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Doing Business in Spain

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CHAPTER 12 Company Law

1-12 Doing Business in Spain § 12.01

§ 12.01 The Individual Merchant (*Comerciante Individual*)

[1] Capacity

According to Article 1 of the Commercial Code, merchants are:

- those with legal capacity to engage in commerce who habitually dedicate themselves to the same; n1
- and
- mercantile or industrial companies which are established according to the Commercial Code.

Therefore, there are two classes of merchants: physical persons and companies. Considering that the requirements determining the mercantile nature of each are different, the two classes will be reviewed separately. The capacity to engage in commerce is dependent upon two factors according to Article 4 of the Commercial Code. They are (a) to be of legal age (18 years of age), and (b) to have authority to dispose of goods.

[2] Incapacities and Prohibitions

The following, among others, may not engage in commerce nor hold any position in mercantile companies:

- those persons declared bankrupt, unless expressly authorized;
- judges, and prosecutors in the territory where they carry out their functions, with some exceptions;
- civil governors, military chiefs, etc. in their respective provinces;
- employees responsible for the collection or managing of state funds; and
- others whom special laws or regulations prohibit from engaging in commercial activities, whether the restriction be general or limited to a specific geographical area.

[3] Registration with the Mercantile Registry

According to the Royal Decree 1784/1996 of July 19, the purpose of the Mercantile Registry is the registration of:

- Individual merchants.
- Mercantile corporations.
- Credit and insurance entities and mutual guarantee companies.
- Mutual and pension funds.
- Any legal or physical person, as provided for by law.
- Acts and contracts established by law.

Functions of the Mercantile Registry include the certification of the corporate books, the deposit and the public notice of accounting documents and those other functions attributed to it by law.

There is a Mercantile Registry in each provincial capital, in the cities of Ceuta and Melilla on the North African coast and on several islands in the Balearics and Canaries Islands. Additionally, a Central Mercantile Registry, purely informational in nature, is located in Madrid. The Central Mercantile Registry is also entrusted with the granting of certificates for corporate names. This certificate must be obtained prior to the incorporation of the company.

Generally, only public documents can be registered at the Mercantile Registry, with some exceptions.

[4] Registration of Individual Merchants

Registration of individual merchants, except for shipping merchants, is voluntary.

The individual merchant who is not registered may not request the registration of any document with the Mercantile Registry, nor take advantage of its legal effects. n2

[5] Registration of Mercantile Corporations

The following must be registered in the registration sheet of mercantile corporations: the constitution, modification, rescission, dissolution, transformation, merger, or spin-off of the entity; the creation of branches; the appointment and dismissal of the administrators, liquidators and auditors; the general powers; the issuance of stock or other negotiable securities, and any other circumstances that are determined by law or by regulation.

A joint stock company or limited liability company with one shareholder or partner, as the case may be, receives special attention. This type of entity must publicize the fact that there is a sole shareholder or partner on the company stationery and register contracts between the company and its sole shareholder or partner. An entity that becomes a joint stock company or limited liability company with a sole shareholder or partner must register this modification. When an entity ceases to have a sole shareholder or partner this modification must also be registered.

Generally, foreigners and companies incorporated abroad may carry out business in Spanish territory, subject to the laws of their own country concerning their capacity to enter into contracts, and the provisions of the Commercial Code with regards to the creation of their establishment within Spanish territory, their mercantile operations, and the jurisdiction of national courts. Treaties and conventions with other countries n3 will govern specific circumstances.

The Mercantile Registry regulation provides for potential fines and, eventually, closure of the registry to those

companies obliged to deposit their financial statements that do not timely do so. Annual financial statements must be filed within the month following their approval by the corporation's partners or shareholders. Notwithstanding, this closure will not affect a registration of resignation of directors or managers, the revocation or renunciation of powers of attorney, the dissolution of the company, the appointment of liquidators and entries ordered by judicial or administrative authorities.

[6] Branch Offices

Branch offices are distinguished from other establishments, such as agencies or delegations, according to predominant doctrine, either because they have their own clientele, or because they carry out operations of the same type as the principal establishment. The creation of branch offices is an administrative act, normally within the competence of the board of directors of a company. n4

The branch manager must hold a general power of attorney, the scope of which will be conditioned by whether he carries out acts which are different from those of the management or activity of the parent company.

In terms of fiscal accountability, the "principle of unity" applies. The branch operations must be reflected in the general accounting of the main establishment. When the branch offices are set up in population centers different from that of the main establishment, each branch must have a daily register to formalize the operations carried out each day.

Branches will be registered in the corresponding sheet of the headquarters of the company in the Registry of the capital of the province where it has its domicile. Additionally, a special sheet will be opened for the branches in the Registry of the province where the branches are established, in the manner and with the effects that are determined by regulation.

FOOTNOTES:

(n1)Footnote 1. According to Article 3 of the Commercial Code, a legal presumption of the habitual exercise of commerce arises from the moment the person who proposes to engage in commerce advertises by circulars, newspapers, posters, signage, or by any other way, an establishment which undertakes any commercial operation.

(n2)Footnote 2. In the registration sheet of each individual merchant the following information will be registered: commercial name, and, where appropriate, the business establishment sign, its domicile and that of its branches, the purpose of the business, the date operations began, the general powers granted, and their revocation; marriage articles and final decisions concerning the marriage such as annulment, separation and divorce; the issuance of bonds and other negotiable securities issued in groups, and any other matters established by law or regulation.

(n3)Footnote 3. *See* Article 15 of the Commercial Code. *See also* Ch. 4 on Foreign Investments for information on legal provisions pertinent to foreign merchants.

(n4)Footnote 4. Regarding the creation abroad of branch offices of Spanish companies, *see* Royal Decree 664/1999 of April 23, regarding foreign investments.