

ALTERNATIVE REMEDIES FOR FINANCIAL DISPUTES - ARAOZ & RUEDA

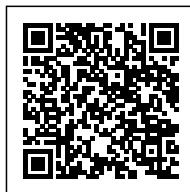
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Investment banks have been engulfed by claims of financial mis-selling and interest rate fixing, as investors see their securities portfolios slump on the back of high risk, speculative products

Los bancos de inversión se han visto imputados por demandas vinculadas a sus diversos productos, lo cual ha afectado a sus inversores, incrementando el riesgo y la especulación. Por eso, los inversores recurren ahora a los Tribunales para buscar remedios contra las acciones de los agentes financieros y las instituciones, dice Alejandro Fernández de Araoz en Araoz & Rueda.

Investors, therefore, are looking towards the courts for remedy against financial brokers and institutions, says Alejandro Fernández de Araoz, Partner at Araoz & Rueda in Madrid.

As part of the objectives of creating a safer and sounder financial system, preventing a future crisis and restoring investor confidence, both the European Commission and the various G20 Summits have recommended and sponsored various alternatives open to those looking for redress:

improving collective redress mechanisms, arbitration and mediation.

The class actions

Securities class actions are common in the US, explains Fernández de Araoz, but in Europe remain problematic and investors face an uphill struggle when suing. "Litigation is expensive and time consuming because of the high costs of expert witnesses and discovery. Spain, for example has a 'loser pays' legal system, so litigation can be risky and expensive. There is no question that collective redress schemes provide added value and cost savings for consumers and businesses."

Contrary to conventional knowledge, these actions remain highly problematic in Spain since, under the current Spanish Civil Procedure Code, they are reserved to registered consumer associations; however, investors are not always consumers and some registered consumer associations are not always a reliable conduit to launch such claims. For Fernández de Araoz, investors (whether consumers or not) with dispersed interests and low individual stakes need special protection in adjudication.

Arbitration

A speedier, more cost-efficient and sophisticated alternative is to use arbitration, he says. "The problem is that arbitration is not cheap and when the claims are not quantitatively significant, it adds 'insult to injury' for investors. And in Spain, arbitration clauses remain relatively rare and the courts can struggle to apply them."

This is down to a peculiarity in the law as to whether investors or companies can be called 'consumers', and whether to deprive them of the access to courts is "abusive" and against their rights. If so, the courts often argue that such clauses are abusive and should be declared null and void.

He highlights the recent case where the Spanish Government brought together 80,000 investors over around €3bn claims over 'preferentes' issued by Bankia. "There is generally the benefit [for arbitration] that hundreds of investors are often in a same position, and an analysis of the Spanish case law shows that the outcomes of judgments are very different and rarely predictable."

Mediate to accumulate

One example of Government sponsored mediation for financial disputes is the FIN-NET Dispute Resolution Network, an EEA Alternative Dispute Resolution (ADR) network. In Spain, however, the effectiveness of its results are dubious, says Fernández de Araoz, because decisions issued by Spain's OIA (Investor Advice Office) are non-binding, and if an investor obtains a favourable decision by the OIA but still has to file a lawsuit, the courts often disregard such decisions.

Fellow Partner Clifford Hendel points to mediation as an alternative for securities disputes, although in its infancy in Spain as a New Mediation Law was only approved last year and is still awaiting a clear regulatory framework.

Hendel highlights that, concerning the right to redress, the European Commission is focusing on ensuring the adoption and application of its recent proposals on ADR and Online Dispute Resolution (ODR) to grant all EU consumers access to simple and speedy procedures to defend their rights. "The Mediation law has rather detailed, and some would say, rather heavy-handed and bureaucratic, provisions regarding the mediation process," he explains. "These include the creation of a public register for accredited mediators and institutions, a requirement for professional liability insurance for mediators and appropriate training, all of which is to be developed by way of implementing regulation."

While Hendel believes that Spain could expect mediation to prosper, the sector starts from a "virtual blank slate". The lack of history, knowledge, familiarity or understanding of mediation in the area of commercial disputes, and the consequent shortage of mediators with experience in this area, means the concept may take time to develop.

"The future of mediation here is uncertain for these very reasons, and depends on how quickly and solidly a real level of knowledge of, and confidence in, the concept can take root with lawyers," he

says, “both in private practice and (especially) in-house”.