

BANKING AND CONSUMER PROTECTION CLASS ACTIONS INCREASING IN SPAIN - LENER AND ASIGNO

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Rules governing class actions are still in need of clarification, despite the efforts of Spain's Supreme Court – only then will third party funding of such cases really take off

Banking and consumer protection-related class actions are on the increase in Spain, though there are still flaws in the rules governing such cases which need to be addressed, says Lener litigation partner Jesús Giner. Meanwhile, Giner also says that the popularity of arbitration remains limited due to the high costs involved as well as the lengthy process for reviewing awards.

The economic crisis in Spain led to an increase in class actions, particularly in the areas of banking and consumer protection. Indeed, Giner highlights consumer protection and consumer class actions as two areas that represent significant opportunities for lawyers in Spain. "The next few years will see the continuation of the trend seen in recent years, that is, an exponential increase in civil proceedings arising from individual and collective actions related to banking contracts, products and investment services," he says.

Floor clauses

Banking sector class actions have been brought in relation to what are known as "floor clauses", which limit the downward variations of interest rates on floating-rate mortgages. However, uncertainty in case law related to this issue makes it difficult for clients to make decisions on potential litigation, Giner says. In recent years the civil law chamber of the Supreme Court of Spain (Tribunal Supremo de España) has sought to bring more certainty but "sometimes the judgments have suffered from a lack of clarity or have been subsequently qualified or even rectified, as happened with the decision that limited the effects of the nullity of floor clauses" he explains. Consequently, there remain a number of issues that still require clarification, such as mortgage

expenses, and mortgages where the interest rate is referred to the Mortgage Loan Reference Index (IRPH), says Giner.

There are a number of flaws in the current rules governing class actions, according to Gina and this is why they are currently limited in number, according to Asigno banking litigation partner Marisé Cosmea. "As a result, cases arising from individual actions are far more numerous," she says. With regard to alternative dispute resolution, Cosmea has identified a notable trend for using dispute resolution methods that encourage "amicable settlements rather than judicial resolutions". Unfortunately, despite the significant potential advantages of not resorting to the court system, mediation has not, thus far, been particularly successful in Spain, according to Cosmea. She adds that this is partly due to the lack of uniformity in the applicable jurisprudence and the uncertainty of relevant case law, which has the effect of encouraging litigation.

Arbitration problems

Meanwhile, the progress made in increasing support for arbitration as a dispute resolution method has been limited. The high costs associated with arbitration are one contributing factor. Also of significance, according to Cosmea, are recent decisions made by Spanish courts that have had the effect of making the process of reviewing awards more extensive. This has had the effect of making the process more lengthy, and this is problematic given that the aim of arbitration is to resolve disputes more speedily than would be the case if they involved litigation.

Third party funding of disputes is becoming more common on a global scale, though Cosmea notes that the trend is only just beginning in Spain. However, she adds that the success of third party funding will depend on "correcting the inefficiencies of class actions".

Another global trend relates to advances in technology and this is having a significant impact on the way law firms operate. Cosmea says the impact of such developments is positive. "Technological developments will make work more efficient and reduce the daily administrative workload, allowing lawyers to focus on value-added work," she adds. Cosmea says that types of technology relieving certain administrative burdens include "computer tools designed for the mass processing of documents and data, especially for due diligence processes".

What types of lawyers do clients want now? Cosmea says: "Clients need innovative lawyers that optimise the client's opportunities, are aware of relevant technological advances and have solid experience in their specific area."