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LESSON 2 IBL: INTERNATIONAL COMPANY LAW – EUROPEAN UNION FRAMEWORK Summary (educational guide)

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1 Companies and other bodies for the business organization of International Business.
Companies and other organizations are actors of IBL. Together with natural persons, they are instruments to give legal form to some business. Companies (also named Corporations) and other business forms give legal support to collective business: those business whose legal holders or owners are groups of individuals that must be organized in accordance with the legal framework. Collective business are not natural persons, nor «single person traders» nor «single business people»). Legal persons are «intellectual fictions»

1.1 We find different types of legal persons that are important in



A. **Foundations.**

- They have no «Members». They have no shareholding.
- They do not have issued capital, although they do have assets
- 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», therefore, in Spain, Foundations are created for the general interest and not for the sole interest of the founder or his family. Some countries, however, accept private interest Foundations.

B. **Trusts.** They are *Common Law* Institutions, deeply rooted in the Anglo-Saxon tradition. Nowadays, they have become useful for investment, so we might find them in IB, even beyond anglo-saxon countries.

- i. Trusts have a very special structure which allows their Beneficiary to be almost unknown to the public. However, «technically classical trusts» are managed for the interest of their Beneficiary that is nominated by the Trust Founder. Trusts are managed by one or various trustees that is the «apparent owner of the trust' assets. And such assets must be

administered in the best interest of the Beneficiary.

C. **Associations.**– They are a very simple type of organization. Associations have «members» (socios). They do not have, in a technical sense, capital, nor shareholders. They can have assets. In accordance with 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*»

D. **Companies**– They are widely used in IBL, and in business in general

- Some are «non-incorporated». They have legal personality but their members are liable for debts of the legal person («non-perfect legal personality») (a.e: sociedad colectiva, sociedad comanditaria simple, and equivalent forms in other countries). Although they have assets, they lack capital in the legal and technical sense. In Spain, the contract for the creation of these company types must be registered in «Companies House» (Registro Mercantil), for them to be classified as «commercial» (mercantiles).
- Other companies are «incorporated» . They are capital companies or «corporations». ie: Sociedad Anónima, Sociedad Limitada , Sociedad Anónima Europea, etc. Corporations are incorporated by their founding members who contribute with money or assets that create the «capital» of those organizations. Most countries regulate a minimum capital for each type of capital company. For instance in Spain an SA must have a minimum nominal issued capital of 60.000€, and an SL of 3.000€
- Their registration in Company's House (*Registro Mercantil*) is a requisite for incorporation as legal persons with full legal personality

1.2 More on incorporated «capital» companies in IBL

1.2.a. Companies have a Nationality and a Domicile. Those concepts are defined differently in different countries and legal systems:

- 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, among others.

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

c) The Spanish System of Nationality and Domicile of Companies is, somehow, an hybrid. Those issues are regulated in Arts 8 to 10 LSC (Ley de Sociedades de Capital), whereby **a Spanish Company is a company that has its Registered Office (domicilio social) in Spanish territory. Also, Companies with domicile within the Spanish territory must fix such a Domicile in the place where the Company has its centre of administration and management; or in the place where such Corporation has its main operation and establishment centre. So, if Spanish companies set (in their Estatutes) their Domicile differently, any third party can take both Domiciles as he or she chooses (the «set» Domicile and the place of administration and main operations).** Nationality and Domicile are very important in Business Law as they are used to find out the Legal System that rules over the legal capacity of business people and collective organizations to operate as a business (Legal capacity to act in business and to trade); to decide where they can sue or be sued, etc.

1.2.b. Legal capacity to act and to trade, in accordance with the Spanish Legal System (and most Legal Systems).

- **Legal capacity to trade in Spain.**
 - **Foreign Companies incorporated abroad (and Foreign private individuals or natural persons)** may trade in Spain. Art 15 Código de Comercio establishes that, Foreign Companies (and Foreign Natural people) are subject to the laws of their own country of Nationality with regard to their ability to contract (legal capacity to act). But they are subject to the laws of Spain in all matters relating to the creation of their establishments (offices, shops, factories, etc) within Spanish territory. Their operations in Spain are also subject to Spanish Laws. And they are bound by the jurisdiction of Spanish

Courts. However, when Foreign persons and companies established in Spain are involved in IB, some exceptions apply as we shall see in this course.

1.2.c. Groups of Companies (and consolidated accounts)

- In general terms, and within the different jurisdictions and legal systems, a Group of Companies exists when several companies that are legally independent are subject to a relationship of dependence and centralized economic decision making 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.
- There are various **comparative legal concepts of Group of Companies**.
 - a. The English System mainly relies on the existence and /or on the possibility of **hierarchical control** and the resulting Groups are **known as vertical groups or subordination groups**
 - b. 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 clauses in their Articles of Association. They usually also have «cross-shareholding» Here the Group can be controlled by different means such as reciprocal agreements, joint projects, services provision....(not only via shareholdings or appointments of Directors) .
 - **In Spain, article 4 of The Spanish Securities Law (Ley del Mercado de Valores) and article 42 of Cco.** A Group exists when a company holds or may hold, directly or

indirectly, control over one or more different 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 acting in their own name but on behalf of the parent company or other subsidiaries or other voting rights held in concert with any other person).

Today, in Spain vertical groups (art 42 Cco) must file **consolidated annual accounts**. However non vertical groups are excluded from the duty to “consolidate accounts”

(duty to draft accounts for the Group as well as individual accounts). The purpose of the consolidated annual accounts is to provide an overview of the economic activity, equity and results of the entire company, each having its own legal entity but depending on the same decision-making centre (the parent company).

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

- **The USA has a tradition of «popular capitalism» and a financial culture whereby corporations often obtain funding mainly from investors that operate in the 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: board of directors of big companies in countries such as Spain or UK have only one Board of Directors. But such big corporations are have 2 Boards in countries such as Germany (one management board and one supervisory

board). The legal reforms in Portugal, Italy, France...., 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. (See in this blog [here](#) and [here](#))
 - 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)

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