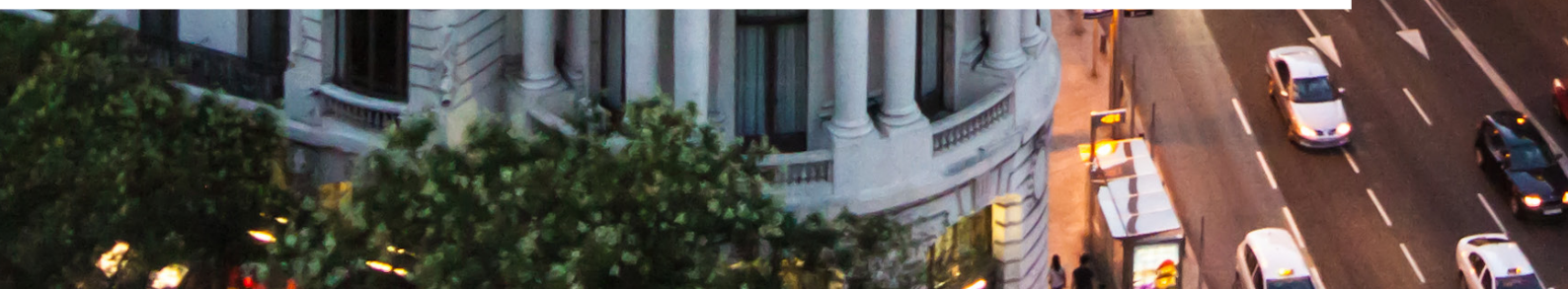




DOING
BUSINESS IN
SPAIN





Spain is increasingly attractive to Chinese investors. After several years of disruption caused by the global economic crisis, the country is enjoying a strong recovery with structural reforms that has allowed Spain to become one of the most stable and fastest growing countries in Europe. In addition to price adjustments and the gradual decline in unemployment, the country is steadily improving its economic performance. Currently, Spain is among the largest economies in the Eurozone and the OECD has improved its GDP growth forecast for Spain to 2.34% for 2018 and to 2.08% for 2019. The recovery is projected to remain strong over the coming years.

Additionally, Spain constitutes a gateway to Latin America, North Africa and Southern Europe. Its transportation and infrastructure systems help Chinese investors to have easy and quick access to these markets. In this regard, several Chinese companies are choosing Spain as hub for their Latam business.

Spain-China relations maintain good momentum with close high-level exchanges and fruitful economic and trade cooperation. Bilateral trade and investment flows between both countries have grown in recent years. In 2016, Chinese investments pumped €1.7 billion into Spain, nearly four times more than the previous year. Focused primarily on industry sectors including banking & finance, energy & power and telecommunications, additional focus was placed on Spain's retail, tourism, commerce, agri-food and real estate sectors.

As President Xi Jinping said in his last meeting with the then Spanish President Mariano Rajoy in 2017, with its special geographic advantage, Spain can play an important role in the Belt and Road Initiative. Both countries have the opportunity to connect their development strategies and to explore the potential for cooperation in fields such as agriculture, bio-medicine, aviation and aerospace.

Spain presents some of Europe's most exciting investment opportunities. This publication provides perspectives on the major market opportunities for Chinese investors into Spain. We hope that these insights add value to your business discussions and we would be delighted to discuss them with you further.

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Why Spain?

Foreign investors have changed their perception about Spain. From the economic instability in 2010, and after several years of intensive legal reforms on key issues such as finance, tax and employment, Spain has turned around its situation. During the last few years its GDP has been growing, companies -national and international- have been increasing their investments and there has been a growth in the employment rate.

The current Spanish economic situation is different to the situation prevailing at the end of 2009. The country has consolidated its position as the 14th largest economy in the world by GDP, the 5th largest one in the Eurozone, the 13th largest receiver of foreign direct investment (FDI) and the 11th largest exporter of commercial services¹. The country has become one of the most attractive domestic markets in Europe, with over 46 million of potential consumers and more than 81 million tourists who visited the country in 2017².

Presently, and according to the information provided by the Spanish Ministry of Economy, Industry and Competitiveness, there are more than 12,000 foreign companies in Spain, more than 70 of them included in the Forbes Top-100.

Spain – China: an increasingly close relationship

Spain and China have a close bilateral relationship at both political and institutional level. As reflected in the study carried out by ESADE China Europe Club³, Chinese investment in Spain is a recent phenomenon and its volume, compared with other countries of the European Union is relatively small. However, this situation is changing. Data⁴ show that China's cumulative investment in Spain rose from USD 920 million in late 2014 to USD 2.05 billion at the end of 2015. Additionally, a total of 96 Chinese companies currently operate in the country, compared with the 74 registered in 2014.

Some of the Chinese companies that have invested in Spain are, among others, Lenovo, Baosteel, Cosco, Huawei, Haier Europe, Minmetals, Air China, Keewaymotor, China Shipping and ZTE.

The sectors that have been more attractive for Chinese FDI in Spain are Energy, Infrastructure, Industrial, Telecommunications, Transport and Logistics, Real Estate and Tourist. The Agriculture and Food sector have also recently attracted the interest of these investors, especially in relation to the subsector of wine.

1 Source: ICEX and Invest in Spain.

2 Source: Ministry of Economy, Industry and Competitiveness.

3 "Chinese investment trends in Europe 2016-17 report". ESADE China Europe Club.

4 "Registro de Inversiones" (Invest in Spain).

The Country*

- Occupies 505,970 square kilometres in Southwest Europe, the second largest country in the EU.
- Almost 8,000 kilometres of coastline.
- Population of 46.5 million people.
- Urban population: 79.6%.
- Compared with other OECD countries, Spain's population is relatively young: 65% is between 16 and 64 years old.
- Official language is Spanish, but there are some other languages that are official in certain Autonomous Communities (regions).
- The currency is the Euro (€).
- The political system is a parliamentary monarchy.
- For administrative purposes Spain is organised into 17 Autonomous Communities, being one of the most decentralised countries in Europe.
- Spain offers an excellent quality of life and is very open to foreigners.
- More than 75 million tourists visited Spain in 2016.

The Economy*

- High revenue country. Member of OECD. Economy based principally on tourism and financial services.
- The 14th economy in the world by GDP and the 5th of the Eurozone.
- Ranked as the 13th largest recipient of direct investment worldwide and the 11th largest exporter of commercial services.
- Ranked as the 18th in the world as exporter of goods and the 15th as importer.
- The services sector is the main contributor to GDP (over 70% of economic activity).
- Economic links to Latin America and North Africa.

*Source: ICEX and Invest in Spain

Spanish and Chinese companies began to appear as global partners in third countries.

Opportunities

Spain has a favourable legal framework for foreign investors as the Spanish law has adapted its foreign investment rules to a system of general liberalisation, without distinguishing between EU residents and non-EU residents, and this approach is not different for Chinese investors.

Some of the key business opportunities that foreign companies find in Spain are:

- The increasing competitiveness of Spanish companies through the implementation of significant reforms in the job market.
- The country has become a centre of innovation supported by a young highly qualified labour force who can adapt to technological changes.
- The know-how and capability of Spanish companies in some sectors such as the Biotechnology, Energy and Infrastructure.
- Extensive and comprehensive system of aid and incentives developed by the central government and other government bodies, with a special emphasis on promoting permanent employment, productive investments and research, development and technological innovation.
- The extensive road and rail network, and the number and location of ports and airports endow Spain with an exceptional communication network that directly promotes trade and tourism.

Spanish and foreign companies established in Spain are increasing their exports and business towards Latin America, USA, Asia, Russia, Africa and Middle East using Spain as a platform for global business.

Rapid growth in international trade and foreign investments in recent years have made Spain one of the most international-orientated countries in the world.

Infrastructure*

- Roads: Spain is ranked 11th worldwide in terms of road infrastructure.
- Train: Leading country in Europe and the 2nd worldwide in terms of number of kilometres of high-speed lines in operation.
- Airports: 46 airports which connect Spain to the world's leading cities. Spain is a major hub for routes linking the Americas and Africa to Europe. One of the leading countries worldwide in terms of number of passengers (200 million in 2015).
- Ports: Excellent maritime transport links. The reinforcement of short-distance maritime transport, both domestic and European, and the development of seaside motorways are key initiatives.
- Industrial infrastructure: More than 60 technology parks in the leading industrial areas of the country.

Cumulative Chinese investment in the European Union (million USD) (2010 - 2015)*

United Kingdom	21,730
Italy	15,010
France	10,520
Ireland	7,720
Germany	7,350
Portugal	7,230
Netherlands	5,990
Hungary	3,850
Spain	2,050

*Source: ESADE China Europe Club

A gateway to Latin America

Spain's attraction for foreign investment not only lies in its domestic market, but also in the possibility of operating with third markets from the country. In this regard, Latin America is one of the most important markets for Spanish companies due to its economic, historical and cultural links. Spain is the second-largest investor in Latin America, only behind the US⁵.

Many Spanish companies have a strategic position in key sectors in Latin America (IT, energy, finance, infrastructure, etc.). Some examples are Repsol, FCC, Indra, Gamesa, Telefónica, Santander, Abertis, BBVA, ACS, Sacyr, Iberdrola, OHL and Gas Natural Fenosa, among others.

Additionally, some multinational companies establish themselves in Spain for managing their operations in Latin America. Some examples are Huawei, Siemens, Alstom, Praxair, ThyssenKrupp and GfK, among others.

The leadership position enjoyed by Spanish companies in Latin America and their presence across Europe have generated a strategic alliance between Spanish and Chinese companies. One of the most important deals in this regard occurred in 2010, with the purchase of 40% of Repsol Brazil by Sinopec. On the TMT sector, ZTE and Huawei are working with Telefonica on several joint projects in Latin America.

The best European platform for doing business with Latin America*

- Spain and Latin America have had a common language, culture and international trade relations for centuries.
- 19 agreements to avoid double taxation in Latin America.
- 15 agreements for protection and promotion of reciprocal investments.
- Spain is the world's 2nd largest investor in Latin America.
- Excellent communications and infrastructure: Madrid concentrates around 35% of total air traffic between Europe & Latin America.
- Multinational companies are increasingly choosing Spain for their Latin American headquarters.

*Source: Invest in Spain and Cámara de Comercio de Madrid

Spanish companies are among the leading companies in the world

- 3 out of 5 flights worldwide are controlled using Spanish air navigation systems.
- Telefonica is one of the largest telecommunications companies in the world (by market capitalisation and number of customers).
- Santander bank is the 2nd bank in the Eurozone and one of the first in the world (stock market capitalisation). Iberdrola is the 4th largest utility company in the world in terms of market capitalisation and the 2nd largest wind power operator in USA.
- The Spanish infrastructure sector is a world leader in foreign markets. The ACS group leads the construction industry with many projects worldwide.
- 30 Spanish companies totalled USD 80 billion in revenue.
- The Panama Canal expansion project has been built by a Spanish-led consortium.

⁵ Source: UNCTAD

**Leading
sectors and
opportunities**



Energy

The energy sector in Spain is undergoing a profound transformation and as such it offers countless opportunities for all players involved. Renewable energies and sustainability are leading this process and their specific weight in the sector is growing exponentially.

The Spanish energy sector is heavily regulated and there is an extensive legislative body and regulations that need to be taken into account when considering an investment opportunity.

Regulated vs. liberalised activities

In general terms, it can be said that the legal and financial structure of the energy system in Spain is based on two different types of activities:

Regulated activities - transmission, distribution, market operation and system operation of both electricity and gas. The remuneration schemes of these activities are regulated and based, mainly, on the investment and operation costs of the infrastructures.

Liberalised activities - generation and trading (comercialización), based on the introduction of competition for these activities. The remuneration schemes of these activities are liberalised (basically pool markets or bilateral agreements for generation). However, an exception can be mentioned in relation to renewable energies, being the remuneration schemes based likewise on the investment and operation costs of renewable infrastructures.

Trends

The importance of renewable energy will continue to grow in the Spanish energy mix.

In the short and medium term, Spanish regulations must also develop self-consumption, smart-grids, microgrids and distributed generation which will help foster renewable energies.

Furthermore, gas will also increase its share in the Spanish Energy mix given that it is a key energy source to support the supply of electricity (through CCGT plants) and also because of the increasing trend of new energy models based on low carbon policies.

Renewable energies at a glance

From an economic point of view, currently two renewable energy groups can be distinguished: those that still enjoy a regulated remuneration and those that, thanks to the level of maturity of the technology, are able to compete in parity conditions in the electricity production market (pool).

Regarding the first group, their economic regime is based on renewable energy assets receiving revenues derived from market share, including an additional tariff that, if necessary, covers: (i) the investment costs; and (ii) the average operating costs needed to carry out the activity, based both on standard costs of operating standard facilities.

The reasonable profit for those facilities already in operation prior to 14 July 2013, before tax, was set as the average performance in the secondary market of the State ten-year bonds in the last ten years increased by 300 basis points (equivalent to a profitability of approximately 7.398%). For new facilities, the profitability resulted in approximately 7.503%. The incentives scheme is updated every 6 years (some parameters every 3 years). The current one will remain without changes until 31 December 2019. In 2020 the Spanish government will update it taking into consideration different settings (market prices, Spanish bond at 10 years, etc.)

We say...

Parity renewables, self-consumption, energy storage, smart-grids and distributed generation will contribute to continue fostering renewable energies in Spain, bringing great investment opportunities.

Gonzalo Olivera

What to take into account when investing in energy companies

Prior Authorisation or notice to the Ministry of Industry

The Ninth Additional Provision of Law 3/2013 establishes the obligation to inform the Ministry of Industry, Energy and Tourism whenever either of the following acquisitions occurs:

- The direct or indirect acquisition by companies that carry out regulated activities ("Regulated Companies") in other companies or assets, which may have a relevant impact on the performance of the activities of the Regulated Companies;
- The acquisition of shares of Regulated Companies, or of shares of companies that indirectly, through companies under their control, carry out regulated activities.

When the acquisition is carried out by companies incorporated in a non-European country, the Ministry may impose certain conditions relating to the conduct of the business, on the acquired and/or the acquiring companies, if it considers that the acquisition implies a threat, real and serious enough, to guarantee the supply of electricity.

Limits to voting rights

Article 34 of RDL 6/2000 establishes the following limitations if a shareholder holds stakes, directly or indirectly, in two or more main operators (five biggest operators) of each of the generation and supply businesses of electricity and gas:

- Full voting rights are only possible in one of the main operators. The voting rights in the other main operator are limited to a maximum of 3%;
- Directors can only be appointed in one of the main operators.

What to take into account when directly acquiring energy assets

Electricity and gas regulations establish the need for prior authorisation for the direct transfer of electricity and gas generation, transmission and distribution assets, provided that the acquirer fulfills all the necessary legal, technical and financial requirements taken into account when the authorisation was granted.

Indirect transfers of these assets, through the merger, spin-off or transfer of shares of the companies holding these assets, may need prior authorisation in certain cases. This framework is completed by regulations passed by each Autonomous Community, which in some cases establish the need for authorisation when an indirect transfer of the asset is taking place.

What to take into account when developing new energy projects

The administrative authorisations needed to develop a new energy project can be summed up as follows:

- Administrative authorisation: the development, construction, amendment and management of facilities have to be previously authorised by the administrative authorities. For energy generation facilities, the connection point to the grid has to be previously obtained in order for the administrative authorisation to be granted;
- Approval of the execution project: the administrative authorities have to approve the execution project;
- Start-up of the facilities is authorised by the administrative authorities, once the facilities have been built and are fully operative;
- Local licences: the construction works for the facilities must obtain the corresponding licences from the Municipality where the works are to be carried out;

Environmental Licences/Permits: which may impose an array of measures to be implemented in the project to protect the environment.

Infrastructure

The Spanish infrastructure sector is very advanced from both a technological and 'know-how' perspective. Spanish companies are generally considered to be on the cutting edge of infrastructure projects, being highly acknowledged in international markets and becoming global leaders in fields such as air and land transport, railways, and public works.

Infrastructure development strategy and investment opportunities

The Government drafted a Plan on Infrastructure, Transport and Housing (PITV) for the period 2012-2024, whose purpose is to re-energise the infrastructures market affected by the economic crisis of 2007-2008.

The drafting of the PITV has been based on the needs of a new economic environment and very strict criteria of quality and efficiency. The PITV aims, among other objectives relating to new investments, to complete the structuring elements and itineraries of the transport network, provide strategic infrastructures (cross-border) and promote participation of the private sector in the funding and development of public infrastructures.

The implementation of the PITV will lead to optimising the existing capacity of the transport system and to further developing the transport networks considering their inclusion within trans-European networks. The construction of more than 3,500 kilometres of high-capacity roads, investing more than 18 billion euros, and additional investments (around 6 billion) in improvements of conventional road networks are envisaged. In relation to high speed train connections there are currently around 2,800 kilometres being studied and analysed, and further developments and improvements in air transport and ports are planned in the PITV too.

Private finance initiatives in public infrastructures

Spanish legislation foresees several ways to implement private finance initiatives in public infrastructures, mainly

Publics works' concession agreements

In essence, the objective of concession agreements is to develop public works and to build new infrastructures or refurbish existing ones, with this being the consideration for such works as the right of the concessionaire to operate the infrastructures once built or to receive a fixed price for such works.

Concession agreements are granted through public

Who can be a concessionaire of public infrastructures in Spain?

Spanish legislation establishes certain requirements to be able to contract with the public sector. Said requirements mainly consist of proving economic, financial and technical capacities, and in some cases being duly classified in the Contractors' Registry within a specific classification.

In addition to the above, non-European Union companies must justify, through the corresponding Permanent Diplomatic Mission from Spain present in the corresponding State, that the country of origin allows Spanish companies to contract with the public sector in said country in a similar way as the one provided for in Spanish legislation.

In case of public works' contracts, the alien company must also incorporate a branch in Spain.

What to take into account when investing in infrastructure projects

Regarding public infrastructure projects, Spanish legislation regulates the need of a previous authorisation for the direct transfer of concession agreements and public-private collaboration agreements, provided that the acquirer fulfills all the necessary legal, technical and financial requirements taken into account when the concession was granted.

In addition, if an indirect transfer of the concession alters the legal, technical or financial capacity taken into account, then authorisation for the indirect transfer may be needed. Interpretation powers of public authorities in relation to the terms and conditions of a concession agreement are quite broad and authorities analyse on a case by case basis whether said authorisation would be needed.

In those cases where public domain assets are involved (such as ports, airports, motorways, etc.), the need for prior authorisation for the indirect transfer of the shares of the concessionaire is normally established by law.

In relation to private infrastructures, its assignment is subject to private law and there would be no need for prior authorisation by public authorities. However, note that planning, environmental and local licences have to be obtained to develop these projects.

bidding processes, based on principles of transparency and equality. The economic risks of the operation and management of the infrastructures are assumed by the concessionaire and the public authorities assume non-commercial risks. However, Spanish legislation establishes mechanisms to rebalance the economic terms of the concession if the agreement becomes unbalanced for any of the parties (concessionaire or public authorities).

Public-Private Collaboration Agreements

By these agreements, both the concessionaire and public authorities participate in the financing of the new infrastructure whenever there are economic reasons or there are other reasons based on the public interest that recommends the use of public resources to develop these infrastructures.

Sometimes, these agreements are carried out through corporate vehicles in which public and private entities have an interest, with both being involved in the management and operation of a given agreement.

The application of this formula of public-private collaboration agreements remains very low, and public infrastructures are generally developed through concession agreements.

However, the increasing importance of these agreements is expected in the coming years to potentially lead to more efficient ways of carrying out infrastructure projects and offers further opportunities for investors.





Real estate

After several years of decline from the peak of 2007, the Spanish real estate market has been seeing a significant resurgence in activity since 2013.

The real estate market is benefitting from a recovery in business confidence, and investors' interest in acquiring commercial property has increased significantly. A general sense of optimism is beginning to be noted in the market, which is evident in the completion of a greater number of large-scale transactions by both Spanish and international companies.

Who can own real estate in Spain?

In Spain all individuals and legal entities with legal capacity can invest in real estate, irrespective of whether they are resident or non-resident. Unlike in some other European countries, in Spain there are no legal restrictions for Chinese investors.

However, foreign investments in real estate for any amount over 3,005,060.52 euros must be declared with the Investments Registry of the Ministry of Economy and Competitiveness (*Registro de Inversiones del Ministerio Economía y Competitividad*) for statistical purposes, but are not subject to prior clearance unless they are made from a tax haven.

Transfer of property in Spain

The most common type of ownership in Spain is full ownership (*propiedad de pleno dominio*), which is similar to the English freehold and includes a generally unlimited right to transfer and encumber the property. Deals are structured either as a direct acquisition of the real estate property (asset deal) or an acquisition of the company holding title to the real estate property (share deal), with the choice between these being mainly tax-driven.

The transfer of the full ownership (*pleno dominio*) of a property only requires a valid contract in writing and the delivery of the possession of the property to the buyer. Unlike in other countries, registration of the transfer of the title of a property at the Property Registry is not compulsory and is only declaratory in nature. However, in practice, due to the high level of protection granted by the Property Registry the transfer of property is almost always formalised in a deed executed before a Spanish Notary Public and recorded at the Property Registry (private sale and purchase agreements cannot be recorded at the Property Registry).

Notwithstanding the above, it is common practice that the parties enter into private sale and purchase agreements regulating that certain conditions must be met prior to completion, including the payment by the buyer of between 5% and 20% of the agreed purchase price.

The Spanish real estate market at a glance...

The real estate market in Spain has achieved great results in 2017 and experts predict that 2018 is going to be an even better year. Prices, sale and purchases, mortgages and new-construction dwellings, as well as leases and returns have increased greatly over the last few years, creating a scenario of recovery and growth in the market.

Tax implications

Crucial for successful real estate investment in Spain by Chinese investors is implementing a tax efficient structure. The tax efficiency of the structure will depend on the specifics of the investment (type of asset, activity to be carried out, nature of the future income, etc), the type of investor (individual, company, fund, joint venture investment, etc.) and their place of tax residence.

Depending on the chosen structure the acquisition of Spanish real estate can be subject to Transfer Tax (TT) or to Value Added Tax (VAT) and Stamp Duty (SD).

VAT & Transfer Tax

As a general rule, transfer of real estate property by legal entities or individuals in the course of a business activity will be subject to VAT at 21% (10% for residential property). In all other cases the transfer will be subject to Transfer Tax at a rate of 6-10% depending on the location of the property. When a transaction is subject to VAT no Transfer Tax may be levied (and vice versa).

Any second and subsequent transfer of buildings and the transfer of rural land in the course of a business activity are subject to but exempt from VAT. Consequently, such transfers will be taxed under Transfer Tax, unless the VAT exemption is waived by the seller. Should this waiver be applicable (depending on the VAT status of the purchaser), the transfer of the building will be subject to and not exempt from VAT, and Stamp Duty would be payable if the transfer is documented in a public notary deed.

Stamp Duty

Public deeds formalising the transfer of real estate property (not subject to Transfer Tax) are subject to Stamp Duty, payable by the buyer at the following tax rates: (i) if the transfer is subject to and not exempt from VAT - between 0.5% and 1.5% depending on the location of the real estate; or (ii) between 0.5% and 2.5% if the transfer is subject to, but exempt from VAT and the VAT exemption is waived.

Stamp Duty is also payable on the public deeds formalising the creation of a mortgage over a real estate property, with the tax rate being between 0.5% and 1.5% and the taxable base the maximum secured amount.

Tax on the Increase in the Value of Urban Land

In addition, the transfer of urban properties is also subject to a local Tax on the Increase in the Value of Urban Land which is paid by the seller. The taxable base and the tax rate are determined by the respective municipalities within the legal limits.

Leases

Under Spanish legislation, lease agreements for non-dwelling use are governed in the first place by the intention of the parties, then by the provisions of Title III of the Spanish Law on Urban Leases (LUL) if their application is not excluded by the parties and, collaterally, by the Spanish Civil Code. Except for the provisions of the LUL regarding legal deposit and judicial proceedings, which are mandatory, the parties are free to regulate the application of any rights and obligations in relation to the lease.

Energy efficiency in buildings

The Spanish government has recently implemented European regulations on energy use in buildings and now, with only a few exceptions, when a property is offered for sale or lease, the owner must supply an energy performance certificate that grades the energy performance of the building from A (best) to G (worst). The aim is to enable a buyer or tenant to compare the performance of different properties.

Golden visas

Non-EU residents, including Chinese investors, are eligible to obtain a residence permit in Spain through the investment in Spanish real estate, provided that the following requirements are met by both the investment and the investor:

Investment requirements	Investor requirements
<p>The investment must (i) be made directly by the foreign applicant, or indirectly through a corporation controlled by the individual and not domiciled in a tax haven; (ii) consist of real estate in Spain with a value of at least 500,000 euros, free from encumbrances; and (iii) be maintained in these conditions for the entire duration of the residence permit.</p>	<p>The investor must demonstrate fulfilment of the following requirements: (i) not being in Spain irregularly; (ii) being 18 years of age or more; (iii) not having a criminal record in Spain and in the countries where he has lived for the past five years; (iv) not being recorded as a person that may be refused entry to the territorial area of countries with which Spain has signed an agreement to this effect; (v) having public or private health insurance arranged with an insurer authorised to operate in Spain; (vi) having sufficient resources for himself and for family members during their period of residence in Spain; and (vii) paying the fee for processing the permit (i.e., 60 euros).</p>

Besides the Chinese investor, his spouse and children under 18 years of age, or those of legal age who are objectively unable to provide for their own needs on account of their state of health, are entitled to apply for the residence permit either subsequently, or jointly and simultaneously with the Chinese investor.

At first, Chinese applicants are eligible for the granting of a residence visa (*visado de residencia*), which will allow them to reside in Spain for at least one year. Chinese investors wishing to reside in Spain for a period exceeding one year, are eligible for a residence authorisation (*autorización de residencia*) for two years (renewable for an additional period of two years), provided that: (a) they hold a valid residence visa for investors, (b) they have travelled to Spain at least once during the period authorised for residence, (c) they continue owning the property or properties with the minimum value indicated, and (d) they are up to date with any tax and social security obligations, where appropriate.

**Key corporate
and M&A
matters**

Incorporation or acquisition

There are a number of principal legal issues that Chinese investors are likely to encounter when establishing, operating or acquiring a business in Spain. In general terms, there are several factors that make Spain attractive to Chinese investors as there are no restrictions for non-residents or foreign entities, although inevitably authorisation is required for investment in certain sensitive industries, such as financial services, public concessions, defence, etc.

Incorporation or acquisition of a local entity

There are several alternatives for a Chinese investor that decides to invest in Spain; basically: (i) incorporate a Spanish company with its own legal personality, (ii) open a branch or permanent establishment, (iii) incorporate a Joint Venture or (iv) initiate the activity through contractual arrangements, such as distribution, franchise or agency agreements.

The most common way to channel an investment in Spain would be through the incorporation of a Spanish vehicle or the acquisition of an existing company. Chinese investors wishing to establish a new business in Spain will have the option of registering a Spanish branch, or of setting up a subsidiary in Spain. This decision is often tax driven. A subsidiary is an independent legal entity which enjoys full decision-making autonomy. In contrast, a branch has no separate legal personality different from the company which it belongs.

The incorporation process of both the branch and subsidiary entails a quick process of a public deed of incorporation together with the appointment of the relevant directors and the registration of these circumstances with the Spanish Commercial Registry; the total process would take between 4 and 6 weeks.

Normally the subsidiary would have the legal form of a limited liability company (*Sociedad de Responsabilidad Limitada*) ("S.L."), or a public limited company (*Sociedad Anónima*) ("S.A."). A brief comparison of the most relevant characteristics of these vehicles is set out below:



	S.L.	S.A.
Share capital	The minimum capital is €3,000 which must be fully paid up upon incorporation.	The minimum capital is €60,000, of which at least 25% must be paid-in upon incorporation.
Shares	They are not marketable securities.	They are marketable securities that can be traded in secondary markets.
Contributions in non-cash	Contributions in non-cash assets do not require verification by an expert.	Any contributions made by the shareholders in non-cash assets must be verified by an independent expert appointed by the Commercial Registry.
Shareholder's liability	The liability of the members for the debts of the company in both forms of entity (S.A. and S.L.) is limited to the extent of their equity contributions. There are only limited exceptions in cases where a sole shareholders' status is not made public or in case of insolvency if the shareholders prevent a creditors agreement from being implemented.	
Transfer of shares and limits	Transfer of shares need to be formalised by means of a public deed before a notary public. In addition, S.L. companies are intended to prevent outsiders' access with some limitations to the transfer of quotas.	The procedure for transferring shares depends on the nature of the title: (registered shares, bearer shares or shares represented by book entries). In principle, the shares are freely transferable, but the company's by-laws may impose other restrictions on the transfer of shares.
Management	Four forms of management are available: a sole director, two or more separate directors, two or more joint directors or a Board of Directors which must have a minimum of 3 members and maximum of 12.	Four forms of management are available: a sole director; two or more separate directors; two joint directors; or a Board of Directors which must have a minimum of 3 members.
Term appointment directors	The duration of the appointment of the Directors has no limit unless otherwise stated in the By-Laws.	The duration of the appointment of the Directors must not exceed 6 years, unless renewed.
Issuance of bonds	<p>An S.L. may issue bonds or securities acknowledging or creating a debt up to double the value of its net equity, unless the issuance is guaranteed with a mortgage, pledge over the shares, public guarantees or a joint and several bank guarantee in which case there is not a limit.</p> <p>However, the bonds issued in an S.L. cannot be converted into shares.</p>	<p>The S.A. may issue numbered series of bonds or other securities that recognise or create a debt. This form should be adopted if an issuance of debt is intended.</p> <p>Bonds issued by a company are considered securities by virtue of which the issuer acknowledges a monetary debt in favour of the bondholders and, depending on the terms of the bond, is obliged to pay interest or repay the principal on the redemption date. There are also convertible or exchangeable bonds, whose redemption entails conversion into, or exchange for shares in the company.</p>
Restricted activities	The following activities shall exclusively be performed by S.A.: Banking, Financial Institution, Pharmaceutical, Pension Fund Managers, Leasing, Insurance and others. In addition, all listed companies shall be S.A. in nature.	

Private M&A

Since the Private Equity boom in the Spanish M&A market in the 1990s, private M&A transactions are usually structured through private auction processes. Depending on the type and quality of the asset, such processes tend to be very competitive, given that not only the main industrial players but also the main international funds (especially European and American) are monitoring the Spanish market looking for investment opportunities.

Following international standards, the process tends to be very well organised and structured with the support of investment banks.

Time is of the essence in this type of process, so it is a must to have all resources ready when the process so demands, since the auction processes are becoming increasingly tighter in terms of timing.

Key issues to consider

- **An experienced deal team:** it is important to have the right team at the right time. Ideally speaking a sophisticated team used to this type of process and able to handle both the strict requirements of the auction processes and also able to anticipate where the process might move to;
- **Get the funding in place:** in order to succeed in an auction process the funding for the transaction needs to be in place or available. Otherwise, a clear disadvantage with other competitors will arise;
- **Timing:** these processes have very tight and inflexible timings, determined by the seller in the process letters. To comply with timing expectations from the seller or even to improve them by suggesting a fast track solution can be a key differentiating element for succeeding in an auction process;
- **Deal certainty:** when a binding offer is presented at the end of the second phase of an auction process, the buyer should be able to sign the attached Share Sale and Purchase Agreement ('SPA') almost immediately, with completion being subject to the consents and approvals of third parties. All the homework should be completed by the bidder for the offer to be successful, unless the price is extremely attractive, deal certainty will prevail in the selection of the preferred bidder;

Auction process

1st Phase

- Invitation to participate in the process
- Limited access to legal and financial information (Teaser or Information Memorandum)
- Indicative non-binding bids

2nd Phase

- Due Diligence Process except for sensitive information
- Management presentations and site visits
- Revise draft of the SPA and other relevant transaction documents
- Binding offer subject to assumptions, conditions and confirmatory Due Diligence

3rd Phase

- Confirmatory Due Diligence: access to sensitive information
- Exclusivity (not always)
- Negotiation of the SPA

Final Phase

- Signing SPA
- Interim business covenants
- Fulfilment of the Conditions Precedent
- Closing of the transaction



- **Management incentives:** a good chemistry with the management of the target company will often make a difference in the auction process. Therefore, do not leave the management of the target prospect until the post-signing stage, since they might play an important role in the selection of the preferred bidder. Having the management supporting your offer might also be a differentiating element. And not only might management be important, but also future plans with the target company and future employment policies, since employment policies are a sensitive topic for Spanish companies nowadays given the high unemployment that Spain is suffering;
 - **Legal documentation:** finally, the mark-up of the SPA and the transaction documents to be submitted together with the binding offer shall be friendly, focusing on those matters that might imply a real concern for the acquirer. The SPA will follow a sophisticated Anglo-Saxon style and therefore is, again, very important to have the right advisers on board.
- One-to-one transactions are in any case not rare, since some sellers, especially industrial players, prefer to keep the process purely private. Even in these processes it is common to see investment banks taking part in the processes from very early stages in order to identify the right acquirer. These processes are clearly preferred by the buyers, including both of an industrial and financial profile, since it allows for a higher certainty about the deal and a lower pressure on price.

Public M&A

Acquiring a private company in Spain is primarily driven by the decisions of the parties involved and follows a deregulated process. Conversely, in order to acquire a company listed in Spain the relevant regulations on the stock market need to be considered. The process would be supervised by the Spanish regulator, the Spanish Stock Exchange Commission (Comisión Nacional del Mercado de Valores or CNMV), which will be responsible for approving any takeover bid to acquire control (oferta pública de adquisición or OPA) of a company which has its registered office in Spain and is listed on the Spanish stock exchange.

The main elements to consider in a takeover bid are the following:

Mandatory takeover bid:

- A mandatory takeover bid will be launched when any person or entity acquires control of a listed company regardless of the way in which such control is obtained (acquiring direct or indirect voting rights, through agreements or through other means such as mergers, capital reductions or variation of treasury stock). Control is considered to be obtained when the direct and indirect voting rights reach 30% or more or when the acquirer has the ability to appoint the majority of the board members within a 24 month period.
- The regulation includes some limited exceptions to the mandatory takeover bid rules that need to be considered carefully.
- The takeover bid should be launched over 100% of the share capital of the listed target and needs to be publicly announced as soon as control has been obtained and needs to be submitted for approval of the CNMV within up to a month after control is obtained.
- The consideration to be offered in a takeover bid needs to be at an equitable price, as determined in accordance with Spanish regulations. It also needs to be guaranteed by a credit institution, guaranteeing payment in full of the consideration to the shareholders accepting the bid. The consideration can be offered in cash or, with certain limitations, as a swap or exchange of securities or both, and shall ensure equal treatment of securities' holders who are in similar circumstances.

Voluntary takeover bid:

- Voluntary takeovers might be launched over any percentage of the share capital of the target company that the bidder wants to acquire.

Passivity rule:

From the public announcement of the offer until the publications of its result, the passivity rule imposes certain limitations on the actions that the board of directors of the target company can take, without the consent of the general shareholders meeting, to prevent the success of the offer.

Estimated timeframe of a takeover bid	
Action	Timing
Filing the takeover	Up to 1 month after obtaining control or announcing the takeover
CNMV's admission	7 business days
CNMV's approval of the Prospectus	20 business days after all the documentation is filed with CNMV
Publication of the Prospectus	Maximum 5 business days from approval
Acceptance period begins	Upon publication of the first notice
Acceptance period	Between 15 and 70 calendar days
Potential extension of the acceptance period	At least 3 days before the end of the acceptance period of the bid
Publication of the target's board of directors report	10 calendar days from the beginning of the acceptance period
Information to workers	Once the bid has been made public
Competing bids	Up to 5 calendar days before the end of the acceptance period
Amendments of the terms of the offer (if no competing bids have been filed)	Before the last 5 calendar days of the acceptance period
Publication of the offer results	Within 5 calendar days after the end of the acceptance period
Settlement of the offer	Usually 3 working days from the publication of the results

Other aspects to consider

Anti-trust

- The acquisition of a company or business in Spain may be subject to anti-trust legislation at both a Spanish and European level.
- If European merger control thresholds are not reached, Spanish merger control rules may apply if the transaction meets any of the following two alternative thresholds:
 - Market share threshold: The transaction entails the acquisition of a market share equal to or higher than 30% of the relevant market; or
 - Turnover threshold: The global turnover in Spain for all the undertakings concerned in the previous accounting year exceeded €240 million, provided that at least two of them achieved an individual turnover in Spain of higher than €60 million.
- If any of the legal thresholds are reached the transaction must be notified and authorised by the National Commission for Markets and Competition (“CNMC”) prior to its implementation.

Foreign investments

- In general terms, foreign investments in Spain are just subject to reporting obligations once the investment is made.
- The only exceptions would be: (i) investments from a tax haven that would need to be notified beforehand and (ii) foreign investments in activities directly related to national security and real estate for non-EU Member States’ diplomatic missions.
- Specific legislation also imposes some requirements for foreign investments on the following sectors: air transportation, radio, raw materials, minerals/mining rights, TV, gaming, telecom, private security and national security related-activities, including the manufacturing and distribution of arms and explosives.

Exchange control

- Exchange control and capital movements are completely deregulated and there is total freedom of action, both for payments abroad or receipts from abroad.

There are only some reporting obligations to the Bank of Spain for statistical and information purposes.



Legal framework

Tax

For a business considering opening or moving into new markets, tax is key. In the case of Spain, its tax system is highly sophisticated, and although complex when analysed in detail, it guarantees a significant level of legal certainty.

In this regard, the general statute of limitations period is four years from the statutory filing deadline or the date the return is actually filed, if later. When an amended return is filed after the deadline or an audit is started by the tax authorities, the four-year period restarts. In general, the Spanish tax authorities can issue binding rulings in advance on the tax consequences of a proposed transaction.

If the business is developed through a subsidiary or a branch, the Chinese company will be taxed in Spain on its attributable worldwide income; otherwise, it will be taxed under Spanish non-residents tax only on every piece of (normally gross) income it obtains in Spain.

Corporate tax, and non-residents tax on permanent establishments

A 'subsidiary' would be classified as a Spanish tax resident company subject to corporate tax on worldwide profits and capital gains, whereas a 'branch' would be considered a fixed place from where an enterprise carries out its business activity in Spain, and thus treated as a permanent establishment subject to Spanish tax on its attributable income and gains in a manner similar to that applicable to subsidiaries.

In this sense, Spain allows the filing of a consolidated corporate tax return and the offsetting of profits and loss within the group of Spanish companies. This is subject to certain limitations, allowing for these purposes for the branch of a foreign company to integrate a Spanish tax group.

The corporate tax base in Spain is comprised of total revenue less deductible expenses and is generally computed on the basis of the Profit & Loss ('P&L') statement as adjusted for tax purposes. Ordinary business income, including dividends and capital gains, will be part of the general tax base, although dividends and gains derived from the sale of shares will normally benefit from exemptions and deductions for the avoidance of double taxation.

We say...

A Chinese company considering opening a business in Spain may do so by setting up a Spanish subsidiary or a permanent establishment (such as a branch), or by neither of these options if it prefers and is able to carry out its business without a presence in Spain.

Alberto Ruano

Indirect taxation

In Spain, a sales tax called VAT (Value Added Tax) is levied at a 21% rate (10% for certain cases) on transfers made and services rendered by companies and entrepreneurs, a tax that is recoverable when the recipient of the asset or service is also a company or an entrepreneur.

When the transfer is made by a non-VAT subject (such as a private individual), VAT is substituted by a transfer tax that is levied at rates ranging from 6% to 10% and which is not recoverable by the payer (although it may constitute an amortisable or deductible expense for corporate tax purposes).

Stamp duties are also levied on contracts signed on public deeds that have access to official registries, at rates in the range of 0.5% -2%.

Other specific taxes may be levied on particular transactions or situations, such as on the transfer or holding of real estate.

Business expenses, including depreciation and amortisation, are generally deductible if they are directly linked to economic activities performed by the taxpayer and are properly recorded and documented. Tax deductibility restrictions are imposed on multiple expenses, such as penalties, payments made to tax havens, portfolio and other asset impairments, and financial expenses that exceed certain ratios. In addition, interest, royalties, fees and payments for technical assistance paid to the head office by a branch are generally not deductible.

Operating losses may be carried forward with no time limitation, but with the limit as of 2017 of i) 70% for companies with a turnover that does not exceed EUR 20 million, ii) 50% with a turnover between EUR 20 million and EUR 60 million and iii) 25% for companies whose turnover exceeds EUR 60 million.

Following the Organisation for Economic Cooperation and Development's ('OECD') general guidelines, Spanish transfer pricing legislation requires that transactions with related parties be carried out on arm's length terms and that taxpayers prepare a specific transfer pricing documentation. Advance pricing agreements may be concluded with the tax authorities.

The standard corporate tax rate is currently 25% (except for banks).

Very few tax credits on the tax quota, calculated as a percentage of the expenses incurred, are available for certain activities such as R+D+I (research & development + innovation), audio-visual productions, and the employment of certain categories of workers. Unused tax credits may generally be carried forward for 15 or 18 years.

The tax period of a company or branch is its business year, which may not exceed twelve months. Taxpayers must file a tax return and pay any tax due within the first 25 calendar days after a period of six months following the close of the business year, although they will need to make three advance payments of corporate tax in April, October and December of every year.

As a rule, companies and permanent establishments have to make on a periodic basis withholdings on account on salaries, rents, dividends and interest on account of Spanish tax, as well as social security contributions.

Withholding taxes applicable to non-residents not acting through a permanent establishment

Normally, when the Chinese company carries out its business in Spain, not through a permanent establishment (i.e. without a fixed place of business or an agent herein located), it will only be taxed in Spain on the specific items of income that it obtains in Spain, with the exemptions and reduced rates set out in the tax treaty signed by China and Spain on November 22, 1990. In this regard, the performance in Spain of activities auxiliary or ancillary to the main business will not entail the existence of a permanent establishment in Spain.

Under the treaty, business income obtained in Spain not through a permanent establishment by a Chinese company will not be taxable in Spain, while dividends, interest and royalties (not derived from scientific, industrial or commercial equipment) paid by a Spanish subsidiary to its Chinese parent company (or any other Chinese tax resident) will be taxed in Spain at the reduced rate of 10%, as compared with the general 19% withholding tax rate applicable to non-residents.

On the other hand, capital gains obtained by a Chinese company in Spain will be generally taxable in Spain at the aforementioned general 19% rate. Profits repatriated by a Spanish branch to its Chinese headquarters will not be subject to any withholding tax in Spain if a reciprocal treatment is received in China by Spanish companies operating through a permanent establishment therein.

Employment

Spanish Employment Law is both formal and strict. In some instances, it is considered to be protective in favour of the employee. In this regard, we generally work with businesses to provide practical advice to potential investors on a case-by-case basis.

Developing a business in Spain

The most common forms used by foreign investors when setting up a business in Spain are the following:

- By incorporating a new company in Spain.
- By acquiring the shares in an existing Spanish company
- By acquiring the assets of an existing Spanish company (or any other reorganisation such as a merger or spin-off): In this scenario employees would be protected under art. 44 of the Workers' Statute that implements the Acquired Rights Directive into Spanish law, which was introduced to protect the employment rights of employees impacted by a transfer of an undertaking. To this extent, the buyer would become the new employer of all of the transferring employees engaged by the seller, inheriting all rights and liabilities under or in connection with their employment. Consequently, there would be an obligation on the buyer to honour the employees' terms and conditions of employment, as well as their previous years of service (please note that if the acquisition is made by a mere sale of shares, the Transfer of Undertakings regulations would not apply).
- By equity contribution through share capital increase;
- By establishing a branch or an open representative office. (Please note that this option should only be a temporary solution).

Employment agreements

In Spain, there are the following categories:

- Permanent contracts (general rule)
- Fixed-term contracts (only if some specific criteria are met)
- Training and apprenticeship contracts

All of them can be concluded on a full-time or part-time basis.

General Managers have a "special" employment status as top executive employees and are not subject to the Workers'

Statute or to the CBA.

Lastly, directors (board members) are linked to companies by means of a commercial relationship which is outside of the scope of Spanish labour law rules.

Mandatory Employment rules

Leading mandatory employment and labour rules are:

- (i) Workers' Statute: the main Spanish employment law; and
- (ii) The applicable Collective Bargaining Agreement (CBA), which covers the terms and conditions of workers either at a sector level or at a company level and are negotiated between an employer (or a number of employers) and the workers' representatives (from trade unions or staff representation).

Additionally, the employer could also negotiate specific and individual employment conditions provided for by the CBA and under the law.

Social security

The Social Security is a public system of contributions paid both by employers and employees that covers some specific state benefits (such as sick pay, unemployment benefit, retirement pension and other benefits such as the public health system, etc.).

In this regard, the employer is responsible for contributing to the Social Security for each of its employees and, therefore, is not allowed to engage employees who are not registered with the Social Security.

Termination of employment

1. Summary dismissal

An employer may be able to terminate an employee's employment without having to give notice or hearing and with no liability to pay severance compensation, if the employee has committed some form of gross misconduct or is guilty of any other serious breach of the employment contract. This includes things like gross dishonesty, fraud, turning up repeatedly to work under the influence of drugs, persistent lateness or unauthorised absence from work, violence, serious insubordination, etc.

Employers must give a written statement detailing the reasons why the employee has been dismissed.

CBAs usually specify circumstances where summary termination is permitted and may establish a disciplinary procedure.

Summary dismissals can be classified as:

(i) Fair: if the employer has a valid reason for dismissing an employee and has acted reasonably in treating that reason as sufficient for dismissal. No severance compensation and no notice or hearing would be required.

(ii) Unfair: if the employer does not have a good reason for dismissing an employee. The employer may opt between reinstating the employee or paying a severance compensation equal to:

- For contracts signed before February 12, 2012: (i) 45 days' salary per year of service for seniority accrued prior to February 12, 2012 + (ii) 33 days' salary per year of service for seniority accrued as from February 13, 2012. The total of (i) and (ii) sum will be capped at a maximum of 24 monthly instalments. Except for employees that as of February 12, 2012 had already exceeded that maximum limit, in which case severance will be that set out in point (i) and be capped at a maximum of 42 monthly instalments.
- For contracts signed after February 12, 2012: 33 days of salary per each year of service capped at a maximum of 24 monthly instalments.

The above compensations are net of taxes, capped at €180,000.

(iii) Null and void: A dismissal is regarded as null and void when it is based on discrimination or carried out with violation of fundamental rights, as well as those based on situations derived from maternity/paternity related rights (pregnancy, birth, feeding, childcare, etc.). In these situations, the employee will have to be reinstated in his or her job position. A damage indemnity may be imposed on the employer.

Salary

Minimum salaries are determined in the applicable CBA or in the individual employment contract (which shall observe the minimum wages of the CBA).

Additionally, and residually, the Spanish Government annually establishes the general public minimum wage for all the Spanish territories. For the present year 2018, this equates to €735.90 in 14 monthly instalments (€10,302.60 per year).

2. Dismissal for objective reasons

An employer can terminate an employment contract for:

(i) Unexpected ineptitude of the employee for performing work of the kind he or she was employed to;

(ii) If the employee is not able to keep up with important and reasonable changes to his/her job (e.g. inability to work with new technology);

(iii) In some circumstances of repeated although justified absence from work;

(iv) Economic, technical, organisational or productive grounds (redundancy): the process to be adopted would vary depending on the number of employees proposed to be made redundant. Collective redundancies require information and consultation prior to the redundancies being made effective. The process of collective redundancy usually takes from 2 to 6 weeks.

Dismissals on objective grounds can be classified as:

(i) Fair: the employee will be entitled to:

- Statutory redundancy pay: 20 days of salary per year of service with a cap of 12 monthly instalments.
- Statutory notice period: 15 days (or payment in lieu).

(ii) Unfair: same as in summary dismissals, plus the statutory notice of 15 days (or payment in lieu).

(iii) Null and void: same as in summary dismissals. In addition, redundancies can be held to be null and void and reversed if the employer does not follow the proper process in carrying out the redundancies.

3. Constructive dismissal

An employee, whose employer has committed a serious breach of its obligations under the employment contract, can go to an employment tribunal to ask to be treated as being dismissed by the employer due to the employer's conduct (known as "constructive dismissal"). An example of a breach of contract by the employer which could potentially give rise to a claim for constructive dismissal would be a situation of harassment or bullying, or not being paid at all or continuous and significant delays in paying salary. A constructive dismissal would be regarded as a summary unfair dismissal (please see above). In addition, compensation for damage may be imposed on the employer.

<p>Do foreign workers need any authorisation to work in Spain?</p>	<p>Yes, all non-EU employees require a work/residence permit.</p>
<p>Will I need the consent of employee representatives to acquire a business in Spain?</p>	<p>If the acquisition implies a transfer of a business (or economic entity) and that business retains its identity after the transfer, the Transfer of Undertaking regulations would apply, so there would be an obligation to inform and consult with employee representatives prior to the transfer.</p> <p>As a general rule, a failure to inform and consult with the employee representatives would not make the acquisition automatically invalid, although it could lead to the application of a fine (up to €6,250).</p> <p>A failure to follow the ACAS Code will not make the dismissal automatically unfair.</p> <p>Furthermore, depending on the way in which the business is sold, the employee representatives may issue a report if a merger, takeover or any other modification of the legal status of the company takes place which will affect the number of employees in the company.</p>
<p>Once I have hired an employee will I be able to dismiss her or him?</p>	<p>When dismissing staff the employer must have a statutory fair reason to terminate the employment contract. If the employer does not bring evidence of a good reason for dismissing the employee, the dismissal may be regarded as unfair and the employee may be entitled to severance compensation (please see above).</p> <p>However, some employee categories have a protected status against dismissal. Examples include pregnant employees, employees on maternity/paternity leave, employees who are members of and candidates for works councils, among others). For these employees with a protected status, if the employer does not bring evidence of a statutory fair reason for terminating their employment (e.g. gross misconduct, redundancy, etc.), the dismissal would be regarded as null and the employee would be entitled to be reinstated in his or her job with the same employment conditions, plus the payment of the wages accrued between the termination date and the date of the reinstatement.</p>
<p>Are strikes common in Spain?</p>	<p>The right to go on strike is guaranteed in the Spanish constitution, with the public sector and the industrial sector having the highest frequency.</p> <p>Strikes are more common in times of recession when companies have to cut back on salaries or staff.</p> <p>The last nationwide general industrial action was in 2012.</p> <p>At a company level, strikes are more common in large and high-profile companies where trade unions have a strong presence, while in small companies it is rather uncommon.</p>

If I want to carry out a collective redundancy: Do I need to observe a notification period with the works council?

Yes, a collective redundancy requires consultation with the employee representatives. The length of consultation should take no longer than 30 days, or 15 days for companies with a headcount of less than 50 employees.

Consultation does not have to end in an agreement, but the parties must negotiate in good faith with a view to reaching an agreement (this is key to avoid a court declaring the invalidity of the redundancies), including any ways of avoiding or reducing the redundancies.

In practice, although the final decision lies with the company, it is highly advisable to reach an agreement with the employee representatives to reduce litigation.

A failure to follow a consultation period would make the redundancies automatically null and reversed.

Could the employer make one of the employee's representatives redundant?

In a redundancy procedure, the employee representatives have a priority right in relation to any jobs which remain in place at the company. Other than this, if the company closes down or there are no suitable jobs for the employee representative, he or she could be made redundant.

In addition, employee representatives cannot be dismissed due to their representative or trade union activities, otherwise the dismissal would be declared as null and void.

When dismissing or making redundant an employee representative, if the termination is regarded as unfair, the employee's representative would have the right to choose between terminating the employment with a severance payment or the reinstatement in his or her previous job with the same employment conditions, plus the payment of wages accrued between the termination date and the date of the reinstatement.

Banking & Finance

During the last decade, the Spanish banking sector has undergone a deep restructuring process as a response to the 2007 economic crisis. Now the worst seems to have passed and the sector is stronger and more stable.

Foreign banks are allowed to lend to Spanish borrowers, without a Spanish banking license, as long as no deposits from the public are taken in Spain.

The standard features of a financing transaction in Spain includes a facilities agreement and its security package. As regards the facilities agreement, it will likely resemble (in the case of syndicated loan agreements) the Loan Market Association standards (duly adapted to the laws in Spain). EURIBOR would likely apply as the reference rate. Facilities agreements are usually subject to Spanish law, but they can be subject to the laws of the jurisdiction chosen by the parties. In fact, it is not unusual to choose the laws of England and Wales for larger transactions, although this may change following Brexit.

As security in Spain is different from other jurisdictions, we would like to underline some of their characteristics below.

Security in Spain

Spanish law permits both personal guarantees (from individuals or companies) and security over specific assets to secure payment obligations (e.g. facilities agreements or bonds).

Personal guarantees under Spanish law are regulated under the Spanish Civil Code as joint and several and subsidiary obligations of the guarantor along with the borrower, where the guarantor has, amongst others, the benefits of:

- excussion (the creditor must seek payment from the principal obligor before claiming under the guarantee);
- division (if there is more than one guarantor, the claim must be divided amongst them); and
- order (if there is more than one guarantor, and an order of priority is established, this order must be followed).

The benefits above can be waived, and it is market practice to do so. Therefore, the creditors are able to claim any guarantor the full repayment of the outstanding payment obligations directly upon a default of a borrower (or even without seeking payment from the borrower first), and the guarantor must pay on first demand, without the right to oppose.

Although it is not expressly regulated under Spanish law, this type of first demand guarantees is accepted by scholars and case law.

Security over specific assets can be granted, but this need to be carried out on an asset-by-asset basis. Several security interests can be created under the same agreement, but they will be separate security interests. The assets encumbered by each one of them must be properly and clearly identified. The table below shows the most common types of security interests under Spanish law, and the assets which can be encumbered by the same:

TYPE OF ASSET	SECURITY	COMMENTS FOR PERFECTION OF EACH TYPE OF SECURITY
Real estate asset	Mortgage	Must be registered with the competent Land Registry of the municipality of the real estate asset. Stamp duty shall be triggered, at a state between 0.5% to 1.5% of the value of the mortgaged real estate asset.
Movable assets	Possessory pledge	Requires delivery of pledged asset to the pledgee.
Listed shares/bonds	Possessory pledge	Listed shares/bonds are kept in book-entry form and the pledge must be registered with the relevant computer registry.
Shares in limited liability company (sociedad limitada)	Possessory pledge	Recording the pledge in (i) the ownership titles of the quotas; and (ii) the company's shareholders' registry book is needed.
Shares in public limited company (sociedad anónima)	Possessory pledge	Requires delivery of share certificates to pledgees and recording in the company's shareholders' registry book.
Credit rights	Either: <ul style="list-style-type: none"> • Possessory pledge • Non-possessory pledge 	Notice to the debtors is not needed for the creation of the pledge but advisable, and necessary in any case to enforce the pledge and prevent set-off/payments carried out by the pledgor.
Bank accounts	Possessory pledge	Notice to the depository bank shall be served.
Industrial machinery	Chattel mortgage	Must be registered with the Movable Assets Registry.
Inventories and commodities	Non-possessory pledge	Must be registered with the Movable Assets Registry.

Although some of these security interests, such as those on inventories or on collections of future trade receivables, can be said to have a “floating” nature, the concept of floating charge does not exist under Spanish law.

All security interests must be granted in a notarial document before a Spanish notary public.

Security over financial collateral is governed by a special piece of legislation (Royal Decree-Law 5/2005), which implements in Spain the EU Financial Collateral Directive. The assets which can be given as financial collateral are cash (including amounts in a bank account, in any currency), securities and financial instruments (and rights over the same) and collection rights (receivables) under bank loan or facility agreements, with some restrictions when the borrowers are consumers, SMEs or microenterprises).

We say...

Derivatives in Spain tend to be done under a Spanish law governed master agreement called CMOF, similar to ISDA, although foreign banks typically prefer to use ISDA documentation.

Joaquín Sales



Enforcement of security

In the event of a breach of the secured obligations, the beneficiary of an in rem right (e.g., a pledge or a mortgage) would be entitled to realize the assets over which the in rem right is taken and to receive the monies obtained from the sale.

In general, there are two main proceedings available that may be chosen by the creditor, i.e., the notarial proceeding and the court proceeding (*procedimiento ejecutivo*). In order to benefit from a notarial proceeding or a court proceeding, it is generally required that the relevant documents and the in rem guarantees have been notarised, as is usually the case.

Notarial proceedings are generally significantly faster than court proceedings. Notarial proceedings can take between one and two months depending on the circumstances, whereas court proceedings (*procedimiento ejecutivo*) can take more than one year.

The court proceeding consists of a court-led public auction sale of the relevant asset and the application of the proceeds arising from such sale to meet the secured liabilities. The secured creditor (or a security agent, in the case of syndicated loans) may participate in the relevant auctions, and payment of the price shall be made by means of set-off, reducing the amount due in an amount equivalent to that offered to the debtor.

Royal Decree-Law 5/2005 provides that the enforcement over collateral arrangements may take place, in relation to the cash kept in the bank account, by setting-off (i.e., by setting-off the amounts due under the secured obligations against the balances of the bank accounts) and in relation to credit rights and negotiable securities, by means of appropriation, namely a form of acquisition).

Dispute resolution

Court based litigation

This is the traditional way of solving disputes in Spain, with a well-established Court system organised for judicial purposes into municipalities, provinces and autonomous communities. The system provides any claimant with the possibility of appealing at least once any judgement issued by any Court, with the possibility of also appealing it once more before the Supreme Court in certain cases. When fundamental rights are breached, there is the possibility of appealing before the Constitutional Court in Spain and, finally, before the European Court of Human Rights in Strasbourg.

Arbitration

Spain has also been for several decades an increasing seat for arbitration proceedings, as a dispute resolution method. In this regard, when deciding arbitration as the method to solve a dispute, the parties can decide to have access to institutional arbitration or to "ad hoc" arbitration. In the first option, the arbitration would be governed by the rules of an Arbitration Court, with the most used in Spain being the Courts pertaining to the Chambers of Commerce such as the ones in Madrid and Barcelona and the Civil and Mercantile Court of Arbitration with seat in Madrid (CIMA). On the other hand, in the "ad hoc" arbitration the rules are set by the parties and the arbitrator or arbitral panel appointed, always complying with the rules set forth by the Spanish Arbitration Act.

The main benefits of arbitration proceedings are the specialisation of the arbitrators on the matter of dispute and the speed of the proceedings until the issuance of the arbitral award, which is not subject to any ordinary appeal but exclusively to a nullity appeal for very limited reasons.

Mediation

Since the enactment of the Spanish Mediation Act of 6 July 2012, mediation in civil and commercial disputes is becoming an increasing alternative method of solving disputes in Spain. In these proceedings, the parties appoint a mediator who tries to get the parties to reach a settlement to solve the dispute. In case the controversy persists, Court-based litigation or arbitration would be the final solution to solve the dispute.

The main benefits of the mediation are its low cost and speed to solve the dispute.

Madrid, seat of arbitration for Latin American countries

Latin America has become the region with the highest number of arbitration proceedings. This achievement has been possible due to, among others circumstances, the ratification of international treaties concerning international arbitration and the adoption of new legislation guidance by the Model Law on International Commercial Arbitration.

Spain possesses a shared judicial tradition with Latin American countries, whose legal systems have been based mainly on the Spanish one. In addition, Spain is the second largest investor country in Latin America. These circumstances imply a big opportunity for Spain, and, particularly, for Madrid in order to position itself as the main seat for these international arbitration proceedings.

Investment treaty protection

Spain is a party to many international bilateral investment treaties. They provide foreign investors with additional protection for their investments in the receiving country and also access to dispute resolution mechanisms, usually to arbitration governed by the International Centre for Settlement of Investment Disputes (ICSID). Spain has entered into international bilateral investment treaties with all developed countries around the world, including China.

Anti corruption

Spain has solid anti-corruption legislation that punishes any kind of corruption committed by companies, individuals and public authorities, either in the private and/or in the public sector. Moreover, Spain has ratified many international instruments against corruption such as the Criminal Law Convention, the Council of Europe Civil Law Convention, the UN Convention and the OECD Convention.

Criminal offences	Committed by public authorities	Committed by companies or individuals
Bribery	To request or accept a financial or any other kind of advantage in order to bring about the improper exercise of a public function or business activity.	<p>To offer, promise or give a financial or other advantage to a public authority or officer in order to bring about the improper exercise of a public function or business activity.</p> <p>Moreover, to promise, offer or give to officers, directors, employees of a company an advantage of any kind with no justification with the purpose to benefit themselves or a third person over others, breaching their obligations on purchasing or selling of goods or on contracting professional services.</p> <p>Finally, to offer, promise or grant any undue benefit to try to corrupt a foreign public official or an official from international organisations, to benefit themselves or a third party, or respond to their requests in this regard, in order to act or refrain from acting in relation to the exercise of public functions to obtain an improper advantage in international business.</p>
Influence peddling	To attempt to influence another public official by directly or indirectly offering, promising or giving a financial or other advantage, with the intention of gaining a financial benefit.	To attempt to influence a public official by offering, promising or giving a financial or other advantage, with the intention of gaining a business advantage.
Prevarication	To make an arbitrary decision in an administrative matter. Moreover, the authority cannot appoint as a public officer anyone who does not comply with the legal requirements.	To accept from an authority the appointment as a public officer knowingly without complying with the legal requirements.
Misappropriation of public funds	To make an improper use of public funds or effects under their responsibility by reason of their duties.	To make an improper use of public funds or effects when these public funds are managed by private companies or individuals or deposited with the latter.
Fraud in administrative contracting	To act by the public authority in any kind of contract, business, operation or activity, which requires in any form their participation, by taking advantage of this circumstance in order to obtain any kind of consideration.	To be a partner in any kind of contract, business, operation or activity of a public authority being aware that the latter has benefitted in some way by reason of his public office.
Disclosing secrets	To disclose any type of secret that is in his knowledge by reason of his public office to obtain a financial benefit.	To disclose any type of secret to third parties by having access to the secret information/ documentation by any means.

Corporate Compliance

Like many other countries, such as USA and UK, Spain has regulated the criminal liability of the company in respect of the criminal offences committed by their employees in their name and on their behalf and for their benefit and also for such offences committed by the latter because of the company not having exercised due control over such employees.

Therefore, it is highly advisable for Spanish companies to establish a system of measures of prevention, surveillance and control to be able to prevent or detect the committing of criminal acts, which are known as “compliance programs”. Their main purpose is that all members in the company accept the values defined in the compliance program in order to establish a culture of compliance with the legality. With the implementation of this program, the company can certify the completion of due control over their employees, prevent the committing of crimes and moderate and even exempt their criminal liability.



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