

## LESSON 3: COMPANY LAW

### SUMMARY:

- 1.-Concept of company
- 2.-Company operating agreement or company contract
- 3.-Types of companies
- 4.-Types of trading companies
- 5.-Company as a legal person
- 6.-Vocabulary

### 1.- Concept of company

From a broad perspective, a company may be defined as a legal relationship voluntarily entered by two or more people who share their money, goods or work with the purpose of developing an activity (art. 1665 Cc and 116 Cco). The pursuit of profit is not a requirement to form a company.

Although there has been a great controversy around its legal nature, a company is considered to be an agreement that creates an organization to perform certain activities. A company is a legal person (an artificial person, invisible, intangible) created by law and with legal entity, and which is capable of having rights, obligations and liabilities. This legal person -and not the members who formed it- is going to be considered the entrepreneur.

The concept of company can therefore be analyzed from several standpoints:

- A) It is an agreement by which two or more people contribute supplying goods, money or work to carry out the activity that they all want to develop in common rather than by themselves.
- B) Such an agreement also creates a legal person, separate from the partners who participate in it. As a legal person, it has its own assets, its own rights, obligations and liabilities, and it carries out its activity while entering legal relationships with third parties.
- C) Under an economic perspective, the agreement allows the legal person to start its own business.

### 2.- Company operating agreement or company contract

There are two main features to consider while analyzing a company's operating agreement:

- a) First of all, it is multilateral. Two or more people participate to achieve a common goal. There is an exception to this rule, because since 1995 Spanish company Law allows both public and private LLCs to be formed by just one person, either natural or legal. In this case, we will have a unilateral agreement.
- b) It creates a legal organization with its own assets and legal entity separate from those of its members.

The main elements in this agreement are: mutual assent, object and purpose

- **Mutual assent**

Mutual assent is typically reached when there is a concurrence of wills. In order to give valid assent, parties must be free and capable according to Common Law. The assent given by people without legal capacity or under misrepresentation, violence or intimidation will be voidable, although not necessarily lead to the nullity of the company. The company agreement will only be null if it is not possible to achieve the assent of at least two members.

- **Object:**

The object of a contract concerns the different obligations assumed by company members after signing the agreement. Not only does it involve duties of contribution in terms of money, goods or services, but also additional ones, like loyalty to the company.

- **Purpose:**

The purpose of the agreement regards the activity or activities that the company wants to develop in order to achieve the common goal (which does not have to be lucrative). It must be lawful and indicated by the contract.

### **3.3.- Types of companies**

We can classify companies according to different criteria:

- a) *Civil and trading companies*

Company operating agreements are regulated by both the Spanish Civil Code and the Spanish Commercial Code. This double system differentiates between civil and commercial companies, and we will therefore have to apply different rules to each. But such a distinction should also remind us that a trading company is legally considered entrepreneur and, because of that, submitted to a particular legal status.

Trading companies are:

- Companies that have adopted one of the legal forms stated by company legislation. The adoption of one of these legal forms becomes official after registering the company in the appropriate Trade Register (art. 116 Cco).
- Companies that have not been registered but develop a commercial activity. The lack of registration can be explained by different reasons. Maybe the company is in the process of formation (“companies being incorporated”). It is also possible that the partners do not want to register the company (“irregular companies”) or the registrar just does not allow the company to register because the agreement does not fulfill the requirements of company legislation.
- Finally, public and private LLCs are always commercial companies, whether their activities are civil or commercial.

*b) Partnerships and corporations (\*)it should be noted that regulations governing particular types of companies, even those described as roughly equivalent, will differ to a greater or lesser extent between countries*

Spanish Company Law classifies companies according to two different models: partnerships and corporations. These two models are just theoretical constructions and unadulterated examples of them are hard to find in company practice.

### **Characteristics of partnerships**

The legal personality of the company is not so clear in this model. Partners play an important role in company life and both their personal and professional situations, as well as their assets, are taken into account when signing the agreement.

#### Assets:

This type of company shows a direct relationship between company assets and its partners.

As a result, partners are liable for company debts.

#### Organization.

These companies are organized under:

- The principle of self-organization. All partners are granted the right to participate in the administration of the company

- The criterion of unanimity in decision-making. It means that all partners must agree and have a right to veto when deciding about company matters.

All these features give these companies a “closed” character, because it is difficult to become and cease to be a member.

### **Characteristics of corporations**

In this model, companies have a full legal personality. They are considered legal entities, completely separate from their members. Partners are seen as investors, who participate in the corporation in order to obtain a profit from the money they have invested.

#### Assets.

There is no direct relationship between partners and company assets. The company exclusively owns the assets used to develop its purpose.

Partners have no liability for company debts.

#### Organization:

Two different bodies govern this type of company. A general meeting in which agreements are adopted, and an administrative body which administrates the company.

Relationships among partners and between the company and its partners are regulated by the articles of association. The articles of association govern the internal functioning of the company.

All these features give these companies an “open” character, because becoming and ceasing to be a member is a free choice.

### **4.- Types of trading companies**

Trading companies under Spanish Company Law may take the following forms:

- *General partnership (sociedad colectiva)*
- *Limited partnership (sociedad comanditaria simple)*
- *Public limited liability company (sociedad anónima)*
- *Private limited liability company (sociedad limitada)*
- *Partership limited by shares (sociedad en comandita por acciones)*

Each of these types has its own regulation. It must also be noted that atypical companies are not contemplated by the Law (i.e. companies which have not

been regulated) for reasons of public order and legal certainty. Nevertheless, our Company Law enables to adapt the legal type to the special needs of a particular business plan, introducing specific clauses in the articles of association. These clauses will only have to comply with Company Law and what is known as “configuration principles of each type of company”

### **5.- The company as a legal person**

The operating agreement is the origin of the company, but once a company has been formed following all legal provisions, it turns into a new legal entity independent from the partners who formed it. This new legal entity will lead its own life and have its own organs which will enable it to enter into legal relationships with third parties.

Companies acquire legal personality once the agreement or contract has been signed and registered. The consequences of acquiring legal personality are as follows:

- First of all, the company becomes a legal person capable of having a legal name, rights, protections, privileges and liabilities, just like a natural person.
- The company will also have its own assets, different and separate from each partner's. With them, the company will have to satisfy its debts.
- Finally, companies will be able to deal with third parties. To achieve this, they will need natural persons who can act on their behalf.

### **6.- Vocabulary**

**Company-** Sociedad

**To enter a relationship-** Concluir una relación jurídica

**Legal person-** Persona jurídica

**Contract / agreement-** Contrato / acuerdo

**Mutual assent-** Consentimiento mutuo

**Legal capacity-** Capacidad legal

**Voidable-** Anulable

**Null-**Nulo

**To fulfill legal requirements-** Cumplir las exigencias legales

**Assets-** Activo de la empresa

**To be responsible for-** Ser responsable de

**To have responsibility for –** Tener la responsabilidad de

**To grant a right-** Conceder un derecho

**Right to veto-** Derecho de veto

**General Meeting-** Junta general

**Administrative body-** Organismo de administración

**Partner-** Socio

**To act on the behalf of-** Actuar en representación de

**General partnership -** sociedad colectiva

**Limited partnership -** sociedad comanditaria simple

**Public limited liability company -** sociedad anónima

**Private limited liability company -** sociedad limitada

**Partnership limited by shares -** sociedad en comandita por acciones