

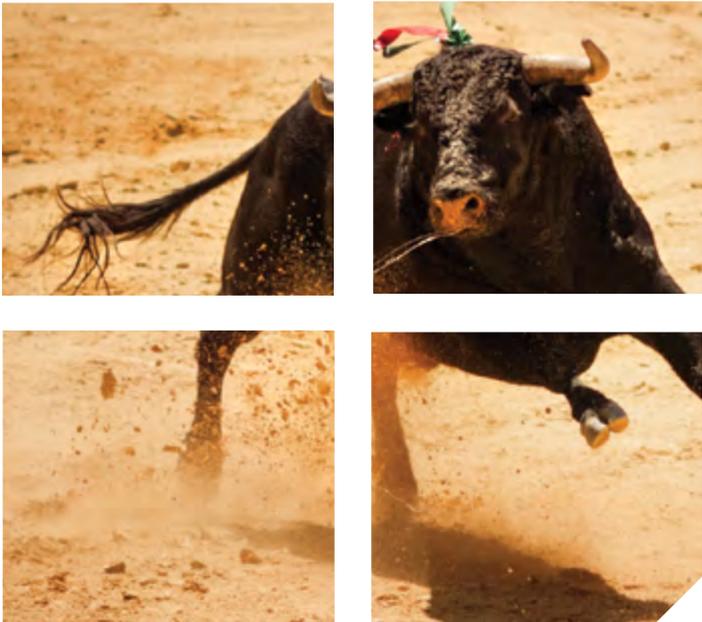
# Collection Profile Spain



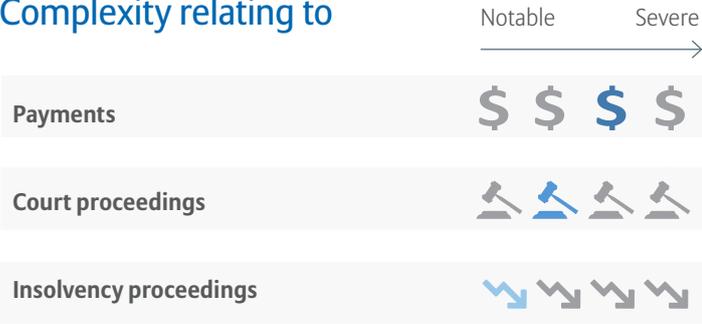
## Collecting in Spain

- The payment behavior of Spanish companies remains poor, with payments often occurring in 70 to 80 days on average. Commercial credit (late payment) constitutes an underlying feature of commercial exchanges in Spain.
- The judicial process in Spain is very slow, so it is usually preferable to conduct efficient and orchestrated debt collection efforts prior to considering legal action.
- When the debtor has become insolvent, collecting debt becomes extremely complicated, especially as far as unsecured creditors are concerned.

## Collection complexity



## Complexity relating to



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## General information

### Availability of financial information

Except for stock exchange listed companies, little information on domestic companies is publicly available. Nonetheless, businesses have an obligation to publish their financials in the official Mercantile Register, and a lack of publication may sometimes lead to closing the company's inscription in the Register.

Euler Hermes obtains financial data from companies as well as from external information providers in order to cross-verify its database of doubtful debtors. Euler Hermes then allocates each company a grade reflecting its financial health and how it conducts business. Grades represent a core of our knowledge and analysis, and help clients identify and avoid risk. Data is continuously monitored to offer the most up-to-date information to support management decisions.

### Main corporate structures

Liability for business debts is determined by legal structures, which are described as follows:

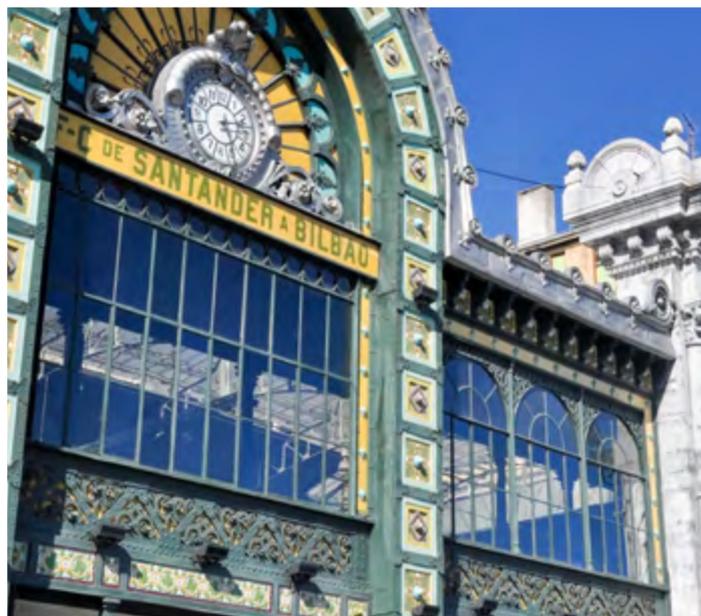
- Sole Proprietorship (Empresario Individual or Autónomo) is available for small businesses managed by an individual and for which no commercial structure is necessary. In this case, the owner is held liable for all business debts. Two or more individuals may also decide to share ownership and responsibilities through Partnerships (Sociedad Colectiva), in which case the partners may be jointly and individually liable for the actions of the other partners. Limited Liability Partnerships (Sociedad Comanditaria) may alternatively offer limited liability to the partners.
- Private Limited Liability Companies (Sociedades de Responsabilidad Limitada, SL or SRL) and their simplified version New Enterprise Limited Companies (Sociedades Limitadas Nuevas Empresas) require minimal capital funds (EUR 3,000) while the shareholders' liability is limited to their contribution. Public Limited Liability Companies (Sociedades Anónimas, SA) are used for larger structures willing to divide their capital (at least EUR 60,000) into tradable shares. In these entities, the shareholders' liability is limited to the value of their shares. Finally, Cooperative Companies are common in the farming sector: the workers are the shareholders, and this type of company is to be registered in a special register depending on the Regional Government.
- Foreign companies may alternatively settle in Spain through Branch Offices, which provide no liability limitations to the foreign parent company. Joint Ventures may take the form of any legal structure listed above, but incorporation is not necessary, so a contract drafted for this purpose would suffice.

### Regulatory environment

Spain has a Civil Law system in which the rules are essentially codified and supported by case law evolutions. The judiciary divides into various court levels including Municipal Courts (Juzgados de Paz) dealing with small claims, District Courts (Juzgados de Primera Instancia), Commercial Courts (Juzgados de lo Mercantil) in the



**Days Sales Outstanding (DSO):** Late payment of up to 15 or 20 days can still occur, with payment often reaching 70 to 80 days on average.



main cities, Administrative Courts (Juzgados de lo Contencioso-administrativo), Appeal Courts spread at the provincial level (Audiencias Provinciales) and a Supreme Court (Tribunales Superiores de Justicia) acting as the court of final jurisdiction.

## Getting Paid

### Days Sales Outstanding (DSO)

The payment behavior of Spanish companies remains poor and commercial credit constitutes an underlying feature of commercial exchanges in Spain. Despite an improvement in 2014 and 2015, late payment of up to 15 to 20 days can still occur and payment often reaches 70 to 80 days on average. As a general rule, the larger the company, the longer the terms.

### Late payment interest

Spain has implemented the Recast Directive 2011/7/EU which stipulates that payments in the EU must be made within 60 days, through the Royal Decree Law No 4/2013 which entered into force in February 2013. By law, the parties may agree on payment terms up to 60 days, but invoices become payable within 30 days if no agreement has been made on the matter. In addition, the law entitles the creditor to receive late payment compensation as agreed through a contract or calculated on the basis of the European Central Bank's refinancing rate increased by 8 percentage points.

Late payment interest essentially is a negotiation tool in the amicable collection phase, though it would also be claimed during the legal phase even though it would rarely be recovered.

### Debt collection costs

In addition, creditors are entitled to receive a flat EUR 40 sum (under the juicio monitorio proceduto) to cover 'minimum supplementary damages,' while also being able to claim compensation for all recovery expenses (legal fees, recovery agency fees, etc.) imputable to the debtor. In practice, not all courts would accept this and it may delay the process.

### Ownership protection

Retention of Title (RoT) agreements aiming to preserve ownership over goods until the related invoice is paid in full (simple RoT) are not common in Spain, but they are admissible. RoT provisions must also be signed before a notary and be registered with the Registro de Bienes Muebles Central, therefore the process may be constraining, so it is not used often in practice.

### Payments

Bank transfers are among the most popular payment means for international transactions as they are fast, secured, and supported by an increasingly developed banking network internationally and domestically. Export transactions are usually guaranteed through an Export Credit Insurance policy, which helps minimize the risk of sudden or unexpected customer insolvency. Euler Hermes' worldwide network of risk offices monitors the financial well-being of customers and grants them a specific credit limit up to which clients may trade and claim should something go wrong. Alternatively, Standby Letters of Credit (a bank guarantees the



#### Payment terms:

By law, the parties may agree on payment terms up to 60 days, though invoices become payable within 30 days if no agreement has been made.



debtor's credit quality and repayment abilities) are often used in relation to export shipment transactions since they constitute reliable guarantees which can be triggered as a 'payment of last resort' if the client fails to fulfil a contractual commitment. Also, irrevocable and confirmed Documentary Letters of Credit (a debtor guarantees that a certain amount of money is made available to a beneficiary through a bank once certain terms specifically agreed by the parties have been met) are increasingly relied upon. Bank guarantees are increasingly difficult to obtain while checks offer no security. Promissory notes (pagaré) are rather common because they are directly enforceable before tribunals if left unpaid, and lead to the debtor's registration with the Registro de Aceptaciones Impagadas (with significant impact on credit ratings). Bills of exchange (recibos) are similarly used as debt recognition titles when the commercial partner is known and trustworthy. Overall, it is advisable to request down payment whenever possible.



## Collecting overdues

### Amicable action

#### Negotiating

The judicial process in Spain is very slow, so it is usually preferable to make concessions at the amicable stage in order to avoid legal actions which can lead to insolvency proceedings.

Before starting legal proceedings against a debtor, assessing its assets is also important as it allows verification as to whether the company is still active and whether recovery chances are at best. In addition, it is essential to be aware of the debtor's solvency status: if insolvency proceedings have been initiated, it indeed becomes impossible to enforce a debt.

### Legal action

#### Ordinary proceedings

If the debt is certain and undisputed, fast-track proceedings may help solve the issue with limited use of the courts. The 'juicio cambiario' procedure aims at obtaining a Payment Order for the recovery of debts documented by a promissory note, check or bill of exchange. The process is very short by Spanish standards (eight months to a year) and starts with an attachment proceeding against the debtor's goods. The

'juicio verbal' is a similar (although oral) procedure which can be initiated for claims below EUR 6,000. The 'juicio monitorio' procedure, in addition, only requires common commercial documentation. Since October 2015, the claim for payment can be done through a notary. If the buyer recognizes the debt (or fails to appear within 20 days from the claim notification), the process becomes an attachment proceeding against the debtor's goods. The attachment proceeding must always be executed through the court. If the buyer doesn't recognize the debt, however, the process becomes an ordinary process. The Monitorio was originally created for claims up to EUR 250,000 but this threshold has now been removed.

In any case, the procedure must be transformed into a normal lawsuit if the debtor fails to pay or brings a defense. When the debtor company has assets in other EU Member States, a European Payment Order procedure facilitating the recovery of undisputed debts (under Regulation EC No 1896/2006) may furthermore be triggered. In this case, the demanding party may request a domestic court to issue an Order to Pay which will then be enforceable in all European Union countries (except Denmark) without exequatur proceedings. Ordinary legal action (juicio ordinario) would usually commence when amicable collection has failed. Legal dunning would often start with a registered Demand Letter which has no legal value apart from recalling the debtor of their obligation to pay the principal together with late payment interest (as contractually agreed or taking a legal

rate as a reference) within ten days. The debtor can then make a proposal for a possible instalment agreement. Otherwise, the creditor would file a claim (in excess of EUR 6,000) with the District Court and serve the debtor with Summons. The debtor is then given 20 days to file a defense, the parties exchange arguments, and a preliminary hearing is organized by the court prior to rendering a decision. The courts would typically award remedies as required by the parties at the start of the proceedings, in the form of compensatory damages, injunctions, specific performance, etc. Punitive damages are not available, however.

#### **Necessary documents**

- Invoices
- Checks
- Delivery notes (whenever the delivery note is not signed by the debtor, a certificate from the transport company is required)
- Actualized statement of account
- Promissory notes
- Credit notes
- Power of Attorney (Hague Apostille)

#### **Time limitations**

Commercial claims, based on transactions that occurred before October 2015, can be brought to court within 15 years. Transactions after October 2015 must be claimed within five years. The three year limitation on unpaid promissory notes and checks still applies and the limitation in transportation disputes remains at one year.

#### **Provisional measures**

In exceptional circumstances, provisional measures may help to preserve the creditor's interests pending a final decision. Upon request, the courts may order provisional measures aiming at preserving the status quo, at preserving evidence or at avoiding irreparable damage (attachment of the debtor's assets, mandatory injunctions to do something, prohibitory injunctions to prevent from doing something, protection of rights, etc.).

It would be necessary to demonstrate that the claim has a good chance to succeed and that damages alone would not suffice in the absence of precautionary measures. In emergency situations, the court may take its decision *ex parte* (i.e. without the debtor being present) within one to three days, though the court would usually request that the claimant provide security on costs in order to protect the respondent from irresponsible action.

#### **Lodging an appeal**

Decisions rendered in first instance may, within 20 days, be brought before the Appeal Courts, which would review the case taking both issues of law and fact into consideration. The decision rendered in second instance may also be appealed against before the High Court, which would strictly focus on legal interpretation matters.

#### **Enforcing court decisions**

A judgment is enforceable as soon as it becomes final (i.e. when all

appeal venues have been exhausted). If the debtor fails to satisfy the judgment within 20 days, and upon request, the Court Clerk shall issue an order to move proceedings forward and shall contact the financial institutions, public registries and any other company or persons so that they are able to provide a list of any assets and rights belonging to the debtor which they know of. As a result, enforcement proceedings would always be more quick and efficient when the debtor's assets can be identified.

The assets shall then be attached in the following order: (i) Cash or current accounts of any kind; (ii) Credits and rights realizable in the act or in the short term, and entitlements, securities or other financial instruments admitted for negotiation on an official secondary securities market; (iii) Jewels and works of art; (iv) Income in cash, regardless of its source and the reason for its accrual; (v) Interest, income and revenue of any kind; (vi) Moveable property or livestock, shares, titles or securities not admitted to official listing, and company shares; (vii) Real estate; (viii) Wages, salaries, pensions and income from self-employed professionals and commercial activity; (ix) Credits, rights and securities realizable in the medium and long term. The debtor may negotiate alternative arrangements or appeal the enforcement order within five days of delivery, however the appeal would not suspend the proceedings.

#### **How long could legal action take?**

In practice, the 'juicio monitorio' procedure would often take a year or so depending on court timing and on the debtor's reaction. Obtaining a court decision under the Ordinario proceedings would take 18 months, but enforcement could at least double this estimate. Proceedings involving foreign parties would in practice be considered by courts equally as proceedings involving domestic parties only. Therefore, no particular delays ought to be expected.

#### **How much could this cost?**

Court fees (Tasa judicial) depend on the type of procedure, ranging from EUR 100 for European Order for Payment and incidental bankruptcy processes, to EUR 1,200 for cassation and extraordinary infringements law.

#### **Collection @ Euler Hermes**

It is always advised to attempt collection prior to any legal action in order to maximize chances of successful recovery and avoid legal costs and delays. Our key principle is to collect in close proximity to the debtor, using a series of letters, emails and phone calls in the local debtor language. Our World Collection Network of Euler Hermes offices and external providers are experts in professional trade debt collection and negotiation, ensuring positive outcomes while retaining important client relationships. Euler Hermes can handle the complete collections process from amicable, pre-legal action through to judgment and enforcement.

## Alternatives to legal action

### Alternative Dispute Resolution methods (ADR)

Given the difficulty obtaining timely decisions from courts, Alternative Dispute Resolution methods such as mediation, assisted negotiation and arbitration constitute an increasingly common way to settle domestic and international business disputes in Spain.

Mediation involves the nomination of a mediator who is given the responsibility to help the parties reach a compromise. In other words, the mediator has no authority to decide on the behalf of the parties and they cannot bind the parties with a decision. An agreement is only binding if a settlement agreement is entered into between the parties at the end of mediation. The mediator really acts as a facilitator to settlement. Arbitration, rather, involves the parties agreeing to rely on an independent and impartial third-party arbitrator, who is given authority to settle the dispute on their behalf. The arbitrator's decision is binding on the parties.

As an out-of-court settlement method, ADR can be cost-effective, generally reduces delays, allows preservation of confidentiality and offers a binding decision which may then be enforced before the courts if necessary. When international transactions are involved, international arbitration may also be considered. Mediation has been gradually promoted since the Mediation Act of 2012 while arbitration is commonly relied upon since the Arbitration Act of 2003 (as amended in 2011), but the trend essentially coincides with the fact that business disputes encompass a significant amount of technical details which are often best settled through expert and confidential negotiations.

### Foreign forums

Spain is a signatory to the Rome I Regulation on the law applicable to contractual obligations, which stipulates that the parties of a contract may, by mutual agreement, choose the law applicable to their contract, and select the court that will have jurisdiction over disputes. Spain is also a signatory to the Hague Convention of 15 June 1955, on the law applicable to international sale of goods, which stipulates that contracts shall be governed by the law chosen by the parties, the general spirit of the agreement and the circumstances of the case. Therefore, business partners may alternatively agree to solve their business disputes in a foreign forum (i.e. under a foreign law or before a foreign court), although domestic courts would typically retain exclusive jurisdiction over specific areas of law (i.e. insurance law, consumer law, employment law, immovable property law, insolvency/company law, etc.). In addition, domestic courts are likely to deny applying the foreign jurisdiction clause if the chosen foreign law has no relationship with the contract, or if the chosen foreign law is manifestly incompatible with Spanish public policy. Overall, using a foreign court would make sense if the international dimension of the transaction requires it (and the contract allows it), but relying on foreign courts to escape lengthy proceedings in Spain has no particular interest as procedural costs would be disproportionate.





### Enforcing foreign awards

Foreign judgments against debtors owning assets in Spain are generally enforceable but various circumstances may apply. On one hand, decisions rendered in an EU country would benefit from particularly advantageous enforcement conditions. Apart from EU Payment Orders, which are normally enforceable directly in domestic courts, the two main methods of enforcing an EU judgment in Spain are by the use of an European Enforcement Order (EEO, as provided under Regulation EC No. 805/2004) when the claim is undisputed, or by registering the judgment under the provisions of the Brussels I Regulation (44/2001).

If the judgment qualifies as an uncontested claim, it can be enforced directly (i.e. without registration) by use of an EEO, provided that the debtor has identified assets in the country. A European Small Claims Procedure (as provided by Regulation EC 861/2007) aiming at eliminating intermediate steps may similarly be relied upon while enforcing decisions up to EUR 2,000.

If the claim is disputed, the procedure for registering an EU judgment with domestic courts is relatively simple. The judgment holder must apply to the relevant court for the judgment to be registered and provide the court with, among other documents, an authenticated copy of the judgment, a certified translation and, if interest is claimed, a statement confirming the amount and rate of interest at the date of the application and going forward. Once the judgment has been registered, it can be enforced as if it were issued by domestic courts (according to the Recast Regulation EC 1215/2012, such an exequatur procedure is no longer required from January 2015).

On the other hand, judgments rendered in foreign countries outside of

the EU would normally be recognized and enforced provided that the issuing country is party to a bilateral or multilateral agreement with Spain (such treaties have been signed with Brazil, Bulgaria, China, Colombia, El Salvador, Israel, Mexico, Morocco, Romania, Russia, Thailand, Tunisia and Uruguay). In the absence of reciprocal arrangements, exequatur proceedings would take place before domestic courts. As a general rule, foreign judgments cannot be reviewed on the merits of the case, but the courts would generally deny admissibility where the foreign decision is neither final nor enforceable in the issuing country, deemed incompatible with domestic public policy or with decisions rendered by domestic courts, if the defendant has not benefited from a due process of law, etc. It should be emphasized that, although Spanish courts do not award punitive damages, they have in certain circumstances agreed to authorize enforcement of punitive damages orders by a U.S. tribunal. Spain is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, therefore its domestic courts ought to recognize and enforce awards rendered through international arbitration proceedings.

### Litigation @ Euler Hermes

Should legal action be necessary Euler Hermes can provide support throughout the legal process from judgment to enforcement via our World Collection Network of Euler Hermes offices and external providers. Legal action can often be complicated and expensive, so you will be informed of all costs prior to any action and advised on which route is best to take.

## Handling insolvent debtors

The insolvency procedure is subject to a liquidity test (*insolvencia actual*) aiming at establishing whether the debtor is permanently unable to settle its due debts.

The Spanish Insolvency Act (as amended by Law 38/2011 of October 2011) provides for insolvency proceedings (*concurso*) inspired by U.S. Chapter 11 and encourages pre-insolvency debt restructuring alternatives to liquidation.

Insolvency proceedings normally commence upon notification of financial difficulties to the court by either the debtor or their creditors, and include a common phase in which the judge will appoint, as a general rule, one or more receivers (depending on the firm's turnover) in charge of managing the business and of determining the debtor's estate/outstanding debts.

### Insolvency proceedings

#### Out-of-Court proceedings

The law provides debtors with an opportunity to seek an out-of-court Formal Refinancing Agreement (*acuerdo de refinanciación formal*). When out-of-court agreements are concluded, it should be noted that the parties are free to write off as much of the debt as they deem necessary.

#### Restructuring the debt

The receivers' opinions as to the viability of the debtor company may lead to the opening of a composition agreement phase (*propuesta anticipada de convenio*) designed to encourage the debtor and creditors to permit the restructuring and survival of the business. By contrast with most countries, however, the Spanish insolvency framework does not provide any moratorium on parallel enforcement proceedings during the debt-restructuring phase. Insolvency proceedings may be opened if the debtor has less than 50 creditors, if its estimated liabilities do not exceed EUR 5 million or if the debtor has filed an early composition agreement proposal. Interestingly, the debtor needs the court's authorization to write off more than 50% of the debt and to agree to a period of payment longer than five years.

#### Winding up proceedings

The common phase (as well as the failure of the restructuring phase) may alternatively lead to the opening of a liquidation phase, the purpose of which is to wind-up the debtor's assets and satisfy its debts. The creditors must then file their claims with the court within one month following the publication of the insolvency declaration in the Official Gazette.

#### Priority Rules

All creditors would be entitled to receive a similar percentage of the overall debt value, but complex priority rules normally apply while distributing the proceeds to the creditors. Debts incurred as a result of the insolvency situation would be repaid first and in full. Section 84.2.11 of the Act would then allow considering 50% of 'fresh money'



loans obtained during the debt-restructuring phase as priority claims. Privileged debts (debts secured with mortgage or pledges, salaries, taxes, etc.) would finally be given preference over normal (subordinated and unsecured) debts which would, in practice, have little chance to be repaid.

#### Cancellation of suspect transactions (clawback)

Receivers are normally entitled to request the court to cancel certain transactions concluded prior to the insolvency proceedings. In particular, any measure taken by the debtor deemed fraudulent or detrimental to the creditors (premature payments, gifts, irrational contracts, undervalued transactions, etc.) would typically be void and converted into either priority claims or normal unsecured debts depending on the act at stake. A suspect period of up to two years may apply.

#### How long could insolvency proceedings take?

Insolvency proceedings in Spain last for two to three years on average, but can last for up to ten years in the most complex cases.

#### Necessary documents

- Invoices
- Checks
- Delivery notes
- Actualized statement of account
- Promissory notes
- Credit notes (if any)

#### Insolvency @ Euler Hermes

Euler Hermes works closely with debtors, creditors and lawyers to provide support during insolvency and restructuring processes. With many options available when it comes to insolvency action, we can offer advice on which option is most suitable.

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