Kingdom of Spain

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1.	**What are the basic criteria for the courts of your jurisdiction to allow enforcement of a foreign judgment?**

1. In Spain, the enforcement of foreign judgments may be subject to different legal regimes, depending on the country of origin of the judgment. At a domestic level and in the absence of an international treaty (please note that Spain has entered into recognition and enforcement treaties with Algeria, Austria, Brazil, Bulgaria, China, Colombia, Czech Republic, El Salvador, France, Germany, Israel, Italy, Mauritania, Mexico, Morocco, Romania, Russia, Slovakia, Switzerland and Tunisia, apart from the multilateral treaties and conventions further developed below), the criteria for the enforcement of foreign judgments are mainly regulated by Law 29/2015, of 30 July, on International Legal Cooperation in Civil Matters ("**Law on International Legal Cooperation**" or "**LILC**"). In addition, the specific procedural aspects of the enforcement procedure are governed by Law 1/2000, of 7 January, on Civil Procedure ("**Law on Civil Procedure**" or "**LCP**").

2. As mentioned, the LILC is of subsidiary application in the absence of international treaties signed by Spain. Therefore, depending on the State of origin of the foreign judgment, the enforcement will be governed either by an international treaty or by national regulation. In any case, regardless of the above, it is important to note that international treaties usually establish *de minimis* obligations, which tend to refer to domestic law for procedural matters and thus the Law of civil Procedure will govern court proceedings. Each of these sources is discussed below.

A. European Union Regulations applicable among EU Member States

(i) Brussels Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Regulation 1215")

3. Regulation 1215 governs the recognition and enforcement of judgments between European Union Member States. Regulation 1215 applies in civil and commercial matters irrespective of the nature of the court or tribunal. Among the matters

excluded from its scope, it is expressly stated that the Regulation shall not extend to the liability of States for acts or omissions in the exercise of State authority (*acta iure imperii*).

4. The main input of Regulation 1215 is that (i) a judgment issued in a Member State shall be recognized in other Member States without any special procedure being required, and (ii) a judgment issued in a Member State and enforceable in that State shall be enforceable in another Member State without any declaration of enforceability being required.

5. As a result, a judgment issued by the courts of a Member State should be treated as if it had been issued in the Member State addressed, since it will be sufficient for the court of the State issuing a judgment to complete a standard form and translate it into the official language of the State where it is to be enforced.

6. Thus, under Regulation 1215, foreign judgments have legal effects in Spain due to the principle of '*automatic recognition*', meaning that it is not necessary, as provided in Article 36.1 of Regulation 1215, to initiate "*any special procedure*" to request such recognition. That is tantamount to an automatic declaration of enforceability.

7. Nonetheless, it must be noted that Regulation 1215 contains a *de minimis* regulation that establishes the basic framework of the request for enforcement of a foreign judgment. Thus, the additional procedural aspects must be adjusted to the domestic procedural rules, which means that what is not provided for in Articles 41 *et seq.* of the Regulation must be filled in by Spanish domestic procedural rules and, in particular, the LCP. In this regard, Article 41.1 of Regulation 1215 provides that:

> "*Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed*."

8. Therefore, domestic Spanish rules of enforcement –contained in Articles 538 *et seq.* of the LCP– will be applicable even if the foreign judgment comes from a Member State of the European Union.

9. Concerning the criteria for enforcement, Regulation 1215 lists a series of criteria for refusing recognition and enforcement of foreign judgments, which a party challenging the enforcement of a judgment issued in another Member State can invoke. However, in addition to the grounds for refusal provided for in the Regulation, the challenging party must be able to invoke those grounds for refusal contained in domestic legislation. Therefore, once again, it is clear that both international and domestic regulations are closely connected (see section I.B below for the grounds for refusal provided for in Spanish domestic legislation).

10. Thus, even if it is not necessary to carry out an exequatur procedure, a debtor can still oppose the recognition and enforcement of a foreign judgment on several grounds. In other words, it is not the party seeking enforcement, but the debtor who must make submissions and establish the grounds for refusal. Such grounds are the same for both recognition and enforcement. In this regard, under Article 45.1 of Regulation 1215, on the application of any interested party, the recognition of a judgment shall be refused:

    (a) where such recognition is manifestly contrary to public policy (public order) in the Member State addressed;

    (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a manner as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

    (c) where the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

    (d) where the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State addressed; or

    (e) where the judgment conflicts with imperative rules of competence established in the Regulation (regarding insurance, consumer contracts, employment, and cases of exclusive jurisdiction).

11. Moreover, Article 46 of Regulation 1215 states that the said criteria are also applicable to the refusal of enforcement.

12. Among such criteria for opposing recognition and enforcement, the breach of public policy has been the subject of specific case law. In this regard, the Judgment of the First Chamber of the Court of Justice of the European Union ("**CJEU**") in case C-394/07, of 2 April 2009, states that "*recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order*".

(ii) *Acta iure imperii* under Regulation 1215

13. As mentioned, Regulation 1215 does not extend to "*the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)*" (Article 1). This wording in Regulation 1215 is a relevant innovation with respect to its predecessor, Regulation 44/2001, which did not expressly exclude *acta iure imperii*.

14. The interpretation of this article and, in particular, the extent of the *acta iure imperii* under Regulation 1215 have been analyzed by the CJEU. A landmark decision in this regard is Case C-308/17, of 15 November 2018 (*Hellenische Republik v. Leo Kuhn*), where the CJEU found that claims brought by creditors of Greek state bonds against Greece in connection with the 2012 haircut do not fall under the substantive scope of Regulation 1215. The ratio rendered by the CJEU is that such claims stem from the exercise of public authority and, as such, cannot be regarded as civil and commercial matters. As the CJEU stated:

> "*34. Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of that regulation, it is otherwise where the public authority is acting in the exercise of its public powers (judgment of 15 February 2007, Lechouritou and Others, C-292/05, EU:C:2007:102, paragraph 31 and the case-law cited).*
>
> *35. That applies, namely, to disputes resulting from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals* (…).
>
> *36. As regards the dispute in the main proceedings, it must, consequently, be established whether its origin stems from the acts of the Hellenic Republic, which arise from the exercise of public authority*."

15. The CJUE then states that the manifestation of such public authority is the result of both the nature of the changes to the contractual relationship between the Greek State and the holders of the securities and the exceptional context in which those changes took place. In fact, the CJUE emphasized that the enactment of a law with retroactive effects in an exceptional context of serious financial crisis suggests that the conflict arises from an exercise of public authority:

> "*42. It follows that, having regard to the exceptional character of the conditions and the circumstances surrounding the adoption of Law 4050/2012, according to which the initial borrowing terms of the sovereign bonds at issue in the main proceedings were unilaterally and retroactively amended by the introduction of a CAC, and to the public interest objective that it pursues, the origin of the dispute in the main proceeding stems from the manifestation of public authority and results from the acts of the Greek*

State in the exercise of that public authority, in such a way that that dispute does not fall within 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012."

16. Therefore, the emission of debt securities alone is not seen as a hindrance to the application of Regulation 1215. It is the exercise of sovereign authority for the purpose of retroactively amending the conditions initially envisaged in a context of necessity that led the CJEU to find that Regulation 1215 was not of application. In other words, Regulation 1215 does not apply when a State ceases to act as a private subject.

17. That is the same reasoning followed by the CJEU in Case 581/20, of 6 October 2021 (*Skarb Państwa v. TOTO*), where one of the parties was a State entity (the Polish Public Treasury) and the subject matter of the contract giving rise to the dispute was the building of a public expressway.

18. The CJEU, in order to determine whether there was an act of *iure imperii*, examined the nature of the legal relationships between the parties. In such case, the contract had been assigned to the Italian Undertakings through a public procurement launched by the Polish authorities; and the construction of an expressway was considered to follow a public purpose. However, according to the CJEU, none of these elements entail the exercise of any powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals. With regard to the notion of 'public purpose' of an activity, the CJEU ruled that "*the public purpose of certain activities does not, in itself, constitute a sufficient element to qualify them as activities carried out iure imperii, insofar as they do not correspond to the exercise of exorbitant powers in relation to the rules applicable in relations between private parties*."

19. This line of interpretation was held by the CJUE even before the entry into force of Regulation 1215. A clear example is the decision in Case C-292/05, of 15 February 2007 (*Lechouritou v. Dimosio*), where the CJEU held that an action aimed at the payment of compensation for acts perpetrated by armed forces in the course of warfare does not constitute a civil or commercial matter.

20. In this regard, in Case C-167/00, of 1 October 2002 (*Verein für Konsumenteninformation v. Henkel*), the CJEU pointed out that "*it is settled case-law that actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention only in so far as that authority is acting in the exercise of public powers*".

21. Such exercise of public powers is found, for example, when a dispute arises from the recovery of charges payable by a person governed by private law to a national or international body governed by pubic law for the use of equipment and services provided by that body, in particular where such use is obligatory and exclusive

(CJEU Judgment in Case C-29/76, of 14 October 1976 (*LTU v. Eurocontrol*), paragraph 4).

22. Also, the CJEU has held that the concept of 'civil and commercial matters' does not include actions brought by the State responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of that administering agent in the exercise of its public authority (CJEU Judgment in Case 814/79, of 16 December 1980 (*Netherlands State v. Reinhold Rüffer*), paragraphs 9 and 16).

23. At a domestic level, Spanish courts have merely followed the interpretation of the concept of '*acta iure imperii*' developed by the CJEU. According to the Judgment of the Superior Court of Justice of Madrid, of 21 July 2016 [AS 2016, 143], 'acta iure imperii' is "*a broad expression that includes all cases in which international or national rules have established the immunity of foreign States from jurisdiction or execution. This is confirmed by the judgment of the Court of Justice (EU) Grand Chamber, S 19-7-2012, No. C-154/2011*".

B. International treaties signed by Spain on recognition and enforcement of foreign judgments

(i) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (the "Lugano Convention")

24. The Lugano Convention applies in Spain to the enforcement of court judgments rendered in Norway, Iceland, and Switzerland (in the case of Liechtenstein, it applies the Lugano Convention of 1988). To date, the United Kingdom has applied to join the Lugano Convention, but it has not yet been accepted by the other Member States.

25. In general, the grounds for the refusal of recognition and enforcement are similar to those contained in Regulation 1215. However, the Lugano Convention requires an *exequatur* proceeding in order to declare the recognition of a foreign judgment. Also, unlike Regulation 1215, the Lugano Convention does not expressly exclude matters relating to the liability of States for acts or omissions in the exercise of State authority.

(ii) Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague

Conference on Private International Law) (the "Hague Convention")

26. The Hague Convention, as the Lugano Convention, does not provide for the automatic recognition of judgments, and therefore requires a procedure of *exequatur* in order to enable enforcement.

27. With regard to *acta iure imperii*, the Hague Convention stablishes in Article 2.4 that a judgment is not excluded from the scope of the Convention by the mere fact that a State was a party to the proceedings. However, it then clarifies in Article 2.5 that "*nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property*."

28. Regarding the grounds for the refusal of recognition and enforcement, it includes a few novel elements, such as, for example, where a judgment is obtained by fraud; or where the proceedings in the court of origin are contrary to a choice of court agreement contained in a trust instrument. In this context, it should be taken into account that Spain is also a signatory to the Hague Convention of 30 June 2005 on Choice of Court Agreements.

29. To date, the Hague Convention has been signed by Costa Rica, Israel, Montenegro, North Macedonia, Russia, Ukraine, United States of America, Uruguay and the European Union. However, it has only been ratified by the European Union and Ukraine. As such, the date of entry into force of the Convention is 1 September 2023, and will apply between European Union Member States (other than Denmark) and Ukraine in relation to the recognition and enforcement of judgments arising out of proceedings commenced after that date. Besides, the United States of America signed the Hague Convention on 2 March 2022, but has not yet ratified it. (For further details, see the website of the Hague Convention https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments/).

(iii) Other multilateral or bilateral treaties

30. Apart from the above, Spain is a party to other international treaties relating to the recognition and enforcement of foreign judgments:

(i) Algeria: Convention on legal cooperation on civil and commercial matters between the People's Democratic Republic of Algeria and the Kingdom of Spain, signed on 24 February 2005.

(ii) Austria: Convention on the recognition and enforcement of judgments, settlement agreements and public deeds in civil and commercial matters between Spain and Austria, signed on 17 February 1984 (superseded by Regulation 1215, Article 69).

(iii) Brazil: Convention on legal cooperation on civil matters between the Kingdom of Spain and the Government of the Federal Republic of Brazil, signed on 13 April 1989.

(iv) Bulgaria: Convention on judicial assistance in civil matters between the Kingdom of Spain and the Republic of Bulgaria, signed on 23 May 1993 (superseded by Regulation 1215, Article 69).

(v) China: Treaty between the Kingdom of Spain and the People's Republic of China on legal assistance in civil and commercial matters, signed in Beijing on 2 May 1992.

(vi) Colombia: The Convention on the enforcement of judgments issued by the respective courts, signed in 1908.

(vii) El Salvador: Treaty on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters.

(viii) France: Convention on the recognition and enforcement of judgments and arbitration awards, settlement agreements and public deeds in civil and commercial matters between Spain and France, signed on 28 May 1969 (superseded by Regulation 1215, Article 69).

(ix) Germany: Convention on the recognition and enforcement of judgments, settlement agreements and public deeds in civil and commercial matters between Spain and Germany, signed on 14 November 1983 (superseded by Regulation 1215, Article 69).

(x) Israel: Agreement between the Kingdom of Spain and the State of Israel for the mutual recognition and enforcement of judgments in civil and commercial matters, signed on 30 May 1989.

(xi) Italy: Convention on judicial assistance and recognition and enforcement of judgments in civil and commercial matters between Spain and Italy, signed on 22 May 1973 (superseded by Regulation 1215, Article 69).

(xii) Mauritania: Agreement on legal assistance in civil and commercial matters between the Kingdom of Spain and the Islamic Republic of Mauritania, signed on 12 September 2006.

(xiii) Mexico: Agreement between the United Mexican States and the Kingdom of Spain on the Recognition and Enforcement of Judgments and Arbitration Awards in Civil and Commercial Matters, signed in Madrid on 17 April 1989.

(xiv) Morocco: Agreement on judicial cooperation in civil, commercial, and administrative matters between the Kingdom of Spain and the Kingdom of Morocco, signed in Madrid on 30 May 1997.

(xv) Romania: Convention between Spain and Romania on jurisdiction, recognition, and enforcement of decisions in civil and commercial matters, signed "*ad referendum*" in Bucharest on 17 November 1997 (superseded by Regulation 1215, Article 69).

(xvi) Russia: Agreement between the Kingdom of Spain and the Union of Soviet Socialist Republics on legal assistance in civil matters, signed in Madrid on 26 October 1990.

(xvii) Slovakia and Czech Republic: Agreement between the Kingdom of Spain and the Czechoslovak Socialist Republic on legal assistance, recognition, and enforcement of judgments in civil matters (superseded by Regulation 1215, Article 69).

(xviii) Switzerland: Treaty between Spain and the Swiss Confederation to facilitate the prompt execution of judgments reciprocally issued in their respective States in civil or commercial matters, signed on 19 November 1896 (superseded by the Lugano Convention, Article 65).

(xix) Tunisia: Convention between the Kingdom of Spain and the Republic of Tunisia on legal assistance in civil and Commercial Matters and recognition and enforcement of judgments, signed on 24 September 2001.

C. Law on International Legal Cooperation and Law on Civil Procedure

31. As already mentioned, Spanish domestic legislation on the recognition and enforcement of foreign judgments essentially comprises these two rules. However, it must be noted that the LILC applies only subsidiarily, (i) in the absence of an international treaty; and (ii) in the absence of other specific national legislation (such as laws on bankruptcy, international adoption, civil registry, and arbitration, among others).

32. In addition, the LILC refers to the LCP regarding the enforcement procedure: "*The enforcement procedure in Spain of foreign judgments shall be governed by the provisions of the Law on Civil Procedure, including the statute of limitations*" (Article 50.2 of the LILC).

33. Firstly, in principle, reciprocity is not required to recognize and enforce foreign judgments under the LILC in the absence of an international treaty. This means that foreign judgments can be recognized and enforced in Spain, even if Spanish judgments are not recognized or enforced in the other State.

34. Nonetheless, Article 3.2 of the LILC states that "*although reciprocity is not required, the Government may, by means of a royal decree, establish that the Spanish authorities will not cooperate with the authorities of a foreign State where there is a repeated refusal of cooperation or legal prohibition of to be provided by the authorities of that State*". Therefore, in a case where no international treaty has

been signed between Spain and the State of origin of the judgment, it is advisable to verify whether there is a legal material that might impede enforcement of a foreign judgement. To date, and to the best of our knowledge, no royal decree has been enacted in such terms.

35. Secondly, the LILC requires an *exequatur* proceeding to be initiated, the purpose of which is to declare the recognition of a foreign judgment and, where appropriate, to authorize its enforcement. This is an important distinction from the rules established in Regulation 1215, where to some extent foreign judgments are treated like domestic judgments.

36. Exequatur proceedings are governed by Article 54 LILC, which allows for the joinder of several requests for *exequatur* in a single application, although enforcement will not be possible until the *exequatur* has been granted.

37. In this regard, under Article 46.1 LILC, foreign judgments will not be recognized in Spain on the following grounds:

(i) where they are not final;

(ii) where they are contrary to Spanish public policy;

(iii) where the judgment was issued in manifest breach of the rights of defense of either party. If a judgment is issued *in absentia* (default judgement), a manifest breach of the rights of defense is deemed to have occurred if the document instituting the proceedings was not served on the defendant in the manner required or with sufficient time to enable the defendant to defend himself;

(iv) where the foreign judgment has been rendered concerning a matter in respect of which the Spanish courts have exclusive jurisdiction or, in respect of other matters, if the jurisdiction of origin did not have a reasonable connection to the dispute. The existence of a reasonable connection to the dispute shall be presumed where the foreign court has based its international jurisdiction on similar criteria to those provided for under Spanish law;

(v) where the judgment is irreconcilable with a judgment rendered in Spain;

(vi) where the judgment is irreconcilable with a judgment previously issued in another State when the latter resolution met the necessary conditions for its recognition in Spain; and

(vii) where there is a pending dispute in Spain between the same parties and with the same subject, initiated before the foreign proceedings.

38. There is a large body of case law on non-recognition of foreign judgments on the grounds of public policy. In particular, Spanish courts have been influenced by the doctrine established by the European Court of Justice. As such, Spanish courts have

also developed a restrictive interpretation of the breach of public policy, which is defined by Spanish courts as "*the system of individual rights and freedoms guaranteed in the Constitution and in the international human rights conventions ratified by Spain, and the values and principles that these embody*" (Judgment of the Supreme Court in case 835/2013 of 6 February 2014 [RJ 2014, 833]).

39. The infringement of the right to a defense, which is understood as the procedural aspect of public policy, has also been subject to consideration by Spanish courts. In brief, it is accepted that the document instituting the proceedings was served on the defendant 'in a proper manner' ('*de forma regular*') if it was conducted according to the law of the proceedings, where the judgement was rendered.

40. Once a foreign judgment is recognized in Spain, it is possible to request enforcement. The enforcement procedure is governed by the LCP (Articles 538 *et seq.*). The procedure can be summarized as follows:

    (i) The enforcement procedure is initiated by the filing of the application for enforcement before Spanish Courts of First Instance. The application for enforcement identifies the basis for the enforcement; the enforcement protection sought; the attachable assets of the debtor which the creditor is aware of; and, if applicable, the measures for locating and investigating additional assets of the debtor.

    (ii) If the application for enforcement complies with all the legal and procedural requirements, the Court of First Instance will order the enforcement and seizure of the assets necessary to cover the amount requested. In the event that the Court of First Instance considers that the legal and procedural requirements are not met, it will issue an order refusing enforcement, which can be appealed.

    (iii) The debtor will be notified of the order, and the measures to trace and investigate will be executed immediately, without the need to hear the defendant.

    (iv) The court's order for enforcement cannot be appealed, but the debtor may object within ten days of the notification of the order. The objection can be sustained on the grounds of procedural or substantive defects. Such grounds for objection are very limited and do not allow for a reassessment of the merits:

        (a) Procedural grounds (Article 559 of the LCP):

            a. Lack of capacity or representation of the defendant.

            b. Lack of capacity or representation on the part of the claimant or their inability to prove the capacity or representation required.

	c. Nullity of the enforcement, either because the judgment does not contain any order of declaratory relief against the defendant, or because the judgment does not meet the legal requirements for enforcement. (b) Substantive grounds: a. The defendant has already complied with the judgment (Article 556 of the LCP). b. The time limitation period to file the enforcement claim has elapsed (Article 556 of the LCP). c. Agreements and settlements have been reached to avoid enforcement, provided that these agreements and settlements are recorded in a public document (Article 556 of the LCP). d. The amount of the enforcement is higher than the debt owed according to the judgment (Article 558 of the LCP). (v) Depending on the arguments submitted by the defendant, a hearing may be convened, or the motion may be decided through an order without hearing the parties, either upholding or rejecting such opposition. 41. However, as we will elaborate in the next section, the criteria and procedure for the enforcement of foreign judgments have some distinctive issues when the defendant is a sovereign State.
2.	**What other considerations may apply to enforcement of a foreign judgment against a state in your jurisdiction, e.g. notice provisions?**
	42. The fact that the defendant is a State significantly changes the picture, for a clear reason: States enjoy sovereign immunities. Sovereign immunities embody a basic principle of public international law that derives from the independence, sovereignty, and equality of States (*par in parem imperium non habet*). In essence, the core of sovereign immunity is that the judges of one State cannot judge another State. In Spain, and internationally, these immunities are divided into two types: (i) Immunity from jurisdiction: the right of a State not to be sued or brought to trial before the courts of another State. (ii) Immunity from enforcement: the right of a State not to have enforcement actions taken against their assets by the courts of another State. 43. In Spain, these immunities are accepted and enshrined in legislation. However, sovereign immunities are not absolute, but, rather, are subject to a number of

exceptions, as will be explained in the following section. Therefore, the existence of these immunities changes the criteria necessary to enforce a foreign judgment; in particular, the enforcement applicant must prove that its request does not violate or infringe the immunity from enforcement of the defendant State.

A. Introduction: general rules applicable to sovereign immunities in Spain

44. Although immunities will be subject to further analysis in the next section, it is worth mentioning at this point the most substantial difference between ordinary enforcement proceedings, and proceedings where the defendant is a State: the rules mentioned in the previous section are to be applied taking into account specific rules and treaties affecting states and their assets, namely:

(i) Conventions on the regulation of diplomatic and consular action:

a. Vienna Convention on Diplomatic Relations, signed in Vienna on 18 April 1961 (the "**1961 Convention**").

b. Vienna Convention on Consular Relations, signed in Vienna on 24 April 1963.

c. Convention on Special Missions, adopted on 8 December 1969.

Spain is a party to these treaties, which have been incorporated into the Spanish domestic legal system.

(ii) Conventions governing the legal regime of immunities enjoyed by foreign States in the forum State:

a. United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (the "**2004 UN Convention**"). This Convention was opened for signing in New York on 17 January 2005 but requires the deposit of thirty instruments of ratification or accession to enter into force (Art. 30.1), and, to date, it is not yet in force.

However, the United Nations General Assembly considers that the immunities contained in this instrument constitute "*a generally accepted principle of customary international law*". Spain deposited its instrument of accession to the 2004 UN Convention on 11 September 2011 and, even if not binding, courts and tribunals have traditionally relied on this Convention. Likewise, Spanish national rules are clearly inspired by this legal material.

b. There are also numerous treaties signed by Spain which, secondarily, govern sovereign immunities. These include the following: (i) the United Nations Convention on the Law of the Sea, of 10 December 1982; (ii) the Agreement among the States Parties to the North Atlantic

Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, of 19 June 1951; (iii) the 1958 Convention on the Territorial Sea and the Contiguous Zone, of 10 September 1964; (iv) the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed in Brussels on 10 April 1926, and Additional Protocol, signed in Brussels on 24 May 1934; (v) the Chicago Convention on International Civil Aviation, of 7 December 1944; (vi) the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft, of 29 May 1933; (vii) the Agreement on Defense Cooperation between Spain and the United States, of 1 December 1988; among others.

(iii) Organic Law 16/2015, of 27 October 2015, on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain, and international conferences and meetings held in Spain ("**Law on Privileges and Immunities**" or "**LPI**"). The LPI is the main Spanish domestic legislation regarding immunities from jurisdiction and enforcement. This law –which is essentially influenced by the 2004 UN Convention– gathers Spanish and international case law and governs immunities and their exceptions in great detail.

B. Regime for notifications to a State or State entity

45. Another difference found when enforcing a foreign judgment against a State is the notification regime. Article 27 of the LILC provides:

> "*Summons and judicial communications directed to foreign states.*
>
> *1. Summons, subpoenas, requests and any other acts of judicial communication addressed to foreign States shall be made by diplomatic channels through the Ministry of Foreign Affairs and Cooperation, and must be communicated by note verbale and in accordance with the provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961.*
>
> *2. Spanish courts shall inform the Ministry of Foreign Affairs and Cooperation of the existence of any proceedings against a foreign State for the sole purpose of issuing a report in connection with jurisdiction and enforcement immunities, which will be transferred to the competent court by the same means.*
>
> *3. In civil proceedings brought in Spain against foreign States, the first summons, which shall be served by the diplomatic channels provided for in paragraph 1, shall be deemed to have been served two months after the date appearing on the diligence or on the proof of receipt thereof.*"

46. A series of specific features in the procedure for the enforcement of foreign judgments against other States arise from the above. The first guarantee that emerges from this article is the obligation of Spanish courts and tribunals to inform the Ministry of Foreign Affairs of the existence of any judicial proceedings initiated against a sovereign State. The purpose of this is to (i) notify the State in question of the existence of such proceedings through the Ministry of Foreign Affairs, instead of employing the usual service system; and (ii) prepare a report based on the circumstances of the case, analyzing the existence of circumstances triggering immunity that would require special protection. This report is mandatory both in proceedings on the merits and in enforcement proceedings.

47. Article 51 of the LPI establishes the criteria to determine if proceedings are considered to have been initiated against a sovereign State:

> "*For the purposes of this Organic Law, it shall be understood that proceedings have been instituted before the Spanish courts against any of the entities or persons who, in accordance with this Organic Law, enjoy immunity, if any of them is mentioned as a party against whom the proceedings are directed*." (stress added).

48. Moreover, communications between the Ministry and the courts are governed by Article 54 of the LPI:

> "1. *The Ministry of Foreign Affairs and Cooperation shall send the summons or notification of the court to the corresponding Spanish diplomatic mission or permanent representation, for the purpose of its transfer to the Ministry of Foreign Affairs of the foreign State or to the competent body of the international organization.*
>
> *2. The Ministry of Foreign Affairs and Cooperation shall transfer to the competent court the non-binding report provided for in Article 27 of Law 29/2015, of 30 July 2015, on International Legal Cooperation in Civil Matters and any communication that, in matters of immunity, is sent to it through diplomatic channels by a foreign State or an international organization in relation to proceedings initiated in Spain.*
>
> *3. The competent court shall, as soon as possible, transfer to the Ministry of Foreign Affairs and Cooperation the requests for the report provided for in Article 27 of Law 29/2015, of 30 July 2015, on International Legal Cooperation in Civil Matters and the communications it addresses to the foreign State*."

49. Therefore, in the absence of a treaty, communications between one State and another are conducted via the ministries of foreign affairs, under Articles 27 and 41.2 of the 1961 Convention. Similarly, the communications are made through the Spanish diplomatic mission or permanent representation in the defendant State. In

practice, this means that the notification is normally made through the Spanish embassy in the defendant State.

50. It is important to note that the aforementioned service procedure must be adhered to in order to avoid problems. Any defect in the notification procedure could lead to the nullity of the summons and, eventually, of the proceedings. Furthermore, although it is not explicitly stated in the law, it is reasonable to conclude that this communication regime must be observed until the State designates its legal representation.

51. Finally, the third paragraph of Article 27 of the LILC establishes a period of two months from which the summons will be deemed to have been received and notified. In practice, this means that the time limit for opposing to the claim (or taking any other action, motion, or procedural step on the side of the defendant) begins two months after the information has been effectively received by the defendant State.

C. Legal report of the Ministry of Foreign Affairs

52. Regarding the report on matters related to immunities to be issued by the Ministry of Foreign Affairs, it is important to emphasize the following two points:

(i) The initiation of legal proceedings against States is not subject to the approval of the Ministry of Foreign Affairs. If this were the case, then a governmental authority would be interfering in a judicial matter, and the right to effective judicial protection could be infringed.

(ii) The legal report, which must be issued by the Ministry of Foreign Affairs, is not binding and, in practice, Spanish courts do not always follow the report.

53. In addition, once the legal report has been received by the Ministry, the courts usually grant a period for the parties to make submissions. This was the position adopted by the Superior Court of Justice of Madrid in Order 12/2016 of 14 November 2016 [AC 2016, 1941].

54. Regarding which proceedings give rise to the communication to the Ministry, the LPI refers to "*any proceedings against a foreign State*" that seems to permit a broad interpretation, which should be in accordance with the criteria established in Article 51 LPI. This would cover any type of legal proceedings before any order.

D. Subsidiary nature of the LILC

55. It must be noted that the LILC is subsidiary to any other international regulation and/or treaty and, specifically, to Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) (the "**EU Service Regulation**"). However, under

	Article 1 of the EU Service Regulation, it does not apply to the liability of a Member State for acts or omissions in the exercise of its authority (*acta iure imperii*). Therefore, the overlap between Article 27 of the LILC and the EU Service Regulation is not clear. 56. The CJEU has held that notices of claims brought by private parties holding public debt against a State fall within the EU Service Regulation's scope (see Judgment of the CJEU of 11 June 2015 in case C-226/13, *Stefan Fahnenbrock and Others v Hellenische Republik*). However, there is no Spanish case law on this matter. Therefore, to avoid procedural problems, it seems safer to follow the regime established by Article 27 of the LILC. 57. Also, Spain is a contracting party to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "**Hague Convention on Service Abroad**"). This Convention does not expressly exclude *acta iure imperii* and, to date, Spanish courts have not elaborated on the application of this Convention in cases where a sovereign State is being served. 58. Nonetheless, Spanish courts tend to adhere to the procedure of Article 27 of the LILC and notify via the Ministry of Foreign Affairs, even in cases where the defendant is also a contracting party to the Convention (see, for example, the Judgment of the Superior Court of Justice of Madrid, of 16 June 2020 [AS 2021, 77], where communications were directed to Nicaragua, a contracting party to the Hague Convention on Service Abroad, through the channel established by Article 27 of the LILC).
3.	**What special considerations apply where the defendant/debtor in enforcement proceedings is a state, e.g. doctrine of sovereign immunity?**
	A. Enforcement immunity under the LPI 59. The LPI, enacted on 27 October 2015, is inspired by the 2004 UN Convention and has codified the national and international practice on immunities. As such, the LPI recognizes and upholds the principle of State immunity, but from a restrictive perspective: sovereign immunities are subject to several exceptions, which mirror the distinction between *acta iure imperii* and *acta iure gestionis*. 60. The LPI defines immunity from enforcement as the prerogative whereby a State, organization, or person and its property shall not be subject to coercive measures or the enforcement of judgments issued by the courts of another State. The concept of 'State' encompasses the following: (i) the State itself and its various organs of government;

(ii) the constituent elements of a federal State or political subdivisions of the State, which are empowered to perform acts in the exercise of sovereign authority and act in such capacity;

(iii) State agencies and institutions and other public entities, even if they have separate legal personality, provided that they are empowered to perform acts in the exercise of the sovereign authority of the State and that they act in such capacity; and

(iv) representatives of the State when acting in that capacity.

61. Immunity from enforcement, together with its exceptions, is governed by Articles 17 to 20 of the LPI. There are essentially two scenarios where it is possible to pursue enforcement or attachment measures against a State:

(i) Where the defendant State has consented to the enforcement measures.

In fact, if a State consents to the adoption of attachment measures, the courts will be able to carry out such measures without violating sovereign immunity. However, the consent of a State to the exercise of jurisdiction against it does not entail consent to enforcement. Such consent can be provided expressly or impliedly.

(ii) Where the assets subject to enforcement measures are used or intended to be used by the State for purposes other than non-commercial public purposes, provided that they are located in Spanish territory and have a link to the State against which the proceedings have been instituted, even if such assets are intended for an activity other than the one that gave rise to the proceedings (i.e., assets intended for *acta iure gestions*).

The LPI includes a list of assets that must be deemed as used or intended for non-commercial public purposes. Therefore, these assets cannot be subject to enforcement measures, except with the consent of the State:

(a) Assets, including bank accounts, used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular offices, special missions, permanent representations to international organizations, or delegations to organs of international organizations or international conferences;

(b) State property of a military nature or used or intended to be used in the performance of military functions;

(c) The assets of the central bank or other monetary authority of the State that are intended for the specific purposes of such institutions;

(d) Property that forms part of the cultural heritage or archives of the State or of an exhibition of objects of scientific, cultural, or historical interest,

provided that it has not been and is not intended to be offered for sale; and

(e) State vessels and aircraft.

(See Section 6 for further analysis of these assets).

B. Enforcement immunity under Spanish case law

62. Spanish courts have adopted a restrictive approach to enforcement against State owned assets since 1986. In particular, the Spanish Supreme Court formally declared the application of the restrictive theory of immunity in its Judgment of 10 February 1986, in the case of *E.M.B. vs. Embassy of Equatorial Guinea* [RJ 1986, 727].

63. This restrictive approach was explained, in the Judgment of the Supreme Court of 22 June 2009, [RJ 2009, 6059]. Although addressing issues on immunity from jurisdiction, this judgment states:

> "*... the rules of public international law* [...] *do not impose a rule of absolute immunity of foreign States from enforcement, but rather make it possible to affirm the relativity of such immunity, a conclusion that is reinforced by the very requirement of the effectiveness of the rights contained in Art. 24 of the Spanish Constitution and by the ratio of immunity, which is not to grant States indiscriminate protection, but rather to safeguard their equality and independence. Consequently, the delimitation of the scope of such immunity must start from the premise that, in general, when the sovereignty of the foreign State is not involved in a certain activity or in the involvement of certain assets, both international law and, by reference, domestic law disallow the non-enforcement of a judgment; consequently, a decision of non-enforcement would entail in such cases a violation of Art. 24.1 of the Spanish Constitution*" (stress added).

64. In this regard, the Spanish Constitutional Court has also emphasized that the principle enshrining immunities is not contrary to the right to effective judicial protection under Article 24.1 of the Spanish Constitution: "*The jurisdiction of the Spanish courts and tribunals must operate within the sphere that international law leaves to the State in this matter; for if it were to extend beyond the sphere delimited by international law and try to make effective in any case the jurisdictional protection in the internal order, the State could, in doing so, commit an unlawful act by violating an international obligation, which would involve its international responsibility to other States*" (Judgment of the Constitutional Court in case 292/1994 of 27 October 1994 [RTC 1994, 292]).

65. On the other hand, as LPI shows, the relative thesis of immunity rests on a fundamental distinction between *acta iure imperii* and *acta iure gestionis*.

According to the Judgment of the Constitutional Court in case 176/2001 of 17 September 2001 [RTC 2001, 176]:

> "*The relativity of the immunity from enforcement of foreign States is based on the distinction between property intended for activities of "iure imperii" (i.e., in which the sovereignty of the State is engaged) and property intended for activities of "iure gestionis" (i.e., activities in which the State does not make use of its power of empire and acts in the same way as a private individual).*"

66. In fact, this is a consistent approach of Spanish courts:

> "*In the international community, we will now speak of a restricted immunity of States, which requires a distinction to be made between acts performed by foreign States through their public authorities (iure imperii acts) and acts of a civil and commercial nature (iure gestionis acts).*
>
> *The consequence of such a distinction between one act and the other is that while acts of iure imperii would be, or rather would continue to be, protected by the principle of immunity from jurisdiction, acts of iure gestionis would not enjoy such immunity.*
>
> *The distinction between one type of act and another is, admittedly, not an easy task, it having been pointed out as a criterion of separation or differentiation that if acts of iure imperii are those performed in the exercise of the sovereignty of the State, acts of iure gestionis are those relating to activities that could also be performed, and with the same scope, by a private individual.*" (Judgment of the Superior Court of Justice of Catalonia in case 4605/2014 of 25 June 2014 [AS 2014, 2229]).

67. In this context, case law has gone deeper into the relative scope of the immunity from enforcement. For example, the Madrid Court of Appeals, in its Judgment of 27 September 1993, [AC 1993, 1971], held that "*the enforcement of a housing lease contract and the actions derived therefrom cannot at all be considered as acts performed iure imperi, but rather iuri gestionis, since no manifestation of sovereignty is made when signing it, nor is the contract linked to services proper to the diplomatic mission, nor has it been proven that diplomatic functions were performed in the dwelling rented by the lessee; therefore, it must be understood that the defendant lacks immunity*".

68. The Constitutional Court, in its Judgment in case 176/2001 [RTC 2001, 176], ruled on the unseizability of parking lots owned by the French Consulate in Bilbao, as they were used for official activities. And the same court has also held that it is possible to enforce against a State the "*amounts corresponding to the refund of VAT when considering, with reasoning, that the same were derived both from actions*

iure imperii and from private activities" (Order of the Constitutional Court of 1 July in case 112/2002 [RTC 2002, 112]).

69. More importantly, the Judgment of the Supreme Court of 13 June 2005 recognized the impossibility of seizing checking accounts of a foreign State intended for the normal functioning of its embassy and consulates, "*even if the amounts deposited in banking institutions may also serve for the performance of acts in which the sovereignty of the foreign State is not involved, namely, for the performance of activities iure gestionis which may not be covered by the ratio of the immunity of the assets of the diplomatic and consular missions*".

70. On this subject, under Article 22.3 of the 1961 Convention and Article 31.4 of the Vienna Convention on Consular Relations, respectively, the property of diplomatic and consular missions is *absolutely immune* from enforcement. This was stated by the Constitutional Court in its Judgment of 1 July in case 107/1992 [RTC 1992, 107]:

> "*In addition to this generic delimitation, it should be borne in mind that certain property enjoys a particular immunity because of the status of its holders, as is the case with the property of diplomatic and consular missions [Art. 22.3 of the 1961 Vienna Convention on Diplomatic Relations and Art. 31.4 of the Vienna Convention of 1963; so that the immunity of States is based on a double distinction: a) the property of diplomatic and consular missions – including bank current accounts – is absolutely immune from enforcement according to contemporary international practice; b) the property of foreign States which is destined for activities iure imperii but not for activities iure gestionis is immune from enforcement.* […]
>
> *With respect to these assets, if they exist, the immunity from enforcement guaranteed by international law* […] *reaches only those which are intended for the performance of acts iure imperii, but not those intended for the performance of activities iure gestionis. Thus, the ordinary courts, in order to satisfy the right to enforcement of judgments, are authorized to direct the activity of forced enforcement against those goods that are unequivocally earmarked by the foreign State for the development of industrial and commercial activities in which its sovereign power is not engaged by acting in accordance with the rules of private-legal traffic*".

71. Furthermore, the Supreme Court has emphasized that the factor that determines the exceptions to immunity is not the nature of the property, but, rather, its purpose: "*Any property used for a public purpose (official non-commercial purposes) enjoys immunity from enforcement, regardless of its nature. Whereas, on the contrary, coercive measures may be taken against property used for a commercial purpose*" (Judgment of the Supreme Court of 3 October in case 517/2019 [RJ 2019, 3998]).

	72. In essence, the reasoning adopted by Spanish courts has generally been consistent since 1986, and the enactment of the LPI has not significantly altered the doctrine of Spanish courts. **C. Assessment of immunities *ex officio* or at the request of a party** 73. Under Article 49 of the LPI, Spanish courts shall *ex officio* assess immunity issues and shall refrain from hearing cases submitted to them when a lawsuit has been filed or proceedings have been initiated. This rule encompasses both immunity from jurisdiction and immunity from enforcement. 74. This is consistent with Spanish case law: "[i]*f the respondent State does not raise it, the domestic courts are obliged to recognize the immunity of the respondent State ex officio. This is established by both the 2004 UN Convention and the LPI*" (Order of the Superior Court of Justice of Madrid of 14 November 2016 in case 12/2016 [AC 2016, 1941]). 75. Of course, immunity may also be invoked by States, in the event that the court considers that its jurisdiction is not affected by sovereign immunity. If so, the State may oppose jurisdiction or enforcement by filing a jurisdictional plea ("*declinatoria*"), which effect is that proceedings are suspended. 76. Nonetheless, in a case of enforcement proceedings, the jurisdictional plea can only be filed when the attachment has been already ordered by the court. Therefore, if the court does not accept immunity *ex officio*, the defendant State may invoke its immunity when enforcement measures have already been adopted. It is thus worth mentioning that in order to assess even *ex officio* immunity from enforcement, it is necessary to determine the purported use of a given asset as has been explained above. 77. Finally, recent case law has ruled on the duty of the courts when assessing whether the assets are attachable or not. According to the Superior Court of Justice of Madrid, in its Judgment of 20 December in case 793/2022 [JUR 2023, 16774]: "*In coherence, and sharing the criteria of the aforementioned judgment, the first ground of appeal is accepted, given that from the account contained in the background facts of this judgment, it is not inferred that the judicial body has carried out either directly or by requesting the assistance of the Spanish Administration a minimum inquiry of the assets of which the executed Embassy could be the owner, and once these are obtained, there must be an express pronouncement on each one of them as to whether or not they are affected by the alleged 'immunity of enforcement*'".
4.	**What exceptions may apply where the claim results from improper actions of the defendant state, e.g. wars of aggression?**

78. As explained in the previous section, sovereign immunity is the main defense used by States to oppose the enforcement of judgments in Spain. Sovereign immunities, although they have exceptions, are recognized in Spanish national legislation, and Spanish courts refrain from enforcing judgments that would undermine the enforcement immunity of third States.

79. However, in the same way that this immunity is recognized, there are also exceptions to jurisdiction and enforcement immunities that have been codified in the LPI. Such exceptions arise from the practice of national and international courts, along with the influence of the 2004 UN Convention, and are found in Articles 5 to 16 of the LPI (jurisdiction immunity) and 17 to 20 of the LPI (enforcement immunity).

80. However, leaving aside these exceptions -whose existence is not in doubt since they are statutorily recognized- there exists an important debate on the possibility of finding other exceptions to immunity from enforcement, which might not be codified by law. In particular, international scholars and doctrine question whether an infringement of the *jus cogens* rules (such as war crimes, torture, genocide, etc.) could constitute an exception to the principle of sovereign immunity (see, for example, Tomuschat, C., *L'immunité des États en cas de violations graves des droits de l'homme*, Revue Générale de Droit International Public, 2005; or Caplan, L., *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, American Journal of International Law, vol. 97, 2003).

81. To date, there are no known judgments of Spanish courts finding in favor or against this possibility. And, to the best of our knowledge, Spanish courts have not considered whether a violation of international law could constitute an exception to that State's immunity from enforcement.

82. However, it must be noted that, since the late 1980s, Spanish courts have been strongly influenced by customary international law. Thus, Spanish courts are often inspired both by international treaties (even if they are not in force in Spain, such as the 2004 UN Convention), and by case law of international or national courts. Therefore, it is reasonable to assume that if a Spanish court were to enter into this debate, it would be influenced by international law. Although this is an aspect that has not been developed in international treaties (in the 2004 UN Convention, the possibility of establishing an exception to sovereign immunity based on infringements of *jus cogens* was discussed but, ultimately, was not included), international case law has addressed this issue.

83. In this regard, an important case is the Judgment of the European Court of Human Rights ("**ECHR**") in *Al-Adsani v. United Kingdom*, of 21 November 2001 (Case 35763/97), which was decided by a vote of 9 judges against 8.

	84. The case arose from the allegation that Al-Adsani, a Kuwaiti and British national, was tortured in Kuwait by order of the Kuwaiti government in 1991. In civil proceedings first instituted in the United Kingdom, Al-Adsani sought compensation against the State of Kuwait. The court decided to grant immunity to Kuwait, so Al-Adsani initiated proceedings against the United Kingdom in the ECHR in 1997. The ECHR delivered its judgment on 21 November 2001, confirming the judgment of the British court. 85. The International Court of Justice ("**ICJ**") ruled along the same lines in the case, *Germany v. Italy* (Judgment of the ICJ of 3 February 2012). In brief, Germany instituted proceedings against Italy in 2008, requesting the ICJ to declare that Italy had failed to respect the jurisdictional immunity that Germany enjoys under international law by allowing civil claims seeking damages for injuries caused by violations of international humanitarian law committed by the Third Reich during the Second World War to be brought against it in Italian courts. Also, Germany requested the Court to declare that Italy had breached Germany's jurisdictional immunity by recognizing judgments of Greek civil courts issued against Germany on the basis of acts similar to those which had given rise to the claims brought before Italian courts as enforceable in Italy. 86. In its judgment issued on 3 February 2012, the ICJ held that the actions of the Italian courts in denying Germany immunity constituted a breach of Italy's international obligations. In this respect, the Court noted that the question which it was called upon to decide was not whether the acts committed by the Third Reich during the Second World War were illegal, but whether, in civil proceedings against Germany relating to those acts, the Italian courts were obliged to grant Germany immunity. 87. In this regard, it is highly relevant that two international authorities such as the ECHR and the ICJ have found that the infringement of the *jus cogens* rules does not amount to an exception to sovereign immunity. If this debate reaches Spanish courts, one would expect Spanish courts to follow the reasonings of the ECHR and the ICJ. 88. Nonetheless, it is undeniable that there is a relevant doctrinal discussion on this topic, and further developments are expected in the future. Ultimately, the principle of sovereign immunity and the principle of access to justice coexist in a delicate balance, and the so-called 'exception of fundamental rights violations' has gained favor among public international academics. Several theories argue in favor of such an exception; among others, the implied waiver approach, or the reprisal approach (see Bröhmer, J., *State Immunity and the Violation of Human Rights*, Martinus Nihoff Publishers, 1997).
5.	**What due process standards and exceptions may apply in proceedings for enforcement of judgment against a state?**

89. In Spain, due process is a fundamental right under Article 24.2 of the Spanish Constitution: "[a]*ll persons have the right to a regular judge predetermined by law, to a defense and to the assistance of counsel, to be informed of the charges against them, to a public trial without undue delay and with all the guarantees, to use the means of evidence relevant to their defense, not to testify against themselves, not to confess guilt, and to the presumption of innocence*". This fundamental right holds a privileged position within the Constitution, as it benefits from the maximum level of protection and thus any breach of this rights in the context of court proceedings may be argued before the Constitutional Court.

90. Spanish domestic legislation does not provide extensive regulation on due process matters in the context of enforcement actions brought against foreign States (even less so in cases where the enforcement judgment was issued in a foreign jurisdiction). Service of documents and communications with foreign States are governed by Article 27 of the LILC and Articles 52 to 54 of the LPI. Judgments by default are governed by Article 55 of the LPI, and prerogatives of States during proceedings are governed by Article 56 of the LPI. Apart from this, there is no other statutory guidance on how due process must be assessed in proceedings against States.

91. However, as examined below in questions V(a) and V(b), certain foreign judgments are not enforceable in Spain if they do not comply with Spanish basic principles and rules. As a matter of principle, judgments issued in violation of the rights of defense, or against public policy, are not enforceable by Spanish courts (see below). Nonetheless, by way of introduction, we will first explain the meaning of due process under Spanish law.

92. In Spain, due process involves, *inter alia*, the fundamental right to a fair trial, a public hearing with full guarantees, and the right of defense in such proceedings with the assistance of a lawyer (Judgment of the Constitutional Court of 14 June in case 105/1999 [RTC 1999, 105]). The right to a lawyer is also a constitutional guarantee of due process, which is not always fulfilled by the appointment of legal counsel. The right to a public hearing and the prohibition of undue delays are also requirements of due process in Spain, as well as the right to submit relevant evidence that is relevant to the defense which, if requested under procedural rules, must be admitted.

93. In any case, as explained (see Section I above), grounds for refusal of recognition and enforcement in Spain include (i) infringement of the right of defense; and (ii) violation of public policy. Therefore, a breach of such principles in the foreign proceedings would render such foreign judgment unenforceable, notwithstanding the defendant's status as a State.

	94. Below, we will examine how these guarantees work in cases where the defendant is a State.
a.	**What standard will the court apply in the enforcement proceedings when assessing whether the service requirements have been met in the original proceedings against a state?**
	95. As a rule, foreign judgments are enforceable in Spain if they do not fall within the grounds for refusal of enforceability provided for in Article 46 of the LILC. Specifically, under Article 46.1.b), a judgment issued in violation of due defense rights cannot be recognized in Spain. In the case of a judgment by default, a manifest infringement of the rights of defense is presumed if the defendant was not served properly and with sufficient time for it to be able to defend itself. 96. To fulfill the requirement established in Article 46, the judgment must be issued as a result of proceedings in which the equal treatment of the parties and the rights to defense have been observed. Service requirements will be met if the proceedings are conducted in compliance with the provisions of the law of the court of origin (the *lex fori regit processum* rule is enshrined under Article 3 of the LCP). However, the rule is not universally applicable and thus a Spanish judge must assess on a case-by-case basis whether the manner in which the defendant was notified allowed him to defend himself effectively. In several judgments (see the Judgment of the Supreme Court of 14 March in case 202/2022 [RJ 2022, 1171]; or the Judgment of the Supreme Court of 4 December in case 1316/2007 [RJ 2008, 36]), Spanish courts have declared that service must be unequivocal, sufficient to justify receipt by the defendants of the claim, and carried out with sufficient time to prepare an adequate defense. It is the duty of Spanish courts to confirm that service standards were duly observed in the original proceedings, the burden of proof of which corresponds to the applicant party who, under Article 54.4.b) of the LILC, is required to certify the correct service of the writ of summons and/or the declaration by the court of origin of the default judgement. In case of doubt, Spanish doctrine and scholars consider that the alleged violation of the right of defense must be proven by the party alleging it (Iglesias Buhigues, J., *Comentarios a la Ley de Cooperación Jurídica Internacional en Materia Civil*, Tirant lo Blanch, 2017, p. 510). 97. Concerning European Union Member States, Regulation 1215 becomes relevant. The Regulation contains a set of rules on the enforceability of foreign judgments in Member States. Besides the standard public policy clause, the regulation states that foreign judgments will not be subject to enforceability when the judgment has been issued in default, if the defendant was not served with a writ of summons or an equivalent document in such a manner and with sufficient time to enable them to defend themselves (Article 45.1).

98. Also, Article 46.1.a) of the LILC refuses enforceability of foreign judgments contrary to Spanish public policy. In fact, the preamble to the LILC considers that the rule contained in Article 46.1.b) (the right of defense) can be understood as falling within the concept of 'public policy', similarly the system of individual rights and freedoms protected by the Spanish Constitution and international conventions (Judgment of the Supreme Court of 6 February in case 247/2014 [RJ 2014, 833]).

99. In brief, to enforce a foreign judgment, Spanish courts will examine if service requirements have been met in the original proceedings. Judicial notifications and communications should not only be served in compliance with an "adequate" *lex fori* but also with the Spanish concept of 'public policy'.

100. On the other hand, service requirements depend on whether the defendant State is a Member State of the European Union, and in what capacity such State appears before the court. Service on a Member State acting as a private entity would be governed by the EU Service Regulation. This Regulation excludes from its material scope "*liability of the State for actions or omissions in the exercise of state authority (acta iure imperii)*". Apart from such cases, a Member State could theoretically be served in accordance with the EU Service Regulation. Nonetheless, the defendant will likely argue that the service requirements were not complied with for the simple reason that it is being sued on the basis of a *iure imperii* activity. Therefore, it is not the safest option to employ the EU Service Regulation channels. In addition, there is no Spanish case law on the service of documents to foreign States under the EU Service Regulation.

101. Notwithstanding the above, and under Article 41.2 of the 1961 Convention and Article 27 of the LILC, the Spanish Ministry of Foreign Affairs shall serve the foreign State with the judicial communication through a *note verbale* from the diplomatic services. Also, notification is considered effective two months after the receipt date.

102. In this regard, the Superior Court of Justice of Madrid, in its Order of 29 June 2022 in case 4/2018 [JUR 2022, 68121], upheld a claim for the nullity of actions brought in the context of an international arbitration seated in Madrid. The basis for the claim of nullity was that notifications made to the defendant (Malaysia) did not comply with the applicable law. After the Court's decision on jurisdiction in 2018, the Spanish Ministry of Foreign Affairs notified the Malaysian Embassy of the request for the appointment of an arbitrator. In 2020, the sole arbitrator issued a partial award on jurisdiction, declaring that a contract existed and contained a valid arbitration clause. Malaysia challenged the partial award on jurisdiction, based on the grounds that it had not been properly notified of the arbitration. The Court ruled in favor of Malaysia and declared the nullity of the proceedings, reasoning that the failure to notify under the formal requirements of the applicable law rendered Malaysia defenseless in the arbitration. The judgment clearly stated that notification

	to States cannot be directly made to the notified State's embassy (in this case, the Malaysian embassy in Spain). The Court explained that service to States must be carried out in accordance with the regime contained in the LILC and LPI. 103. In any event, the Spanish standard for service to foreign States requires notification through diplomatic channels. This standard, together with the rules regarding due process and public policy, must be taken into consideration while examining if service requirements were met in the original proceedings.
b.	**What exceptions may apply where conventional forms of service against a state are impossible, e.g. due to absence of diplomatic relations?**
	104. In the current regulations, there is no exception to the standard of diplomatic notification when dealing with foreign States. The Order of the Superior Court of Justice in the Malaysian case referenced above is a clear example that no exceptions are allowed to service requirements with foreign States; service requirements established in the 1961 Convention, the LILC, and the LPI are imperative. It is important to note that, in the Malaysian arbitration case, Malaysia had the opportunity to contest the arbitrator's jurisdiction twice, and, still, the Superior Court of Justice of Madrid held that the breach of formal requirements of service was sufficient to declare the nullity of proceedings. 105. The role of the Spanish Ministry of Foreign Affairs is not limited to service. Under Article 27.2 of the LILC, the Ministry shall issue a report on matters relating to immunity from jurisdiction and enforcement, which shall be sent to the competent court. 106. In view of the regulatory framework, it is important to clarify the order of application. According to Professor Gómez Jene, in principle, the procedure provided for in the 1961 Convention should prevail over the one provided for in Article 54 LPI. Only in those cases in which the procedure provided for in the international text cannot be observed, would the LPI regulation come into play (Gómez Jene, M., *La Notificación Judicial a un Estado Extranjero*, in "Cuadernos de Derecho Transnacional", vol. 13, no. 2, 2021, pp. 739-744). 107. On this point, it is noteworthy to highlight the provisions contained in the 2004 UN Convention. Not yet in force, the Convention was signed by the United Nations General Assembly in 2005 and ratified by Spain in 2011. Although the Convention is not in effect, the LPI recognizes that its provisions are a generally accepted principle of customary international law. The 2004 UN Convention employs less restrictive terminology: its rules allow the initial notification to be carried out using any international convention applicable, or any special notification arrangement between the claimant and the State involved, if not prohibited by the law of the

	forum State. Failing that, the 2004 UN Convention allows both the diplomatic route or any other means accepted by the State involved. 108. The rigidity of the regulation and the absence of exceptions in this regard is because the immunity of foreign States is a guiding principle of international law. Also, the right of defense benefits from the highest level of protection granted to fundamental rights by the Spanish Constitution. In various judgments, the Spanish Constitutional Court has declared that the right of defense encompasses service requirements: "*A special duty of diligence is imposed on the judicial bodies in performing acts of procedural communication to ensure their receipt by the recipients, thus allowing them to defend themselves and avoid defenselessness*" (Judgment of the Constitutional Court of 11 July in case 91/2022 [RTC 2022, 91]).
c.	**What standard will the court apply in the enforcement proceedings when assessing whether the right to representation requirements have been met in the original proceedings against a state?**
	109. As stated above, the right to representation is set out in Article 24.2 of the Spanish Constitution, which recognizes it as a right "*to the defense and assistance of legal counsel*". In practical terms, the duty of representing the parties is attributed to lawyers and court agents in the Organic Law of the Judicial Power ("**LJP**"), and it is their constitutional responsibility to guarantee legal assistance in legal proceedings. The parties shall be able to freely appoint their representatives from among the lawyers and court agents who meet the legal requirements (Article 545 of the LJP). 110. For instance, in civil proceedings, the involvement of court agents and lawyers will generally be mandatory, with the exceptions established in Articles 23.2 and 31.2 of the LCP, respectively. 111. In the case of enforcement proceedings before Spanish courts, the foreign State must, as well as natural or legal persons, be represented by (i) a court agent (see the case of the enforcement proceedings against Argentina in the Judgment of the Supreme Court of 3 October in case 517/2019 [RJ 2019, 3998]), and (ii) by one or more lawyers. 112. The representation of the Spanish State (and its autonomous institutions) in court is the responsibility of a specific body of senior public servants, who are referred to as "*Abogados del Estado*". Their role is to advise, represent, and defend all constitutional bodies and territorial entities. This representation and defense in court is meant for any legal order or jurisdiction, both in Spain and abroad, including supranational tribunals (see Article 1 of the Royal Decree 997/2003, of 25 July, which approves the Regulation of the State Legal Service). Therefore, this body is in charge of representing Spain in international disputes, before foreign

	tribunals, institutions, and arbitration proceedings, and may be assisted by private law firms of the jurisdiction in question, when required (see, for instance, the hiring by the *Abogacía del Estado* of the American law firm Curtis, in order to avoid the seizure of the bank accounts of the Cervantes Institute in London in the context of the arbitration proceedings on renewable energies). 113. Although the Spanish courts have not yet set any precedent regarding the standards of representation of the foreign State subject to enforcement in the original proceedings, the abovementioned national standards could be relevant in the assessment of the fulfillment of such requirements. 114. Moreover, the standards applied to enforcement proceedings against natural or legal persons might give a hint of those eventually applicable to foreign States. In particular, it should be noted that, when it comes to the assessment of the representation in the original proceedings, effectiveness prevails over formality. An example of this is provided for in the Judgment of the Supreme Court of 4 April 2006 in case 387/2006 [RJ 2006, 1917], which concerned a dispute regarding the formality of the power of attorney, due to the failure of the German notary to certify the representation of the parties as well as their capacity to grant such power of attorney. The Spanish Supreme Court held that as the failure to comply with the formality in question had not been challenged in the original proceedings, it could not be reviewed in the enforcement phase, and, also, that the trend in case law had "*softened this requirement to the point of turning it into a formality of economic significance, which, in no case, can hinder the right to obtain the protection of the courts*". Of course, this criterion could be subject to a different consideration if it involved the representation of a foreign State (and not a natural or legal person), given the public concerns attached to it. 115. In any event, it is also worth noting that, in these cases, deference is given to the law or courts where the judgment subject to enforcement was issued. In the abovementioned judgment, the Supreme Court considered that there was no evidence that "*the power of attorney had not been granted in accordance with the formalities of the country of origin* [Germany]". Similarly, the Barcelona Court of Appeals, in its Order of 28 April in case 138/2022 [JUR 2023, 97011], considered that in the exequatur and enforcement proceedings, "*the possibilities of defense in the foreign court* [of Switzerland] *cannot be questioned*". 116. Therefore, Spanish courts will probably refrain from any assessment of the foreign State's right of representation in the original proceedings. Where applicable, this assessment will probably focus on effectiveness rather than formality, with the law of the court of the original proceedings prevailing, rather than the Spanish one, notwithstanding observance of public policy, as we see below.
d.	**What exceptions may apply where the defendant state cannot find legal representation, or chooses not to be represented?**

	117. Regarding a lack of representation in the original proceedings, Spanish courts have outlined two different scenarios that have different consequences in enforcement proceedings: (i) The first scenario is where the judgment subject to enforcement was issued in breach of the right of defense of any of the parties, where the defendant was not served with the writ of summons or equivalent document in the proper manner and with sufficient time to enable them to defend themselves. In these cases, Article 46.1.b) of the LILC provides that the consequence shall be the non-recognition of the foreign judgment. This was true even before the LILC was enacted since the national courts were already following this approach in 2008. In its Judgment of 25 September in case 115/2008 [JUR 2009, 107758], the A Coruña Court of Appeals stated that "*ignorance of the existence of the proceedings, a type of default that, due to its implications for the proper respect of the rights of defense, becomes an obstacle to the recognition of the foreign judgment*". Again, it is worth mentioning that the burden of proof of the validity of the service of the writ of summons rests with the party initiating the enforcement proceedings, as it is part of the evidence that must be submitted together with the enforcement claim (Article 54 of the LILC). (ii) A second type of failure to appear duly represented at the original proceedings is where the service of the writ of summons was correct, and the failure to appear before the relevant court was in some way a voluntary decision by the defendant (where such defendant is a State or any natural or legal person). In this case, the exception set out in Article 46.1.b) of the LILC shall not be applicable, and the foreign judgment will be recognized and enforced by the Spanish court. For instance, in the abovementioned Judgment of the Barcelona Court of Appeals, of 28 April 2022 [JUR 2023, 97011], defendant claimed she could not find legal representation in the original proceedings (which took place before the courts of Switzerland) since she could not afford such defense. Despite the fact that in Spain free access to justice is available when required, this was considered irrelevant by the Barcelona Court, given that the defendant "*was duly summoned and was able to defend herself, despite the fact that she could not be assisted by counsel due to her lack of resources*", and that "*the fact that, unlike what happens in our jurisdiction, there is no free access to justice for cases of insufficient income cannot be considered in these proceedings*".

Therefore, Spanish courts may take a similar approach to duly served States that fail to find legal representation for any given reason.

Where such a State chooses not to be represented, again, there is no precedent in Spanish case law in this regard, but both the legal provisions under the LILC and the relevant case law on the enforcement of foreign judgments against natural or legal persons, may give us an idea of the trend that courts could follow, in which public policy and effective judicial protection are both considered. As stated previously, Article 46.1.b) of the LILC prevents the recognition of final foreign judgments for breach of the right of defense or representation of any of the parties, only in circumstances where the judgment was issued without the corresponding summons which allowed for such defense (namely, not in cases in which default is voluntary). Accordingly, Article 54 of the LILC requires the enforcement claim to provide evidence, *inter alia*, of the correct service of the writ of summons.

Concerning the applicable case law (again, not specific to States), the Judgment of the Supreme Court of 6 October in case 599/2016 [RJ 2016, 4774] followed a previous Judgment of 10 December 2002 [RJ 2003, 31], in which it considered that the failure to serve the defendant with the judgment (which gave rise to the enforcement) affected Spanish public policy, even if this was not a procedural requirement under the law of the court of origin. As a result, the foreign judgment was deemed not subject to recognition and enforcement.

However, in its 2016 Judgment, the Supreme Court considered that this approach was only applicable in cases where the defendant failed to appear because of the lack of due notice of the proceedings (i.e., involuntarily). In cases where such default was by consent, and the defendant simply chose not to be represented, the Supreme Court considered that public policy was not altered by the failure to serve the judgment of the court of origin, but rather by the bad faith of the defendant who was reluctant to appear in such proceedings, and then tried to use it to prevent the enforcement:

> "*However, such declaration, in its general sense, is applicable to those situations of default not consented to by the defendant himself, but in no case, as in the present case, can it justify those situations of default not only consented to by the defendant himself, but also articulated from his procedural bad faith in the course of the proceedings. In this sense, the prohibition of procedural bad faith, as a projection of the notion of abuse of rights, undoubtedly constitutes a presupposition that preferably integrates the concept of public order of the forum and that prevents the right or the claim that has been made, lacking an honest*

	and legitimate purpose, to the detriment of a third party, from having the effects pursued from a bad faith action of one of the parties". As a result, any exception could be related to the notion of public policy – which is an undefined legal concept– but could have a significant impact on the assessment of the grounds for enforcement or prevention of such enforcement against a foreign State that, voluntarily, did not appear in the original proceedings. Public policy, as the Supreme Court shows, can be interpreted in both ways, either as a defense of the Spanish legal order, preventing the enforcement when the standards for due process are not met, or even, on the contrary, where the party subject to enforcement which chose not to appear before the original court shows bad faith that constitutes an abuse of rights that would allow the enforcement, regardless of the lack of representation.
6.	**What assets may be subject of enforcement if the claim is against a state and what are the requirements, e.g. enforcement against assets of state owned entities?**
	118. Regarding the assets subject to enforcement, and considering the provisions of the 2004 UN Convention, Spanish authorities adopted the LPI. 119. Articles 17 to 20 of the LPI essentially reproduce Articles 18 to 21 of the 2004 UN Convention, providing for standards regarding immunity of States against enforcement measures before Spanish courts, considerably similar to the UN ones. However, the LPI differs in several ways regarding the scope of assets and requirements of immunity provided for in the 2004 UN Convention, which are, nevertheless, perfectly compatible with it. **A. Consent and the main exception to immunity** 120. Firstly, under Article 17.1 of the LPI, the general rule is that Spanish courts shall refrain from ordering enforcement or other coercive measures against the property of foreign States, both before and after the judgment, unless that State has consented to it, expressly or tacitly. 121. Regarding express consent, under the 2004 UN Convention, it is granted through (i) an international agreement; (ii) an arbitration agreement or written contract; or (iii) a written or oral declaration before a court. In this regard, it is worth mentioning that Article 18.1 of the LPI does not mention arbitration agreements, although these should be understood as being included within "*written contracts*". 122. Regarding tacit consent, while it is expressly accepted in the LPI, the 2004 UN Convention only accepts it implicitly. Both provisions are comparable in this regard since Article 18.2 of the LPI states that "*tacit consent for the purposes of the preceding Article is deemed to exist only when the foreign State has allocated assets*

of its own to the satisfaction of the claim which is the subject of the proceedings", an assumption which Article 19.b of the 2004 UN Convention includes as distinct from express consent. Therefore, the assignment of State assets to the satisfaction of the claim is, in both cases, understood as consent.

123. As a limit of the above, both under the 2004 UN Convention (Article 20) and the LPI (Article 18.3), the consent of the foreign State to the exercise of jurisdiction (referred to in Articles 5 and 6 of the LPI) shall under no circumstances imply consent to the adoption of enforcement measures.

124. Finally, regarding the possibility of withdrawing the consent given, there should be no objection when such possibility was prearranged by a treaty, arbitration agreement, or contract, if the revocation respects the limits that were agreed upon therein. However, the intention of the concerned State to waive such immunity must be unequivocally clear and refer to the specific assets affected by that waiver. However, the withdrawal of consent will not be effective if it takes place after the enforcement action has been brought, nor will it be possible where the consent was given by "*a declaration before the court*" or "*a written communication in specific proceedings*" (Article 18.1. c) of the LPI and, in similar terms, Article 19 a) of the 2004 UN Convention).

B. Assets for purposes other than official non-commercial ones, located in Spain and with a link with the State affected by the enforcement

125. The limits to immunity regarding the enforcement of assets of foreign States have been shaped over several decades, with a trend towards more flexibility, in order to allow effective judicial protection as set out in Article 24 of the Spanish Constitution. A landmark decision in this regard is the Judgment of the Spanish Constitutional Court in case 107/1992 of 1 July 1992 [RTC 1992, 107], which distinguished (i) *iure imperii* assets, for public non-commercial purposes; and (ii) *iure gestionis* assets, for private purposes. According to the Judgment of the Supreme Court of 14 February 2020 in case 146/2020 [RJ 2020, 1380], such distinction allows the reconciliation of the constitutional principle of effective judicial protection with the immunity granted to foreign States and their assets in Spanish territory.

126. This distinction between *iure imperii* and *iure gestionis* was enshrined in the LPI, in which Article 17.2 establishes that, regardless of the express or tacit consent of the concerned State, after the judgment has been issued, Spanish courts may also take enforcement measures if it has been determined that the assets subject to the enforcement measures are used or intended to be used by the State for purposes other than official non-commercial purposes, even if they are intended for an activity other than that which gave rise to the litigation. However, this rule is limited to assets that (i) are located in Spanish territory; and (ii) have a connection with the State against which the proceedings have been instituted.

(i) Located in Spanish territory.

The courts of a State cannot order coercive measures against the assets of another State, or any other subject, located outside such court's territory. However, this is not an issue linked to the principle of immunity of the State's assets, but, rather, to the jurisdiction of courts.

(ii) Connection with the State subject to the enforcement.

The LPI has adopted restricted criteria in the identification of the entities whose assets may be subject to enforcement, referring in Article 17.2 to '*States*', against which the proceedings are conducted, instead of '*entities*', as established in Article 19.c) of the 2004 UN Convention.

According to the definition of 'State' provided by Article 2.a) of the LPI, apart from the State and its organs, jurisdictional immunity only benefits certain entities with their own personality, namely: (i) the State and its various organs of government; (ii) the constituent elements of a federal State or political subdivisions of the State, which are empowered to perform acts in the exercise of sovereign authority and act in such capacity; (iii) State agencies and institutions and other public entities, even if they have separate legal personality, provided that they are empowered to perform acts in the exercise of the sovereign authority of the State and that they act in such capacity; and (iv) representatives of the State when acting in that capacity.

Consequently, public companies and other State entities carrying out mere commercial activities may not in principle claim the immunity provided for in the LPI, when they are parties to enforcement proceedings brought before the Spanish courts.

Regarding '*connection*' with the State subject to the enforcement, both the 2004 UN Convention and the LPI state that if a judgment is issued against a particular State entity, coercive measures cannot be taken against assets of another entity of the foreign State, or against the assets of the foreign State itself. The Spanish tribunals have interpreted such connection as an equivalent to "*property, possession, control or others*" (Judgment of the Superior Court of Justice of Madrid 432/2020, of 16 June [AS 2021, 77], in an enforcement proceeding against the Embassy of Nicaragua in Madrid), therefore linking the concept to them, although not limiting it necessarily to such scope.

C. Assets subject to immunity

127. Article 20 of the LPI provides a list of the assets which, among those owned, held, or controlled by the foreign State concerned by the enforcement, are *iure imperii,*

namely, dedicated to public non-commercial purposes, and, therefore, subject to immunity. These assets are the following:

(i) Assets, including bank accounts, used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, permanent representations to international organizations or delegations to organs of international organizations or to international conferences (not applicable to bank accounts intended exclusively to purposes other than public non-commercial ones).

The LPI does not grant immunity to any of these bank accounts and expressly excludes accounts intended "*exclusively*" for purposes other than public non-commercial ones. Regarding the accounts of diplomatic missions and consular posts that are of a "*mixed*" nature (e.g., that are used both for public and for unofficial commercial activities of the foreign State), both the LPI and the 2004 UN Convention seem to be clear about their immunity. In this regard, the LPI echoes the landmark case law of the Constitutional Court, which, in its Order in case 107/1991, recognized the unseizability of the bank accounts of diplomatic missions and consular posts, "*both because of the unique and indivisible nature of the balance of the account, and because of the impossibility of an investigation into the operations and the funds and their destination in a bank account attached to a diplomatic mission, which would imply an interference in the activity of the diplomatic mission, contrary to the rules of public international law*".

As a result, the trend in case law regarding bank accounts of diplomatic missions is that these are generally deemed to be covered by full immunity. The following are examples of judgments in which the complete immunity of embassy accounts has been recognized: (i) the Judgment of the Superior Court of Justice of Madrid of 20 December 2022 in case 793/2022 [JUR 2023, 16774], regarding the Embassy of Kuwait; (ii) the Judgment of the Supreme Court of 25 June 2012 [RJ 2012, 9582], regarding the Embassy of Chile; or (iii) the judgments of the Superior Court of Justice of Madrid of 9 April in case 252/2008 [JUR 2009, 125226], and, of 15 July in case 490/2009 [JUR 2009, 407960], both regarding the accounts of the Embassy of the Republic of Indonesia.

As a landmark judgment in this regard, we must mention the Judgment of the Supreme Court of 25 June 2012 [RJ 2012, 9582], which followed the abovementioned constitutional doctrine, since there had been several dissenting judgments recognizing the enforcement of bank accounts of the embassies concerned. This was the case of the Superior Court of Justice of Madrid in its Judgments of 29 June in case 661/2004 [AS 2004, 2401], and, of 8 June in case 401/2011 [AS 2011, 2300]. In both of these cases, the rationale behind the enforcement of these accounts was that "*if the judge has*

declared that the funds are for management purposes and such declaration has not been annulled, the balance must be deemed to be unique and indivisible in its consideration as a seizable asset". The Supreme Court rejected this approach and cleared any doubts regarding the immunity of embassy bank accounts devoted in whole or in part to *iure imperii*.

(ii) Assets of a military nature or used or intended for use in the performance of military purposes.

Although the military nature or use of a certain asset might seem obvious, in practice, it may lead to legitimate doubts. In the Montasa case, of 2 June 2003, the Court of First Instance of Rota (Andalucía) had to assess the nature of the activity of a commissary store located in the Naval Base of the United States Navy Resale System Office. The Court of First Instance concluded that the commissary could not be considered a military activity that affected US sovereignty, and, therefore, seized its bank account. However, the Cádiz Court of Appeals, in its judgment of 8 November in case 42/2004 [JUR 2005, 78178], overturned this enforcement, as it considered that the funds in such bank account were public funds, since the commissaries of the Navy are managed by military personnel, and the accounts are controlled by the Department of Defense of the United States, therefore are subject to immunity.

(iii) Assets of the central bank or other monetary authority of the State which is intended for the purposes of such institutions.

In this case, the requirement regarding the specific purposes of the monetary authority is specific to the LPI, since the 2004 UN Convention simply refers to the assets of the central bank or another monetary authority, regardless of its intention. However, both provisions are not contradictory, in view of the requirement contained in Article 31.1 of the 1969 Vienna Convention to contemplate the object and purpose of any treaty in the interpretation of its provisions.

(iv) Assets that belong to the cultural heritage or archives of the State or an exhibition of items of scientific, cultural, or historical interest, provided that such property has not been or is not intended to be offered for sale.

It is worth mentioning that this provision of Article 20.1.d) of the LPI, encompasses letters d) and e) of Article 21 of the 2004 UN Convention.

(v) State vessels and aircraft.

In this case, (which, is expressly referred to in the LPI, but not in the 2004 UN Convention), depending on the use attributed to the vessels or aircraft in question, they may be considered *iure imperii* assets (if dedicated to

transportation of State representatives, for instance), or *iure gestionis* (subject to enforcement), if their use is commercial.

As a result, a commercial aircraft could be seized unless it is devoted to a non-commercial use, closer to that of a State aircraft (if its purpose is the transport, for example, the Head of State or government Ministers). Consequently, it cannot be inferred that any aircraft, vessel, or similar asset, owned or controlled by the State, automatically enjoys immunity from enforcement, since the immunity will be reserved for *iure imperii* State vessels or aircrafts. This was the understanding of the Court of First Instance No. 101 of Madrid, in its Decisions of 14 April 2014 and 3 September 2015, when it agreed to the preventive seizure of an aircraft insofar as "*the property on which the seizure is requested does not appear to be a property destined to iure imperii activities, but to commercial activities*" (Izquierdo, I., *Dificultades asociadas a la ejecución de resoluciones extranjeras frente a Estados soberanos en España*, in "LA LEY Mediación y Arbitraje", No. 7, LA LEY 6795/2021).

128. Therefore, the abovementioned assets are excluded from enforcement measures of the foreign State, unless, as provided for in Article 17.1 of the LPI, such foreign State has consented to such enforcement (expressly or tacitly), and/or they are deemed to be *iure gestionis* assets.

129. In practice, it is often difficult to identify assets of a sovereign state subject to enforcement, that are on Spanish territory, and that are not *iure imperii* and, moreover, whose use as *iure gestionis* assets can be proved. In such cases, it is essential to establish who has the burden of proof regarding the nature of the assets as *iure imperii* or *iure gestionis*.

D. Burden of proof

130. Neither the 2004 UN Convention nor the LPI do establish which of the parties to the enforcement proceedings has the burden of proof of whether the assets potentially subject to enforcement have a public non-commercial purpose. Article 17.2 of the LPI simply allows enforcement measures once "*it has been determined*" that the assets are used or meant to be used by the foreign State for public non-commercial purposes.

131. Leading legal experts on the matter such as Gascón Inchausti point out that the enforcing party cannot be required to provide full evidence of the use of the foreign State's assets "*although it does have the burden of asserting their attachable nature and of providing sufficient arguments and/or facts to substantiate, even prima facie, its assertion*". The author explains that this procedure is key to the effectiveness of the enforcement since it provides the court with a basis to establish that the assets

	are not used for official purposes, thus placing the burden of proof on the foreign State. 132. As a result, it is the responsibility of the foreign State subject to enforcement to prove, a simple statement is not enough, that these assets are linked to the fulfillment of official non-commercial purposes. This means that the failure to produce a document or the refusal to testify, covered by its immunity from evidence, does not place the foreign State at an advantage insofar as "*the court is allowed to draw from the foreign State's refusals the appropriate consequences on the merits*" (Gascón Inchausti, F. *Inmunidades procesales y tutela judicial frente a Estados extranjeros*, Madrid, 2008, pp. 368-370). 133. Spanish courts have upheld this interpretation regarding the burden of proof. The Superior Court of Justice of Madrid, in its judgment of 16 June 2021 in case 432/2020 [AS 2021, 77], ruled on enforcement proceedings against the Embassy of Nicaragua, for the unfair dismissal of workers. The assets subject to enforcement were, in this case, the Embassy's bank accounts that were not used or intended to be used for diplomatic purposes. The Superior Court of Justice of Madrid considered that "*the Embassy, in accordance with Article 217.3 and 7 of the LEC* [LCP]*, bears the burden of proving, if applicable, that the accounts are intended for the use protected by immunity*". 134. Notwithstanding the above, not only must the enforcing party identify the assets that could be subject to enforcement and their nature, the State subject to its enforcement must provide evidence, if applicable, of the reasons why such assets could be subject to immunity. The court also plays a key role in defining the actual protection of such assets through immunity. In subsequent enforcement proceedings against the Embassy of the State of Kuwait (again due to the unfair dismissal of workers), the Superior Court of Justice of Madrid, in its judgment of 20 December in case 793/2022 [JUR 2023, 16777] followed the well-established approach of the Supreme Court and Constitutional Court in holding that: (i) the court has the burden of carrying out "*directly or through the Spanish Authorities, a minimum inquiry of the assets that are the property of the enforced Embassy*"; and (ii) "*once obtained, there must exist an express decision for each of them, on whether they are or not affected by the alleged 'immunity of enforcement'*". And such a decision, the Superior Court of Justice noted, must be made in the terms established by the landmark judgment of the Spanish Constitutional Court of 1 July in case 107/1992 [RTC1992, 107], and the judgment of the Supreme Court of 26 June 2012 [RJ 2012, 9582], which delved into the differentiation of *ius imperii* and *ius gestionis* assets. 135. Placing the analysis of the immunities of foreign states within the framework of the right to effective judicial protection enshrined in Article 24.1 of the Constitution, the Spanish Constitutional Court has inferred from such fundamental right a broad duty of diligence of the court in locating the assets of the foreign state that might

	be subject to enforcement, stating that "*it is up to the executing judge in each case to determine, in accordance with our legal system, from among the assets specifically owned by the foreign State in our territory, which are unequivocally destined to the development of economic activities in said State, without making use of its power of empire, acts in the same way as a private individual*" (the landmark judgment of the Spanish Constitutional Court of 1 July in case 107/2022 [RTC1992, 107]). In this regard, the Constitutional Court emphasized the possibility for the court not only to require the foreign State to disclose its assets and rights, but also to seek the cooperation of the other public authorities.