

REQUISITES FOR BECOMING A TRADER

MARIO R. BONELLO

MORE often than not, traders devote their time and risk their money with the intention of deriving a profit therefrom; this is what is called 'intromissio speculativa'. 'La figura del commerciante risulta pertanto da questi due elementi: la interposizione nello scambio (di merci, denaro, servizi) e la speculazione, collegati fra essi dal rapporto di causa ad effetto: la interposizione è determinata dallo scopo del guadagno e il guadagno è l'effetto della interposizione' (Bolaffio). Again, 'È commerciante quel fotografo il quale esercisce uno stabilimento fotografico e, quindi, specula sia sull'altrui attività, sia colla rivendita delle materie prime. Ma non può qualificarsi tale il fotografo che, esercitando la sua arte, non tiene alcuno stabilimento, ma loca meramente la sua opera.' (Emm. Darmanin no. vs. C. Giglio; Vol. XXVII, Pt. I, P. 958). Section 4 of the Commercial Code defines a trader as 'any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership'. It is of the utmost importance to distinguish between a trader and a non-trader, for a trader has certain rights and duties at law, which are not applicable to a non-trader. Yet a trader does not acquire a juridical status, but a social one.

Our law has not imposed any formality or the necessity of registration for a person to become a trader. It has adopted in this respect a realistic point of view depending on facts, that is, the exercise of acts of trade. 'Biex wiehed ikun kummerċjant il-liġi trid li huwa jagħmel, bi professjoni, u b'ismu, atti ta' kummerċ. U mhux biżżejjed, biex jistabilixxi definitivamente il-kwalità ta' kummerċjant, il-fatt li wiehed jassumi dik il-kwalifika fl-attijiet u l-kuntrattazzjonijiet li huwa jagħmel.' (C. Cutajar vs. S. Camilleri, Vol. 33, Pt. III, P. 466). It may be rightly assumed that Section 4 is one of public policy. It should also be noticed that a very wide

discretion is left to the Courts in deciding what constitutes exercise of acts of trade, what is meant by profession, and how many acts of trade are required. The answer to these questions may vary according to each particular case.

First of all, then, the law requires the person who is to become a trader to *exercise objective acts of trade*, that is those acts enumerated in Section 5. The actual exercise of these acts is required and it should appear therefrom that the person performing them is assuming in respect of third parties a direct, personal and unlimited liability for any consequence deriving from such acts. It may also be pointed out that acts of brokerage, though not included among the objective acts of trade by the law, have been considered to be so by tradition. Such exercise of acts of trade must be repeated for a number of times, though they need not be the same acts of trade which are so repeated. This requisite is a question of fact which may vary and which may have to be decided by the Courts in case of controversy. The acts of trade need not even refer to the same line of trade. The number of such acts of trade may vary from case to case, so that while in some cases a number of them are essential, in other cases, such as in the case of an undertaking, one would be sufficient.

Such exercise of objective acts of trade need not be performed by the individual who is to become a trader 'in persona', but he may appoint agents to act instead of him; but in such a case, the acts are to be performed in the name of the principal. The said exercise of objective acts of trade must be performed with the *intention of speculation*; 'finis mercatorum est lucrum!' So that a person, who in the management of his affairs frequently makes use of bills of exchange (an objective act of trade) does not become a trader if he does not have any intention of making a profit.

The law requires as a further element for becoming a trader that the exercise of acts of trade be *by profession*, that is, that at least they are to form the primary means of living and a constant source of income. 'Il compiere atti di commercio, anche abitualmente, non attribuisce a chi li effettua la qualità di commerciante se l'esercizio di quelli atti non è fatto per professione.' (Bolaffio). The person who is to become a trader must therefore devote his services to trade in such a way that it becomes his normal and permanent occupation, though it need not be his only or his principal occupation, 'perchè commerciante non è se non chi assume una responsabilità illimitata per gli atti di commercio (oggettivi) conchiusi professionalmente nel suo nome commerciale.' (Bolaffio). The draft of the French Commercial Code contained the following definition of a trader: 'A person who notoriously exercises acts of trade as his principal profession'. But when the final text was passed the words 'notoriously' and 'principal' were deleted. So too, in our law the notoriety of the objective acts of trade is not a necessary element, for the objectivity of the acts of trade is not dependent on their publicity. So a person who exercises acts of trade in secret would still become a trader, though obviously evidence to prove that he has acquired the status of a trader may be more difficult to produce. It is a known fact that some persons exercise trade secretly, because of their holding some employment with the Government or for some other reason, but this does not mean that they do not become traders if all the requisites for so becoming exist. 'Il-fatt li kummerċjant ikollu l-liċenza relativa għall-kummerċ tiegħu f'isem il-mara mħabba l-fatt li huwa impjegat ma jnehħilux il-kwalità ta' kummerċjant; għax billi huwa jeżerċita l-kummerċ okkultament u ma jagħmelx mill-kummerċ l-uniku mezz tas-sussistenza tiegħu, huwa jibqa' xorta waħda kummerċjant.'

The third requisite for becoming a trader is that the person who exercises objective acts of trade by profession does so *in his own name*. So that a director or representa-

tive of a business is not a trader. He must assume vis-a-vis third parties full responsibility of the transactions, performed by him. The law does not say that he must also act 'on his own behalf'. So a Commission Merchant, who transacts business in his own name, but for or on behalf of his principal still becomes a trader. As a general rule, of course, a person who acts in his own name acts also on his own behalf. What is really required by the law in this respect is that the person who actually transacts business in his name assumes a personal and direct liability in respect of third parties. Some text-writers, such as Bolaffio, argue that the phrase 'in his own name' implies that the act of trade must be performed also 'on his behalf'. Vivante, Goldschmidt and others, however, rightly disagree.

The law only requires the above three requisites for a person to become a trader. 'I tre requisiti . . . debbono concorrere ed essere concomitanti per far sorgere la figura giuridica del commerciante. La mancanza di uno solo di essi sarebbe sufficiente per fare escludere tale qualità'. (Pipia). No formalities whatsoever are imposed. Act No. XXX of 1927 introduced the Register of Traders, but registration is optional and not compulsory; as a result, it seems, that traders have tacitly agreed not to make use of this Register of Traders. In Italy, 'l'iscrizione obbligatoria nel registro non basta da sola ad attribuire la qualità di commerciante a chi effettivamente non lo sia; ne la omissa iscrizione fa perdere la qualità di commerciante a chi in realtà lo è' (Bolaffio).

One must distinguish between incompatibility to trade and incapacity to trade. In the case of incompatibility, the person could still become a trader, but he would make himself liable to certain sanctions imposed by law or otherwise. In the case of incapacity to trade, on the other hand, the person who is incapable cannot acquire the status of a trader.

Furthermore the law provides in Sec. 4 that the term 'Trader' shall include any commercial partnership. A Commercial Part-

nership acquires the status of a trader the very moment a Certificate of Registration is issued under the Commercial Partnerships Ordinance of 1962. It becomes a trader independently of the exercise of acts of trade. 'Le società commerciali diversificano dagli altri commercianti, persone fisiche o giuridiche, in ciò: che come scrive il Mancini nella sua Relazione - costituite le società commerciali, le medesime, *fin dal momento della loro legale costituzione*, sono persone rivestite della qualità di commercianti, prima ancora e senza richiedere da parte di questi enti collettivi una prova dell'esercizio abituale del commercio.' The object for which the commercial partnership is set up takes the place of the actual exercise of objective acts of trade and this is an exception to the general rule. 'Ciò che dà alla società l'impronta commerciale è l'oggetto sul quale spiega la sua operosità'. (Bolaffio).

But what about the partners of a Commercial Partnership? Do they acquire the status of a trader? As regards *limited partners*, who have their liability limited to their amount of their share in the partnership (all partners in a Limited Liability Company and at least one partner in a partnership 'en commandite') all text-writers agree that they do *not* become traders. But conflicting views exist as regards *general partners*, who are liable for the losses of the partnership in an unlimited way (all partners in a partnership 'en nom collectif' and at least one partner in a partnership 'en commandite'). Those who argue that general partners become traders come to this conclusion because in the event of

bankruptcy of the partnership the general partners also become bankrupt, and as only traders can be declared bankrupt so it follows that the general partners are by law considered to be traders. Our Courts tend to favour this view, though the matter 'ut sic' has never as yet formed the object of a decision.

Yet the better view today seems to be that general partners do *not* become traders; it is the partnership as such that is a trader, for it is considered by law as a 'juridica persona', subject to all the rights and duties of traders; a commercial partnership has its own name, a legal domicile, a capital and a will of its own; it is by law considered as a fictitious person. Furthermore, if general partners become traders, they would do so from the moment the said Certificate of Registration is issued and this would make them become traders prior to and independently of the exercise of acts of trade, which as we have seen is a necessary element for becoming a trader, which exception can in no way be justified. Again if they do become traders, what trade books would they be bound to keep? The bankruptcy of the general partner should not be regarded as resulting from the fact that he is a trader, but it must be regarded as a *sanction* established by law in order to protect the partnership's creditors, and therefore as an exception to the general rule. A Commercial Partnership does not, therefore communicate at the general partners its status of a trader; but in the event of bankruptcy the status of bankruptcy is conveyed to the general partners in the sole interest of the partnership's creditors.