Baker & McKenzie

GENERAL GUIDE FOR DOING BUSINESS IN SPAIN

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A prospective investor in Spain may select among various business forms to operate in Spain. This memorandum intends to describe several aspects of doing business in Spain, including: forms of business organization, foreign investment legislation, tax planning, distribution agreements and labor aspects.

I. Corporate Law Aspects

1. Company

1.1 Types of Companies

Several types of corporate entities are available in Spain. The most common ones are the Limited Liability company ("Sociedad Limitada" or "SL") and the Public Limited Company ("Sociedad Anónima" or "SA"). Both types of companies enjoy limited liability for shareholders. SAs are the most common corporate vehicle in Spain for multinationals and listed companies. However, the use of SLs is more frequent, since Spanish corporate law establishes more stringent requirements to operate an SA, including the increase of the minimum capital required to incorporate a company.

Other corporate forms generally include the *Sociedad Colectiva* (i.e., general partnership), the *Sociedad en Comandita Simple* (i.e., limited partnership) and the *Sociedad en Comandita por Acciones* (i.e., limited partnership through shares). However, given that the partners of these legal forms do not have limited liability, the existence of these types of entities is anachronistic, and they are very seldom used by foreign companies.

1.2 Main Differences between an SA and an SL

An SA is a corporate structure mostly designed for large corporations that require the availability of control mechanisms or sophisticated legal structures. Therefore, an SA may adopt special requirements to call meetings, vote, or establish a quorum for meetings. With regard to operations, an SA would thus resemble a typical US corporation.

In contrast, SLs were conceived to be used for small or family-owned companies, where trust and personal relationships constitutes the basis of the company. This is why the legal structure and mechanisms to operate an SL are less sophisticated than those of an SA. However, Spanish corporate law imposes significant restrictions on the transfer of quotas of SLs. The statutory voting requirements are more stringent than those applicable to an SA. However, for a fully foreign-owned Spanish subsidiary, the choice between the two corporate entities will most likely only depend on the capital amount that the foreign company intends to invest initially. As explained below, the minimum capital amount required to incorporate an SA is €60,000 (approximately, US$ 82,373.67), of which at least 25% must be paid in upon incorporation. In contrast, the minimum capital requirement for an SL is € 3,000 (approximately, US$ 4,119.96), but it must all be paid in on incorporation.

The following comments apply to both SAs and SLs, unless specifically indicated otherwise:

1.3 Minimum Capital

As indicated above, the minimum capital amount to incorporate a company in Spain is the following:

For SAs: € 60,000, of which at least 25% must be paid in upon incorporation. Payment of the outstanding portion of capital must be carried out as indicated in the company's by-laws.

For SLs: € 3,000, all of which must be paid in upon incorporation.

Contributions in kind are acceptable in both cases, but in the case of SAs, if no exception applies, they require prior appraisal from an independent expert.

1.4 By-laws

There are generally no limits on the provisions of the by-laws to be adopted for the local subsidiary, but they must comply with the requirements of Spanish corporate law (for instance, in the case of SAs, no different rights can be granted to the same type of shares). The by-laws must state, however, at least the corporate name and address, the corporate purpose, the term for which it is incorporated, the date of commencement of operations, the capital, the means of discussing and making decisions, the fiscal year and the type of management.

1.5 Management

Four forms of directorship are available:

In the case of SAs:

(i) One sole director;

(ii) Two or more separate directors;

(iii) Two joint directors;

(iv) A Board of Directors. A Board of Directors must have a minimum of three (3) members.

In the case of SLs:

(i) One sole director;

(ii) Two or more separate directors;

(iii) Two or more joint directors;

(iv) A Board of directors. A Board of Directors must have a minimum of three (3) and a maximum of (12) members.

The company's directors need not be Spanish nationals but, if foreign directors are appointed, they must obtain a Foreigner Identification Number ("NIE"). Spanish and Foreign companies may also act as directors but, if they are appointed, they must obtain a Spanish Tax Identification Number ("NIF"), and they must also appoint a legal representative.

1.6 Shareholders Meeting

(i) Types of Meetings

There are two types of Shareholders' Meetings, depending on their purpose. The meetings may be ordinary or extraordinary. Ordinary meetings are held to review the annual accounts, the management of the company and the allocation of financial results (i.e., Annual General Meeting). They must be held within 6 months after the close of each fiscal year. Other meetings held at any time to discuss any different matters are regarded as extraordinary meetings. However, ordinary meetings may also include issues not related to annual accounts.

(ii) Quorum Requirements

For SAs, regular resolutions, that is, those not entailing an amendment of the company's by-laws, have the following quorum requirements:

- 25% on first call.
- any percentage on second call.

In contrast, special resolutions (those amending the by-laws) require at least:

- 50% on first call.
- 25% on second call.

These percentages always refer to authorized capital percentages. The by-laws may increase said percentages, but without reaching unanimity.

(iii) Examples of special resolutions are resolutions on capital increase or reduction, change of corporate purpose or address, issue of debentures, merger and split-off. In contrast, there are no special quorum requirements for SLs to adopt quotaholders' resolutions, only voting requirements.

(iv) Voting Requirements

In the case of SAs, once the quorum is met, shareholders' resolutions require a majority vote of all attending or represented shareholders. In case of a special resolution, if the meeting is held at first call, the absolute majority of those attending or represented shareholders |must vote in favor. However, If the meeting is held at second call, two-thirds of the attending or represented shareholders must vote in favor. The above quorum and voting requirements may be raised above the statutory ones.

In contrast, SLs require the majority of votes for regular resolutions with the requirement that they represent at least 1/3 of the votes corresponding to the quotas into which the capital is divided.

For special resolutions, the following votes are required:

(a) For the increase and reduction of capital and any amendment of the by-laws, the favorable vote of more than 50% of the corporate capital is required.

(b) For the transformation, merger or split-off, the suppression or limitation of the right of preference in capital increases, the exclusion of partners, relocation to a foreign country, the assignments of all assets and liabilities and the authorization for the directors to conduct the same activity, the favorable vote of at least 2/3 of the corporate capital is required.

The above voting requirements may be raised by the statutory ones.

1.7 Accounts

The mandatory financial statements are:

(i) Balance sheet;

(ii) Profit and loss account;

(iii) Changes in Equity Statements;

(iv) Cash Flow Statement; and

(v) Annual Report *(Memoria)*.

For companies which are obliged to have their annual accounts audited, the following documents are also mandatory:

(i) Management Report *(Informe de Gestión)*, which must include a proposal to allocate the results; and

(ii) Audit Report. *(Informe de Auditoría)*.

These financial statements must be prepared by the directors within 3 months after the close of the fiscal year. Approval by the shareholders must be given within 6 months after the close of the fiscal year. Thereafter, the accounts must be filed with the Commercial Registry within 1 month after approval by the shareholders.

1.8 Exchange Controls

There are no significant restrictions on foreign investment in Spain since the Royal Decree of April 23, 1999 deregulated capital transactions and investments unless foreign companies operate in special sectors, such as TV and radio broadcasting, gambling, air transportation and defense, or if the investment is originated in any of the countries considered tax havens by the Spanish government (e.g., Gibraltar, Channel Islands, etc.). If this is the case, the investment is subject to prior verification from the Foreign Investment Office, a division of the Ministry of Economy and Finance.

In addition, note that once the foreign investment takes place, it is necessary to declare the investment and register the investor with the Foreign Investments Registry by filing the pertinent forms.

1.9 Legal requirements to incorporate a company in Spain:

I. Incorporation before a Notary Public

Under Spanish Law, a company is incorporated by means of a notarized deed granted by the founding shareholders.

The notarized deed of incorporation must include the following documents:

(i) Name Clearance Certificate. This Certificate is issued by the Central Commercial Registry within fifteen days after the application date and it certifies that no other company operates in Spain under the same or a similar name. This certificate is valid for three months, but the name is reserved for six months. In the case of expiration, it will be necessary to apply for a renewal.

(ii) Bank Certificate. Foreign shareholders must obtain a bank certificate from a bank legally established in Spain, stating that the funds contributed to capital in exchange for shares have been received.

(iii) Power of Attorney. A Power of Attorney to be executed before a Notary Public in the country of the shareholder/s is required to incorporate the company, in order to approve the by-laws and appoint the members of the first management body. Once the Power of Attorney has been executed before a Notary Public, it needs to be authenticated with the Apostille of The Hague Convention.

The notarial deed of incorporation must also include the following details:

(a) Name and civil status of the shareholder/s (or corporate name, if the shareholder is a corporation), nationality and domicile. Please note that according to Spanish corporate law, all of the shareholders are required to appear (personally or represented) before the Notary Public to incorporate a company. The incorporation of sole shareholder companies is authorized under Spanish law.

(b) Appointment of Directors. The members of the management body do not need to be Spanish nationals or residents in Spain. Notwithstanding the above, as indicated, foreign directors and foreign persons empowered by Spanish companies must have or need to apply for a NIE. Having a Board of Directors of three members is normal practice is Spain. Further, a lawyer generally serves as a Secretary-non-Director and handles all the legal paperwork involved in the day-to-day operation of the company. The Directors will have to accept their appointment either before the Notary Public when the company is incorporated or after the company's incorporation through a letter of acceptance.

(c) If all the Directors of a company are non-Spanish tax residents, it will be necessary to appoint a Spanish resident tax representative (who does not need to be a director). This individual shall either be a Spanish citizen or a foreigner with a Residence and Work Permit in Spain. This person will be in charge of signing all the tax documents of the company to be filed with the Spanish Tax Authorities.

(d) The by-laws of the company must be attached to the notarized deed.

(e) In compliance with Law 10/2010, of April 28 on Prevention of Money Laundering, it is necessary to state in the public deed the identity of the ultimate real owner of the founding shareholder/s. It is understood that the real ultimate owner is the individual or individuals who hold/s at least 25% of the company's capital, either directly or indirectly. If the ultimate holding company is listed, the above-mentioned Law does not apply, but it is necessary to state so in the public deed. If a real owner exists, it is sufficient to identify the name and identification number of this person (e.g., his/her passport number).

II. Registration of the Company

Once the Deed of Incorporation and by-laws have been executed before a Notary Public, they must be registered with the Commercial Registry. Registration is accomplished by filing the public deed of incorporation with the Commercial Registry.

Fulfilling the requirements for the incorporation of a company in Spain normally takes one month. This process could be expedited in some special circumstances.

III. Tax Obligations with regards to the Incorporation (SA or SL)

(i) Spanish Tax Identification Number. *(NIF)* The SA or SL company must obtain a tax number to be used in any transactions which may have tax consequences.

(ii) Transfer Tax. The incorporation of a company in Spain is exempt from Capital Tax *(Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados)* as of December 3, 2010. However, a formal Tax Form (Modelo 600) must be filed within 30 days following the execution of the incorporation deed.

(iii) Value Added Tax Registration. Registration of the company for VAT purposes.

(iv) EU VAT Number. A VAT Number must be obtained when supplying/receiving any EU sales or services.

(v) Local Business Tax *(Impuesto sobre Actividades Económicas)*. The company must be registered for Local Activity Tax purposes in order to carry out its business. However, the company will be exempt from Local Activity Tax during the first two fiscal years after its incorporation. Subsequently, the company will be subject to the referred tax. The amount of tax quota due to be paid will depend on the type of activities the company is engaged in.

(vi) The company must be registered as an employer with the Social Security authorities, if applicable.

(vii) Minute Books/Share Registers must be stamped.

(viii) Accounting Books must be stamped.

IV.Tax Obligations After Incorporation (both for SAs and SLs)

(i) Corporate Tax. Currently, the standard rate is 28% (25% as of fiscal year 2016) on the profits of the company, regardless of whether it is a public limited company or a limited liability company.

(ii) VAT. The current rates are 21%, 10% and 4%.

(iii) Local Taxes, if any, depending on local regulations.

2. The Branch

Unlike companies, branches do not have a legal personality different from that of their home office. Thus, the branch liability exposure extends to its head office by operation of law.

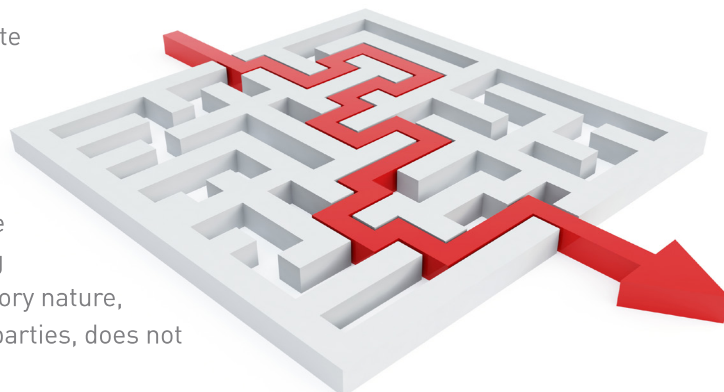
From a corporate standpoint, to the extent that the branch is not different from the entity itself, but rather a part of the foreign company, the corporate requirements are minimal. Basically, all that is required is that a manager duly authorized to manage the affairs of the branch be designated. Also, any subsequent amendment of the Articles of Incorporation and/or by-laws of the foreign company, and/or the amendment of any other document filed in Spain, must be registered with the Spanish Commercial Registry.

Every year branches must file certain financial statements with the Foreign Investment Office, a division of the Ministry of Economy and Finance. This enables the Foreign Investment Office to determine the profit amount which may be remitted abroad. Companies are not required to file these statements.

Likewise foreign companies with branches in Spain must file their Annual Accounts with the Commercial Registry in which the relevant branch is registered every year. If the parent company has already filed its Annual Accounts in the registry of its country, it will only need to provide evidence to that effect. If the parent company is not required to prepare and file Annual Accounts under the laws of its country of origin, it must prepare Annual Accounts related to the activities of the branch and file them with the relevant Commercial Registry.

3. The Representative Office

Like Branches, Representative Offices are not, from a corporate standpoint, different entities in themselves, but rather part of the foreign company. A Representative Office must limit its activities to merely "eyes and ears" activities so as to avoid falling within the scope of a permanent establishment. Please note that the maintenance of a fixed place of business with the sole purpose of advertising, supplying information, conducting research or developing other activities of auxiliary or preparatory nature, carried out for the enterprise itself, without invoicing to third parties, does not constitute a permanent establishment.



Therefore, if the activities are limited to those identified above, the Representative Office will be exempt from Spanish income tax and is also exempt from filing the Annual Accounts with the Commercial Registry. As soon as the Representative Office signs agreements, invoices to third parties or carries out commercial activities, it will be considered a permanent establishment by the Tax Authorities, as it is a branch and will have to pay income tax.

The Representative Office is always subject to taxes deriving from the conduct of its activities (i.e. withholding payroll tax, Social Security).

As you may see, the decision on how to enter the market under Spanish legislation will naturally depend on the type, size and amount of the investment to be made. The tax aspects should also be considered.

II. Tax Planning

1. General Considerations

Spanish branches, corporations and limited liability companies are subject to corporate income tax in Spain on their worldwide net income and capital gains, irrespective of the source of such income or gains.

The standard tax rate is currently 28% and will decrease to 25% in 2016. In addition, companies with a turnover below EUR 10 million may benefit from a reduced tax rate of 25% on a maximum of EUR 300,000 of their total taxable base.

Companies domiciled and operating in the Spanish provinces of Vizcaya/ Bizkaia, Guipúzcoa/Gipuzkoa and Alava/Araba, which are part of the Basque Country autonomous region, may be taxed at a lower flat rate of 28%. The provinces of the autonomous region of the Basque Country and Navarre have developed their own corporate tax laws and regulations, which generally result in a more favorable corporate tax treatment. These laws and regulations somewhat differ from the general rules which are mentioned in this guide.

Spanish law provides a full exemption for dividends and capital gains derived by a Spanish corporate taxpayer from a substantial participation, provided that the following requirements are met: (i) a minimum ownership percentage (5%) or cost of acquisition of EUR 20 million and a one-year minimum holding period in the subsidiary; (ii) for foreign subsidiaries only, a minimum level of (nominal) taxation of 10% under a foreign corporate tax system similar to the Spanish Corporate Income Tax. This minimum level of taxation is deemed to be met if the subsidiary is resident in a country signatory to a tax treaty.

Dividends distributed by a Spanish corporation or a limited liability company to an EU shareholder are exempt from dividend withholding, provided that the abovementioned requirements are met. On the contrary, dividends distributed by a Spanish corporation or a limited liability company to a foreign shareholder are subject to dividend withholding tax at the rate of 20% (19% in 2016), unless otherwise provided for by a Double Tax Treaty.

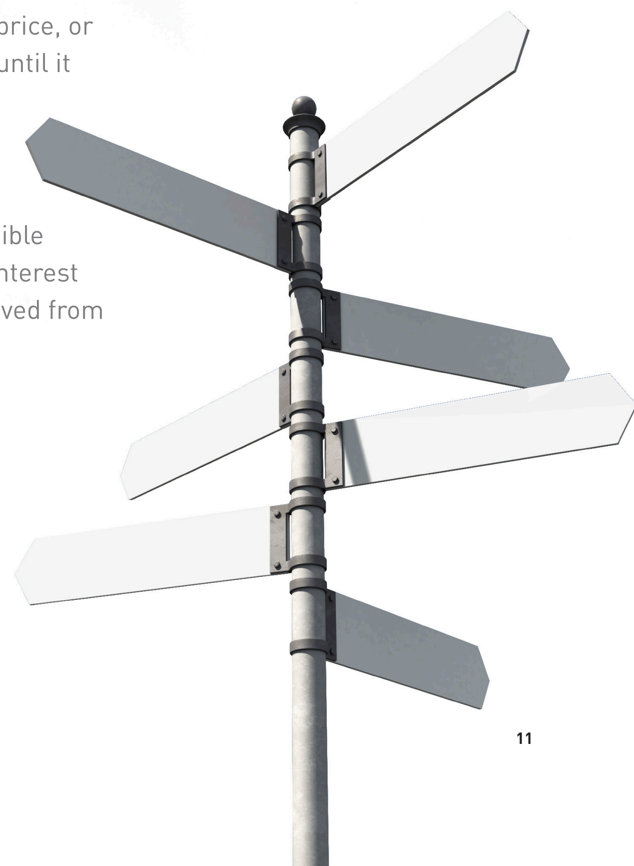
Royalties (in certain specific cases), interest and similar payments made to EU companies are exempt from withholding tax (royalties as of July 1, 2011). The withholding tax on royalties, interest and similar payments made outside of the EU is 24% (for royalties) and 20% (for interest and similar payments) (19% in 2016), unless otherwise provided for by a Tax Treaty. For example, the Treaty between Spain and the US provides reduced tax rates (10%) on royalty payments, except for royalties for the use of copyright in literary, dramatic, musical or artistic works, which are subject to 5% withholding tax; and royalties for the use of films, and of industrial, commercial or scientific equipment, which are subject to 8% withholding tax.

In addition, Spain imposes 20% (19% in 2016) capital gains tax on the transfer or exchange of the stock of Spanish companies; however, following OECD standards, most of the Double Tax Treaties signed by Spain state that such capital gains are not taxable in Spain unless real estate companies are involved.

Spain implemented the EC Directive on the Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (Council Directive 90/434/EEC). This Directive is designed to remove some of the major upfront tax costs of mergers, acquisitions and group restructuring involving companies based in different EU countries. In broad terms, it ensures that, for qualifying transactions, tax on any unrealized gains at corporate and shareholders' level arising on the cross-border transfer of shares or assets will be deferred until they are realized. The Directive also provides for the carry-over of tax losses and tax credits in certain circumstances.

New financial expense limitations are established with an impact in leveraged buy-out transactions. An additional limit of 30% of the operating profit for financial expenses derived from debt granted to purchase stakes in any type of company is established. This limitation is not applicable, however, in the year of acquisition if the debt does not exceed 70% of the acquisition price, or in subsequent years if the debt is reduced by 5% on an annual basis, until it reaches 30% of the acquisition price.

Finally, new rules limiting the use of hybrids (profit-participating loans, redeemable shares, shares with no voting rights, etc.) have been enacted. In this sense, interest paid will no longer be tax deductible for the paying company when the lender could be tax exempt on the interest received or taxed below 10% nominal tax rate. Interest payments derived from intra-group profit participating loans will not be tax deductible.



2. Transfer Pricing

Spanish Corporate Income Tax Act includes the arm's length guiding principle, by which transactions with related parties must be valued according to the conditions that would be agreed upon between non-related parties in the same or similar market conditions. Spanish Tax Law and administrative practice also accept the principles set forth in the OECD guidelines on transfer pricing and multinational companies.

Article 18 of the Corporate Income Tax Act states that taxpayers must value their related transactions according to arm's length principles, and it also provides the valuation methods available for these purposes. Taxpayers must support the valuation made according to the valuation method used with the means legally available and must also keep adequate transfer pricing documentation for all intra-group transactions, including domestic ones.

In accordance with statutory rules and administrative regulations, simplified documentation requirements will be introduced for entities with a turnover under EUR 45 million.

The tax authorities are entitled to adjust the prices or compensations agreed to by related parties (and eventually impose penalties), even regarding domestic related party transactions, and include the profits or taxable income that would have accrued if the conditions to which the related parties agreed are considered not to be at arm's length.

3. Tax Credits

Several long-standing tax credits were abolished as of 1 January 2015 and replaced with a capitalization reserve, which allows undistributed profits to reduce the corporate income taxable base up to 10% of the year's profit if the reserve is maintained for five years.

The R&D tax credit remains in certain cases up to 50% of the amount of qualifying expenses.

NOLs can be offset against profits up to 60% of the taxable base in any given year . Such limitation does not apply, however, to NOLs up to EUR 1 million.

The following limitations will apply to the compensation of NOLs on a temporary basis (only for 2015):

- 50% of the taxable base where the total turnover of the company is at least EUR 20 million but less than EUR 60 million.
- 25% of the taxable base where the total turnover is at least EUR 60 million.

Corporations, companies and branches domiciled and operating in the provinces of Vizcaya/Bizkaia, Guipúzcoa/Gipuzkoa, and Alava/Araba have additional tax credits available and higher percentages in some cases.

4. Schedule for Paying Taxes

Corporate income tax returns must be filed, if necessary, within 25 days after six months have elapsed since the close of the company's fiscal year. Prepayment of the current year's taxes for the equivalent of 18% of the tax quota of the previous fiscal year is due in April, October and December for companies whose turnover in the preceding year exceeded EUR 6,010,121.04. Finally, the statute of limitations for the determination of the final tax liability is four years.

5. Imports and Duties

In general, an importer must pay duty and value added tax upon importing products into Spain. Duty rates are based on the number and origin of the products being imported, and the standard rate of the value added tax is currently 21%. Duty and value added tax apply only to permanent imports.

As of 2015 certain operators are allowed to defer payment of VAT until the periodical VAT return is filed. This option could be applied for by those taxpayers that meet the requirements foreseen in the VAT regulations (i.e. annual turnover exceeding Euro 6.010.121,04), with its validity being extended to the following years unless expressly waived by the taxpayer or if the taxpayer no longer meets the requirements. This measure should help avoid effective payment of VAT if the taxpayers have full deduction of VAT.

Temporary imports are subject to prior authorization from the Ministry of Economy and Finance. Authorizations for temporary imports are granted for a maximum period of two years and are renewable. No duty or value added tax is assessable on temporary imports unless they are not re-exported from Spain within the applicable period.

As of July 2010, in order to import from a Member State of the European Union, it is necessary to obtain an EORI number. This number is the same for all European Countries and must be stated in any filings made with the Customs Office.

In general terms, those entities carrying out transactions with the Customs Office must obtain a new EORI Number or, given the case that they already have one from another Member State, they must apply for it to be recognized in Spain. In this regard, please note that the Spanish Tax Authorities have introduced an additional requirement to link the EORI number to an existing Spanish Tax Identification Number (NIF). As a consequence, entities carrying out import or export transactions from Spain will need to obtain a NIF Number before applying for the EORI Number.

When importing certain types of goods, importers may be required to first obtain an import license from the General Directorate of Foreign Trade in the Ministry of Economy and Finance ("DGCE").

III. Dealer Legislation

1. Distributorship Agreements

There are no specific Spanish laws applicable to distribution agreements in general or the termination rights of distributors in particular. Instead, the general provisions on contractual matters contained in the Spanish Civil Code and Commercial Code govern distribution agreements. Accordingly, parties to a distribution agreement are free to agree the contractual terms that will govern their relationship, provided that such terms do not contravene the law, public morals or public order.

Although a distributor acts in its own name and so cannot be considered a commercial agent as prescribed under Spanish Agency Law, the Spanish courts have held that, in certain circumstances and under specific conditions, the provisions of Spanish Agency Law are applicable by analogy to distribution agreements or, at least, that such provisions should be used as guidelines by the courts when assessing a distribution agreement. Still, this kind of analogy cannot lead to an automatic or direct application of the provisions of Spanish Agency Law. Instead, it has to be proven that specific circumstances justify its application, particularly regarding the requirements and fairness of the compensation for the goodwill generated (Supreme Court Judgments 593/2010 of September 29, 2010 and 647/2013 of November 5, 2013).

The termination of a distribution agreement must be in accordance with the terms of the agreement. In the absence of written agreement, there are no special formalities for the termination of a distribution agreement. In order to meet the burden of proof, notice should be in writing and sent to the other party in any way that provides evidence of such notice and receipt of the termination letter by the other party.

Any termination notice period included in a written distribution agreement will be binding on the parties.

The termination notice should be "reasonable", which will depend on how long the relationship has lasted and the level of integration between the principal and the distributor. The longer the relationship has lasted and the higher the level of integration, the longer the termination notice should be.

Although the period of the termination notice to be given varies in each case, Spanish courts have afforded to distributors the protection offered by Spanish Agency Law. Accordingly, the terminating party should usually give at least one-month notice for each year of the relationship, but if the relationship has lasted a very long time and there is a high degree of integration between the parties, the cap of six months provided by the Spanish Agency Act may be considered too short. Nonetheless, the regulation of the agency should not be mandatorily applied, since the parties have autonomy and freedom to determine the most appropriate notice, provided that the agreed notice period is reasonable given the term of the relationship between the parties (Supreme Court Judgment 378/2010 of June 22, 2010).

If one of the parties terminates the relationship without giving the prior termination notice required by the written agreement or, in the case of an oral distribution agreement, terminates the relationship without providing a "reasonable" prior termination notice, the other party may be entitled to claim compensation for the losses and damages caused by such termination (Supreme Court Judgment 1236/2011 of March 15, 2011).

Under the principle of "damages suffered", the distributor would probably include the non-amortized portion of the investments made in the conduct of the business, provided that such investments were made either at the request of the principal or were reasonable taking into account the expected duration of the relationship. Under the principle of "loss of profits", the Spanish courts would normally include the amount that the distributor would have earned if the contractual or reasonable prior termination notice had been given.

The burden of proof is on the distributor to prove the actual losses and damages suffered, as well as the direct relationship between those losses and damages suffered and the unlawful termination of the relationship.

In addition to the compensation for the losses and damages, Spanish Courts have sometimes recognized the right for a distributor to receive compensation for the clientele generated whenever the distributor has increased the number of clients or substantially increased the volume of transactions with existing clients, and the principal was able to continue to benefit from the same.

The right of the distributor to receive compensation for goodwill has been recognized mainly where the distributor is integrated into the sales organization of the principal, in respect of the tasks to be performed. Circumstances that the Spanish courts have taken into account to consider that the distributor has been integrated within the sales organization of the principal are: (i) the distributor is granted an exclusive distribution right for a given territory; (ii) the distributor is not allowed to sell competing products or otherwise compete with the principal; (iii) the distributor is obliged to provide additional services (to render post-sale services to the customers, carry out advertising activities for the products, etc.); (iv) the principal has the right to control and supervise the distributor's activities; and (v) the percentage that the sale of the contractual products represents in the total turnover of the distributor (the higher the percentage, the more integration is likely to exist).

As for the calculation of the amount of compensation payable for the development of clientele, Spanish courts have applied by analogy the criteria applicable to commercial agents as stated in Article 28 of the Spanish Agency Law. The compensation for the clientele generated should not exceed the distributor's average annual remuneration received over the preceding five years or over the duration of the agreement, if shorter. Contrary to commercial agents who receive a commission as remuneration, the remuneration of the distributor is generally the margin that the distributor obtains when selling the products, that is, the difference between the price at which it purchases the products and the price at which it re-sells the products. However, it is to note that case law is not clear on whether the margin should be the gross margin (that is, the difference between the purchase price and the sale price) or the net margin (that is, the difference between the purchase price and sale price minus expenses and taxes).

The distributor must prove that it has increased customers and that the principal can potentially continue to benefit from them. Factors which will be relevant when assessing whether the principal continues to benefit from the clientele are the existence of a post-contractual non-compete obligation on the distributor, and the principal's knowledge of the distributor's customers (e.g. whether during the relationship the distributor has been providing the principal with information regarding the identity of its clients). However, where the trade mark of the distributed products was so well known that the distributor's efforts had not been crucial to market the products, Spanish courts have adjusted the amount of the compensation for loss of customers.

Spanish courts have accepted the validity of a contractual clause agreed between the parties pursuant to which, upon termination of the relationship, the distributor will not have the right to claim compensation for the clientele generated. While in an agency agreement this type of waiver would be considered null and void, in a distribution agreement the parties may freely agree so. (Supreme Court Judgment 862/2010, of December 30, 2010).

Finally, the distributor will not be entitled to receive compensation for the clientele generated if the distribution agreement has been terminated due to a breach by the distributor, such as nonpayment of outstanding invoices.

2. Agency Agreements

On May 27, 1992, Spain enacted Law 12/1992 on Commercial Representatives, which implemented in Spain Directive 86/653 EEC of December 28, 1986 on the Coordination of the laws of the Member States relating to self-employed commercial representatives. The provisions of law 12/1992 are mandatory and cannot be altered by agreement between the contracting parties with respect to matters within the scope of the said Law.

The primary areas of concern under Law 12/1992 are as follows:

2.1. Right of the agent to receive commissions

Article 12 provides that an agent is entitled to receive commissions not only for transactions which were concluded as a result of its direct action (i.e., purchase orders by agents), but also for orders solicited in an indirect manner (i.e., a customer attracted by the agent refers a third party directly to the principal). In addition, an agent who has exclusive responsibility for a specific geographical area and/or list of customers is entitled to commission with respect to any transaction that is made within its specific geographical area or with customers on its list, regardless of whether the agent actively promoted the customer.

Commission becomes due to the agent when (i) the transaction has been or should have been consummated by the principal according to the agreement between the principal and the customer or (ii) the agreement has been performed, in whole or in part, by the, customer, whichever is sooner. This rule is intended to protect the agent against nonperformance or breach of contract by the principal. Actual payment of commissions must be made no later than the last day of the month following the quarter during which the commission became due, unless the contracting parties have agreed on an earlier payment date.

The agent has a right to receive from the principal a summary of the commissions accrued for each transaction or operation, and a statement of the basis on which the amount of commissions accrued has been calculated. This summary is due on the last day of the month following the calendar quarter in which the commissions have accrued, or sooner if the sales representative agreement provides otherwise. In addition, the agent is entitled to receive from the principal the information necessary to verify the amount of commission accrued by the agent, and to inspect the principal's accounting books for this limited purpose.

The agent will lose its right to receive the commission only if the principal is able to prove that the customer did not perform the agreement for causes not attributable to the principal. Finally, the agent is not entitled to reimbursement of the expenses that it may have incurred in performing the commercial agency, unless otherwise agreed.

2.2. Non-competition covenants

If the agency relationship has lasted less than two years, the non-competition covenant may not exceed one year from the date of termination of the agency agreement. If the agency relationship has lasted over two years, the non-competition covenant may last up to two years. In addition, the covenant not to compete must be limited to a reasonable geographic area or a list of customers and must only affect the class of goods or services covered in the acts or transactions promoted and/or concluded by the agent.

2.3. Damages in lieu of notices.

Agency agreements entered into for a specific term will terminate in accordance with the terms and conditions agreed upon. But if an agency agreement for a specific term continues to be performed by both parties after the lapse of its initial term, the agency agreement will be converted into an indefinite term agreement.

Agency agreements for an indefinite term may be terminated unilaterally by either of the parties upon written notice to the other. In such cases, the required period of prior notice is one month for each year the agency agreement has been in existence with a maximum of six months' prior notice, unless the agreement provides for longer notice periods. The Supreme Court has held that an agent will be entitled to obtain compensation where the notice period is non-existent or shorter than the term required under Spanish Law 12/1992, provided that the agent has proven the damages suffered as a consequence of such lack or shortfall of prior notice.

However, each party to an agency agreement for a definite or indefinite term may terminate the agreement at any time without the need of prior notice in the following cases: (i) when the other party fails to perform, totally or partially, any or all of the obligations established by law or by contract and (ii) when the other party has been declared in bankruptcy or suspension of payments. In such cases, the agency agreements may be terminated upon receipt of the notice of termination stating the reason for the termination.

In practice, the amount of such compensation would be equivalent to the amount that the agent would have earned, had the correct notice period been given.

2.4. Compensation for loss of customers.

Spanish Law 12/1992 provides that, unless the commercial agent breaches the agency agreement, the agent will be entitled to receive a termination indemnity, which may not exceed an amount equal to the agent's commissions for one year (calculated from the agent's average annual commissions over the preceding five years or the period that the agreement has been in force, whichever is the longer), if and to the extent that: (i) the agent has introduced new customers or has significantly increased the volume of business with existing customers, (ii) the principal continues to benefit from the customers obtained by the agent after the agency agreement has terminated, and (iii) the compensation is equitable in the circumstances of each case, taking into account matters such us the existence of a non-competition covenant, loss of commission or any other circumstances.

Spanish Agency Law sets a maximum amount for the compensation for loss of customers, capped at the average annual amount of remuneration received by the agent in the last five years of the agreement. If the agreement lasted less than five years, the reference shall be the average annual amounts received by the agent over the duration of the agreement.

The agent has no right to compensation for loss of customers in the following circumstances: (i) where the termination of the agreement by the principal is due to breach of the agent's contractual or legal obligations; (ii) where the agent has requested the termination of the agreement, unless such request is based on a cause attributable to the principal or based on the age, illness or invalidity of the agent pursuant to which the agent cannot reasonably be required to continue with its activities; and (iii) where the agent has transferred its rights and obligations under the agency agreement to a third party with the consent of the principal.

2.5. Compensation for damages.

In addition to the above, the agent is entitled to recover damages where the prior notice is not sufficient to enable the commercial agent to amortize the costs and expenses incurred during the performance of the agency at the principal's request.

This right to receive a minimum compensation for termination of the agency agreement without cause by the principal cannot be voluntarily waived, because the provisions of Law 12/1992 are mandatory; as a matter of public policy, therefore, any such alleged waiver will be null and void.

2.6. Post-termination commissions.

Upon termination, regardless of any compensation to which the agent may be entitled under Spanish Agency Law, the agent is entitled to collect commission for transactions completed after the agency agreement has been terminated in the following circumstances:

- where the relevant commercial transaction was due to the activity of the agent while rendering its services and has been completed within three months following termination of the agency agreement; or
- where the principal or the agent received a request for the products or services from the customer prior to the termination of the agency agreement, provided that the agent would have been entitled to commission for such transaction if it had been completed while the agreement was in force.

2.7. Statute of limitations.

The right of the agent to claim compensation for damages and for loss of customers will be time-barred one (1) year after the termination of the agency agreement.

IV. Labor Law

The major Spanish piece of legislation in terms of labor law is the Workers' Statute and its implementing regulations, which define the respective rights of employees and employers, general terms of employment contracts, procedures for dismissal and collective bargaining rules, among other aspects. Another important source of labor law are collective bargaining agreements (CBA), which can be negotiated at national, regional or company-wide levels.

The Workers' Statute has been modified by three legal instruments (Law 35/2010 of September 18, 2010, Royal Decree 3/2012 of February 11, 2012—also called the "Labor Reform"—and Law 3/2012, of July 6, 2012) which were enacted in order to introduce more flexibility in the Spanish labor market and reduce the level of unemployment. These instruments have introduced several major changes to the Workers' Statute and its implementing regulations.

Employment Contracts: Employment relationships within the scope of the Workers' Statute are deemed to exist when services are rendered for consideration by an individual for the benefit and within the organization of an employer, irrespective of whether or not there is a written individual contract. If employees waive their rights under labor law, it will automatically be considered null and void.

An employment agreement is established either for a definite (temporary contract) or indefinite (permanent contract) period of time. There must always be a justified reason for temporary employment, otherwise the employment shall be considered permanent. After the employment term, the contract must either be terminated or permanently extended (with benefits in terms of Social Security contributions). There are different types of temporary contracts applicable to specific cases, namely agreements for extraordinary production requirements, certain type of work or services, temporary agreements, training contracts and apprenticeship contracts. In addition, a new type of temporary employment contract was introduced by Law 11/2013, the so-called "first employment contract for young people".

- “First employment contract for young people”: this type of temporary employment contract introduced by Law 11/2013 allows companies to hire an employee with experience under 3 months below the age of 30 for a period of between 3 months and 6 months.

- Apprenticeship contracts: Law 3/2012 made the maximum age the employee can be in order to sign the apprenticeship contract more flexible, increasing the maximum age from 25 to 30 years old. These measures remain applicable while the unemployment rate is over 15%. In addition, companies entering into this type of contract are entitled to benefit from a Social Security deduction of between 75% and 100% of the amount they would pay to the Social Security for those employees hired under an apprenticeship contract.

  The duration of the apprenticeship contract shall range between six months and two years (collective bargaining agreements can increase the minimum or reduce the maximum length of the contract). Law 11/2013 has increased the length of time a potential employee is entitled to sign an apprenticeship contract for from the completion of his/her studies. In this sense, Law 11/2013 allows employers to enter into this type of contract even though five or more years have elapsed since the completion of these studies. Before this reform, an apprenticeship contract could be only entered into with potential employees who had completed their studies within the previous 5 years. This measure will remain applicable while the unemployment rate is over 15%.

Moreover, a type of permanent contract was introduced by Royal Decree 3/2012, the so-called employment contract to support entrepreneurs, for companies with fewer than 50 employees. This special characteristic of this type of employment contract is that during the first year of employment (probationary period), the contract can be terminated without prior notice or entitlement to severance pay. This type of contract can only be used when the Spanish unemployment rate is 15% or over. Employers may only use this type of contract for employees under 30 and they will be entitled to a tax credit of €3,000. Other deductions will apply depending on the specific characteristics of the employee (age, duration of unemployment). The employer is required to keep the employee in employment for 3 years and to maintain the employment level within the company for one year; otherwise the deduction amounts will be need to be returned.

Terminations: Unless the dismissal is for cause, the employer has to choose between paying severance compensation or reinstating the employee. For employees hired after the Labor Reform, the severance compensation is calculated on the basis of 33 days’ salary per year of employment, capped at 24 months.

The severance compensation for the contracts that were in force prior to the Labor Reform will be calculated on the basis of 45 days' salary per year of employment prior to the Reform and 33 days' salary per year of service after the Reform, capped at 720 days of salary. This maximum amount may be exceeded if the calculation of the severance for the period of service prior to the Labor Reform reflects a higher amount; in that case this will be the maximum amount, with a limitation of 42 months' salary.

If the dismissed employee is reinstated, the company is obliged to pay the salaries due for the period of time between the dismissal and the reinstatement or, when applicable, the date on which the court decision renders the dismissal unfair.

In the event of termination of a permanent contract due to economic (negative economic situation), technical, organizational or production-based reasons (known as objective grounds), the compensation will be calculated on the basis of 20 days' salary per year of employment, capped at 12 months. The need to justify the negative economic situation is no longer as strict as it was before, since a situation of "real or foreseen losses" or a "persistent decrease of income" being deemed sufficient for such purposes. Three consecutive quarters during which the level of income has decreased every quarter in comparison with the same quarter in the prior year will be deemed a "persistent decrease in income" and therefore will justify the dismissal.

An employee shall also be entitled to receive compensation for the termination of his/her temporary contract, except in the cases of apprenticeship and training contracts and replacement contracts. The compensation has been increased from 8 days' salary per year of employment to 12 days' salary per year worked. This new provision will be implemented progressively until January 1, 2015. For temporary employment contracts signed on 2014, the severance compensation for termination amounts to 11 days' salary per year worked. For temporary employment contracts signed as from January 1, 2015, the severance compensation for termination will amount to 12 days' salary per year worked.

The latest amendments have introduced relevant changes in collective lay-off regulations: (i) the requirement of obtaining the Labor Authority's authorization has been removed; (ii) if more than 50 employees are affected, then the company has to prepare a outplacement plan for a period of 6 months; (iii) if the company implementing a collective lay-off employs more than 100 employees, or a company that is part of a corporate group employing the same number of employees, had profits within the two financial years prior to its commencement and the percentage of employees terminated aged 50 or over, among the total number of employees terminated, is higher than the percentage of these employees in the entire workforce of the company, then the company must make a special contribution to the Tax Authority.

Working hours and flexibility measures: The maximum work week length is 40 hours. Overtime is, except in exceptional cases, voluntary and cannot exceed 80 hours overtime per year. Employees will be given one and a half days minimum rest in every week of work. An annual vacation of thirty calendar days is obligatory and in certain circumstances, such as marriage (15 days), maternity (16 weeks) and paternity (13 days) others, paid leaves of absence are mandatory.

If there is no agreement on this matter with the employees' representatives or the collective bargaining agreement does not provide anything in this regard, the employer may establish an irregular distribution of 10% of its employees' working schedule over a one-year period.

The transfer of employees or substantially change their work conditions (including the salary, functions and remuneration system) has become considerably easier to justify, as these measures are not linked to the negative results of the company any more, but to competitiveness, production and organizational matters.

A special procedure has been put in place to change work conditions included in a CBA due to economic, technical, organizational or production-based reasons. Two consecutive quarters in which the level of income during each quarter has decreased in comparison with the same quarter in the prior year will be deemed sufficient economic justification. The proceeding includes a negotiation period with the employees' representatives and, in case of disagreement, the involvement of mediation bodies.

The procedure for the suspension of employment contracts is more lax than before, as the prior Labor Authority's authorization has been removed.

Collective Bargaining: Company CBAs will be applicable if their scope of application coincides with a given sector's CBA. This priority of application affects the main matters which are regulated by CBAs, such as salary, overtime, working hours, etc.

- Retirement: Royal Decree-Law 5/2013, of 15 March, included a new type of retirement (partial retirement), which allows partially retired employees to receive 50% of the pension benefit while continuing to work and receive salary for the services provided. Some requirements regarding age and contributions to the social security system must be met.

The age of retirement has been raised from 65 to 67 years. This new provision will be progressively brought until 2027. The age for early retirement has been raised from 61 to 63 years. This new provision will also be progressively brought until 2027.

Non-application of the collective bargaining agreement:

A Commission on Collective Bargaining Agreements for the autonomous regions have been created in order to resolve disputes over the non-application of a collective bargaining agreement.

Unemployment benefits

The entity managing unemployment benefits may require dismissed workers to provide evidence that they have received the relevant legal severance compensation.

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