is determined in the "estatuto" and it may not exceed three years or five years if the SA has a "Comite de Vigilancia" (not common for family business)[286]. The default rule is the maximum authorized term[287]. Shareholders' meeting elects the Board members and it can reelect them for unlimited successive terms[288]. Normally the Directors are persons, but the law authorizes a legal entity (business) to be Director of another legal entity[289]. The IGJ has authorized a SRL to be designated Director of a SA[290]. The "estatuto" should establish the organization and functioning of the Board, its quorum can by less than a majority of Board members[291]. Election based on classes of shares[292] and cumulative voting[293] are options authorized by the Law. The Board meets at least 3 times a year[294], and the roles of the directors are personal and cannot be delegated[295]. The law accepts the delegation of the vote of one director to another, but only in the case that the meeting has quorum[296]. The meetings may not be held by mail[297]. This has been extended to the

[284] PEREZ, *supra* note 275, at 387.
[285] ZUNINO, *supra* note 189, at 239 (Citing Law No. 19550 §255).
[286] *Id*., at 240 (Citing Law No. 19550 §257).
[287] *Id*.
[288] *Id*.
[289] Estevez Liliana B., *Practica : una Persona Juridica Como Directora de una Sociedad Anonima*, Revista Doctrinaria Societaria de ERREPAR (Feb. 2001), at htpp: www.legalmania.com/derecho/transmision_hereditaria.htm. (Last visited Feb. 20, 2004).
[290] ZUNINO, *supra* note 189, at 240.
[291] *Id*., at 241 (Citing Law No. 19550 §260)
[292] *Id*., at 242 (Citing Law No. 19550 §262).
[293] *Id*., at 242. This right is limited to the election of 1/3 of the Board members. (Citing Law No. 19550 §263)
[294] *Id*. at 245-6 (Citing Law No. 19559 §267).
[295] *Id*. at 245 (Citing Law No. 19550 §266)
[296] *Id*.
[297] *Id*. This has been extended to the impossibility of using electronic media either (ABA, supra note

impossibility of using electronic media either[298]. The President of the Board represents the SA in all matters, but the "estatuto" may establish this representation to be shared by two or more directors or by an "executive committee" of directors[299]. The Board elects the firm's officers (called "gerentes")[300]. The remuneration of the directors is optional, but the law states a maximum of 25% of the firm's profits for the directors' remuneration[301]. SAs must maintain official books[302].

b) Business succession planning (possibilities of customization on transfers of shares, not special provisions for "family corporations").

Shares are freely transferable[303]. The "estatuto" may restrict such transferability, but it may not prohibit it[304]. The death of a shareholder does not produce the dissolution of the SA, nor does the dissociation of the deceased shareholder[305]. The shareholder's successors acquire the role of new shareholders by force of the law[306]. However, the "estatuto" may establish a limitation of the transferability of nominal shares, but it may not prohibit such transferability[307]. This may be done with the purpose of protect the cohesiveness of the founder group, the conduction of the business or other purposes[308]. Those provisions are valid[309] and they should be written in the shares[310]. In those cases, the "estatuto" must provide the procedure for the acquisition of the successors' shares at a

[298] ABA, supra note 238, at 25.
[299] ZUNINO, supra note 189, at 246 (Citing Law No. 19550 §268, §269).
[300] *Id.*, at 247 (Citing Law No. 19550 §270).
[301] *Id*., at 241 (Citing Law No. 19559 §261).
[302] ABA, supra note 238, at 25.
[303] *Id*. at 213 (Citing Law No. 19559 §214)
[304] *Id*.
[305] MARIANO GAGLIARDO, SOCIEDADES DE FAMILIA Y CUESTIONES PATRIMONIALES 34 (1999).
[306] *Id*.
[307] Perciavalle, *supra* note 234, at 3.
[308] *Id*.
[309] "El Chañar SA", CNCom. [1994-D] L.L. 275.
[310] ZUNINO, *supra* note 189, at 213 (Citing Law No. 19550, §214)

fair price[311]. In despite of the legal authorization of these type of agreements, reality shows that members of family SAs do not tend to settle these provisions because they do not want to "spoil" the enthusiasm of the new endeavor, and also because determining how to establish the price of the shares for the buy-out involves technical difficulties[312].

c) Costs.

The registering fee that IGJ charges for SA constitution is higher than the ones of the SRL (220 PESOS of Argentina)[313]. The "urgent" registration (on the same day) is also an extra 182 PESOS of Argentina[314]. Other costs are the publication in the "boletin oficial" (approximately $300 or $400 PESOS of Argentina, related to the length of the text to be published), and the professional fees of the lawyer and the "escribano" (notary). Lawyers and notaries charge between $600 and $800 PESOS of Argentina as professional fees. Escribanos charge also around $200 PESOS for conducting process of registration. The legalization of signatures and copies is around 50 PESOS and other official fees are 40 PESOS. Seals reach around 80 PESOS of Argentina. The total cost of constitution of a SRL is between 1500 and 1900 PESOS of Argentina[315].

SAs' structure is complex, and their constitution and functioning is the most expensive of that of all the other types of legal entity for businesses[316].

SAs have requirements of publicity and they have constant supervision of government administrative offices[317]. Argentina's government has agencies at the

[311] GAGLIARDO, *supra* note 305, at 34.
[312] Ivan Bakmas, *Sociedades Anonimas Cerradas*, [1997-B] L.L. 1212, 1216.
[313] The national currency of Argentina is the peso ($). Its ratio with the USA dollar as February 2004, is 1 US$ = 2.95 PESOS.
[314] *Id.*
[315] See s*upra* note 246.
[316] *Id*., at 107.
[317] Moretti, *supra* note 249.

national and local levels to oversee the existence and life of the SAs[318]. The government supervision of the development and functioning of the SAs is very close. That implies higher costs.

A. New developments of legal regulation of Small and Medium Businesses.

Because of their national economic significance, the small and medium businesses are in the agenda of Argentina's administrators and legislators[319]. However, their focus tend to be too one-sided towards financial and tax aspects. The National Congress passed the Law No. 24467 in March 1995[320]. This law was named the "Statute of the Small and Medium Businesses", but its goal was mainly to promote the growth and development of small and medium size business by means of providing tools to facilitate their access to finance. Law No. 25300 amended Law No. 24467 to include in the system the "Micro businesses"[321]. The definition of a micro, small or medium size business is made by the enforcement authority and it relates to annual total sales in three sectors farming, industrial, trade and services[322]. As said, the main goal of these statutes is to provide access to financing. The law creates a national fund for the development of the micro, small and medium business[323]. The statute also created a new type of business entity called "Sociedad de Garantia Reciproca" (SGR)[324]. The SGR is a group of businesses, which constitute a common fund to guarantee the credits acquired by the member businesses in the financial system[325]. The SGR is composed by two types of members,

[318] PEREZ, *supra* note 275, at 388.
[319] Law No. 24467, 3/15/95, B.O. 3/28/95. PAULA C. SARDEGNA, MICRO PEQUENAS Y MEDIANAS EMPRESAS 11(2002).
[320] *Id.*
[321] *Id.*, at 3. Law No. 25300, 8/16/00, B.O. 9/7/00.
[322] *Id.*, at 4.
[323] FONAPYME (Fondo Nacional de Desarrollo para la Micro, Pequeña y Mediana Empresa). *Id.* at 7.
[324] *Id.*, at 13.
[325] *Id.*, at 15.

"socios participes" (participant members) and "socios protectors" (protective members). The "socios participes" are the micro, small and medium businesses that obtain financial support from the SGR[326]. The "socios protectores" are bigger businesses that obtain tax benefits, opportunities of investment, and development of clients and sellers by participating in the SGR[327]. The only goal of the SGR is to provide security to the debts acquired by its members with third parties[328].

It is too soon to evaluate the success of the SGR system. According to the statistical data published by the IGJ, only one SGR was created in each of the years 1999, 2000, 2002, and four were created in 2001. The economic recession that Argentina lives, since the fourth quarter of 1998, aggravated by the overwhelming financial and economic crisis that the country lived at the end of 2001, is probably an undeniable cause for a very slow development of any changes in the business environment[329].

These statutes did not cover the structural problems of the family businesses'. But the peculiarities and organizational needs of the family businesses have not been indifferent to legal scholars. Besides the failed ideas of single person SRL commented supra, other projects were generated. One of the most relevant and controversial was the proposal to include in the Law No. 19550 a new sub-type of SA called "Sociedad Anonima Simplificada", following the French legislation[330]. That project developed by a

[326] *Id.,* at 20.
[327] *Id.*
[328] *Id*, at 14.
[329]Guillermo Perkins, *Managing Argentina Family Firms in Crisis: Strategic Challenges and New Managerial Skills of Argentina Family Firms*, (IAE, Escuela de Direccion y Negocios de la Universidad Austral), 2002-2003, at http://www.iae.edu.ar/web2003/centros/cefam/cefam.html (Last visited Feb. 9, 2004).
[330] Horacio Fargosi, *Breve Apunte sobre Novedades en la Regulacion de las Socidedades Comerciales*, [2003-F] L.L. 1059.commenting the project presented by the commission created by Resolucion Ministerial MJ465/91 following the French law of July 12, 1999 §3 "L' elargissement du domaine des societes par actions simplifiees".

Commission in 1991, tend to help to the adaptation of the legal system to the requirements of the market[331].

[331] *Id.*

CHAPTER V

CONCLUSIONS.

As said, the ability to maintain a harmonious relationship among the family members participating in the firm is essential to the company's well being[332]. The company operates more efficiently on a basis of consensus, however, consensus is not always possible because divergences of interest may appear[333]. This may lead to an "exploitation" of the minority by the majority, via privation of the minority's part of profits or income[334]. Private contractual arrangements are an important tool to satisfy members or shareholders needs in closely held businesses, but ex-ante legislative provision and ex-post judicial intervention are very important tools also[335].

The limited-liability choices for legal entity of family businesses in Argentina and in the U.S. present different approaches regarding: Decision-Making, Business Management, Conflict-Resolution and Business Succession Planning. This thesis presented and analyzed those different approaches.

In the U.S. after the appearance in the 1990s of the LLC, there was a thought that close corporations would diminish in numbers. However, that did not happen. The reasons include the existence of precedents regarding close corporations, which give businesspeople predictability and certainty in the eventuality of a judicial claim, and also the existence of clear default rules, which are not as clear for the newer LLCs[336]. Courts have generated precedents that recognize the different characteristics of closely- held

[332] Heterington and Dooley, *Illiquidity and Exploitation: A Proposed Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 1-4 (1977).
[333] *Id.*
[334] *Id.*
[335] *Id.*

businesses, and legislatures enacted legislation providing for specific status for this kind of firms.

In Argentina, because the SAs were conceived as the structure for big businesses, they lack personal elements, characteristic of the other types of business legal entities. SA Law considers shareholders as mere investors. However, shareholders of family SAs are much more than mere investors. They are siblings, mother, father and children among themselves. In spite of the availability of the SRL, considered by legal scholars a more technically adequate form of legal entity for small family held businesses, family SAs are many times the preferred option for family business founders for sociological traditional reasons. As said, family SAs do not have a special regulation in Argentina's Law, but they should have legal answers according to its needs.

The conclusion to make at this point is that there is not a "best" choice of legal entity for Family Business in the USA and in Argentina. The different legal choices provide with "better" or "worse" options of legal entity according with the entrepreneurs' expectations and concerns. However, legislation in the USA has recognized the special characteristics of family businesses and allows more possibilities of customization of the rules than Argentina's law. This last issue constitutes an interesting point for future legislative action in Argentina.

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[336] *Id*. at 384.

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