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Lesson 2, IBL. International and EU perspectives of Companies. (2.1)

To be completed with classroom notes



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1.- Companies in International Business Law

- The concept of «*empresa*» enterprise, as a multidisciplinary idea. At the head of the «*empresa*» we find either private individuals (natural persons) or legal persons.
- Legal persons are «intellectual fictions» with legal consequences
 - Different types of legal persons.
 - **Foundations.** No «Members». No shareholding. Foundations are legal persons, made up of assets whose objective/s are set up by its «Founder». Article 34.1 Spanish Constitution says: «The right of Foundation is recognized for purposes of general interest, in accordance with the law»
 - **Trust.** They are Common Law Institutions, deeply rooted in the Anglo-Saxon tradition. Nowadays, they become useful for investment.
 - **Associations.**- They have «members», but they do not have shareholders. Article 22 of the Spanish Constitution: «*The right of association is recognized. Associations must register in a public registry for the sole*

purpose of transparency»

▪ **Companies**

- Some are «non-incorporated». They have legal personality but its members are liable for debts of the legal person («non-perfect legal personality»)
- Others are «incorporated» (capital companies or «corporations») ie: Sociedad Anónima, Sociedad Limitada , Sociedad Anónima Europea, etc. Their registration in Company's House (*Registro Mercantil*) is a requisite for incorporation (in Europe)

Incorporated «capital» companies

◦ **Nationality and domicile**

- Their Nationality and domicile can be defined in accordance with different criteria:

a) Some legal systems follow the «*Real Seat Theory*», whereby nationality is linked to the administration of the company's business. This system is followed in the German Legal System.

b) Some legal systems follow the Incorporation Theory, whereby the place of incorporation determines the Nationality, ie UK's Legal System

- Spanish System of companies nationality and domicile. Arts 8 to 10 LSC:
 - **A Spanish Company is a company that has its registered office (domicilio social) in Spanish territory**
 - **Companies with domicile within the Spanish territory must fix their domicile in the place where they have their centre of administration and management.** Or, where they have their main operations and establishment. **If Spanish companies set their domicile in a different place, any third party can take both domiciles (the «set» domicile and the place of administration and main operations) as valid**

- **Foreign Companies (and private individuals)** Art 15 Cco: Foreign natural persons and companies incorporated abroad may trade in Spain. When they do so, they are subject to the laws of their country with regard to their ability to contract (legal capacity to act). They are subject to the laws of Spain in all matters relating to the creation of their establishments within Spanish territory, their operations and jurisdiction of Spanish Courts (without prejudice to what may be applicable in

individual cases by the International Treaties and Agreements).

- **Groups of Companies.** In general terms, and within the different jurisdictions and legal systems, a group of companies exists when several companies are legally independent and are subject to a relationship of dependence and centralized economic decision making (governance) by means of a variety of contractual mechanisms and/ or shareholdings. They retain their formal legal independence, but they act in the market with the logic of a single business. Therefore, two elements characterize, in general terms, the group of companies:
 1. The direct or indirect relationship of dependence of one or several companies with respect to another; and
 2. The exercise of a unitary or centralized economic governance, that is, the unity of decision.

There are various **comparative legal concepts of Group of Companies.**

- The English System relies on the existence and /or on the possibility of hierarchy control. Such Groups are **known as vertical groups or subordination groups**
- The Germanic concept is broader and it is based on the **notion of the unity of decision.** The group is made up of companies acting jointly by means of agreements and/ or through clauses in the Articles of Association. They usually also have «cross-shareholding» Here the Group is controlled by any means (not only via shareholdings or appointments of Directors) by one or more natural or legal persons.
- **In Spain, article 4 of The Spanish Securities Law (Ley del Mercado de Valores) and article 42 of Cco. , (this latter is related to the obligation to “consolidate annual accounts by groups of companies”) refer to Groups of Companies:** A Group exists when a

company holds or may hold, directly or indirectly, control over one or more other companies. In particular, control will be presumed to exist when a company (parent/dominant), is in relation to another company (dependent/ subsidiary), in any of the following situations:

- a) It holds the majority of voting rights or may hold such majority by virtue of agreements with 3rd parties
- b) It has the power to appoint or dismiss the majority of the members of the administration body (such as the Board of Directors). This circumstance shall be presumed when the majority of the members of the administration body of the dominated company are members of the administrative body or senior executives of the dominant company, or of another company dominated by it
- Please note that

for these purposes, the voting rights can be direct votes of the parent company or indirect voting power (votes held through other subsidiaries or through persons

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Today, in Spain «coordination groups» are excluded from the duty to “consolidate accounts” (duty to draft accounts for the Group as well as individual accounts).

A few Comparative Law Ideas on Company Law and Securities Markets: USA v EU

◦ USA

- This country has a tradition of «**popular capitalism**».: **Corporations obtain funding mainly from investors at Stock Markets**
- Company Law is mainly regulated by States. Company Law follows Model Laws (**Model Business Corporation Act**), as well as the **General Corporations Law of the very influential State of Delaware**.
- Soft Law under the movement of «Corporate Governance » is very influential particularly from 1994 with the American Law Institute Principles of Good Corporate Governance.
- **Securities Laws are federalised**, mainly with the **Securities Act (1933) and the Securities Exchange Act of 1934**. Both have been modified in many occasions (for instance with the Sarbanes-Oxley Act of 2002 and the Dodd Frank Act of 2010. The Securities Exchange Act created the SEC, Securities Exchange Commission (a Supervisory and Regulatory Authority).

◦ Europe.

- Tradition of **bank funding** for big corporations
- Continental European countries have a tradition of blockholders (shareholders with great stakes and long term interest in the companies).
- There are differences in governance in different countries, ie: one board of directors of big companies (UK, SP), two boards if big companies (Germany), with legal reforms in some countries such as Portugal, Italy, France to allow for choice so that shareholders can decide if the company has 1 board or 2 boards of directors
- The movement of «Corporate Governance has also been very influential, since 1992, with the Cadbury Code (UK), the «Codigo Olivencia» and new the Código Unificado de Buen Gobierno de 2015 in Spain, etc. Soft law Corporate Governance Recommendations have been made into law in many countries (in Spain with [Ley 31/2014](#), de 3 de diciembre, por la que se modifica la Ley de Sociedades de Capital para la mejora del gobierno corporativo)
- **Following the 2007 crisis, the EU has tried to bring securities and markets issues to the EU legislation.** This has not been achieved completely. However, MIFID2 (Markets in Financial Instruments Directive,2), MIFIR (Markets in Financial Instruments Regulation), and other legislation are harmonizing and unifying some aspects of Securities Laws. Since 2010 there are 3 independent financial authorities in the EU

that help the EU Commission in the Supervision and Regulation of the Financial sector at EU level:

- ESMA (European Securities and Markets Authority)
- EBA (European Banking Authority)
- EIOPA (European Insurance and Occupational Pensions Authority)