

# LITIGATION & ADR ANNUAL REPORT 2018: CONSUMER CONFLICT

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**Consumers are showing an increased willingness to take on banks and major corporates, a trend that is being driven, in part, by increases in third party funding – meanwhile, there are calls for the establishment of an ‘arbitration hub’ in Iberia**

Consumers of financial products in Spain and Portugal are growing in confidence and now know that they have the ability to take legal action against banks that have mis-sold them any of their products. Indeed, financial sector disputes are a key source of work for lawyers in Iberia. However, though class actions may be most common in the finance industry at present, energy and telecoms consumers are also expected to increasingly seek legal redress if they believe they have been mistreated by major corporates. Meanwhile, third party funding is expected to fuel a surge in such claims, in addition to anti-trust disputes. Elsewhere, arbitration is growing in popularity, so much so that lawyers in Madrid say steps should be taken to establish the city as an ‘arbitration hub’ given the popularity of the Spanish language around the world. They also argue that Spain’s close links with both South America and North America, and its proximity to Africa, make it the ideal choice for international arbitration.

## **Spain: What have been the major developments and trends in litigation and ADR in the last year?**

"A number of local firms that flourished with regard to consumer complaints related to financial products are trying to look for new similar cases. This creates risks not only for financial institutions, but also other sectors such as the automotive or the pharmaceutical sectors. The evolution of this trend may lead to consumer and product liability litigation becoming more sophisticated." **Mercedes Fernández, partner-in-charge, Madrid, Jones Day**

"The legislative reforms approved in recent years have resulted in a significant decrease in the number of pending litigation and appeals in Spain. The total number of pending cases and appeals decreased from 3.2 million cases at the end of 2010, to around 2 million cases at the end of 2017." **Javier Torre de Silva y López de Letona, partner, CMS Albiñana y Suárez de Lezo**

"Banking litigation and insolvency proceedings have decreased considerably. The number of disputes resolved using ADR, rather than in traditional courts, might continue to increase due to the caseload of traditional courts, the perception of lower costs and the shorter timescales." **Esther Domínguez, lawyer, Marimón Abogados**

"Financial litigation has occupied a central place in the Spanish scene over the last year. In this regard, it is important to point out the creation of regional courts specialised in land clauses ("cláusulas suelo"), as well as in lawsuits related to mortgage costs, which have had a significant impact on the banks' profit & loss accounts." **Fernando Manzanedo, partner, Ramón y Cajal Abogados**

"During the last year we have noted an increase in the number of lawsuits related to unfair competition, as well as litigation regarding intellectual property." **Jordi Sánchez Sánchez-Crespo, partner, RCD Rousaud Costas Duran**

"Third party funding is becoming an increasingly important tool in global commercial arbitration matters." **Gonzalo Aranzabal, partner, Watson Farley & Williams**

"The three major arbitral institutions in Spain, the Corte de Arbitraje de Madrid (CAM), the Corte Española de Arbitraje (CEA) and the Corte Civil y Mercantil de Arbitraje (CIMA), have signed a memorandum of understanding aimed at establishing a single institution to jointly handle international arbitrations, while continuing to administer domestic arbitrations separately." **Luis Capiel, partner, Arias SLP**

## **Banks selling NPLs**

Óscar Franco Pujol, partner at DLA Piper, says claims for antitrust-related damages is a growing area for law firms. He adds that the sale of non-performing loans (NPLs) by banks should also generate a significant amount of contentious work. "In the last year, around €50 billion of NPLs have been sold in Spain and some of this will turn into litigation," Franco Pujol says. Acquisition of debt and shares by funds will also lead to a significant amount of litigation, says Linklaters partner Borja Fernández de Trocóniz. "Funds are more aggressive in the way they act as shareholders - they want returns, they are fearless about litigation and they think less about relationship issues," he adds. Financial litigation related to banking matters is another major source of legal work, according to Uría Menéndez partner Álvaro López de Argumedo, who adds that his firm has acted for banks in many such cases. Meanwhile, though class actions may, at present, be most common in the finance sector, they are likely to soon become a feature in other consumer sectors, such as energy and telecoms, argues Borja de Obeso Pérez-Victoria, partner at Gómez-Acebo & Pombo.

Increasingly, the defence of class actions is being handled by clients' in-house lawyers rather than being referred to external law firms, says José Antonio Rodríguez, partner at Ashurst. "Some law firms, meanwhile, have created departments of paralegals to handle such claims," he adds. Alberto Fortún, partner at Cuatrecasas, says there are already well established firms that are focused on creating new types of class action. He cites recent international news referring to class actions brought against Intel or Apple. "From the perspective of law firms representing the defendants in such cases, you need to have good co-ordination of the defence and this requires teams of lawyers used to working with other jurisdictions," Fortún adds. There is a huge appetite for the third party funding of legal claims, says Pérez-Llorca partner Fernando Bedoya, who adds that consumer, antitrust and restructuring-related claims are among the types of business being targeted. Cristina Coto, partner at Ruiz Gallardon Abogados says third party funding is "now on the rise in Spain, particularly in relation to international disputes". Lawyers say that major law firms generally don't handle consumer cases - which may involve thousands of claims - rather, they develop a defence

strategy for the initial cases brought against new products and then when the number of claims multiplies, these are passed on to "factory firms" that are geared up to handle lots of cases. Mass

consumer litigation does not generate significant work for major law firms as the profitability of handling such cases tends to be lower, says Fernández de Trocóniz. Fortún adds that product liability litigation, especially in relation to the intellectual property aspects, is a growing area of work for law firms. M&A and investment-related disputes are another significant growth area for law firms, according to Bedoya.

Meanwhile, Allen & Overy partner Javier Castresana points out that in cases where “new players have taken control over corporates after an equity investment or a loan to own strategy, it is becoming more and more common for new owners to revise decisions taken by former shareholders and consider legal action against directors and former directors”. He adds: “Although we expect a decrease in the amount of restructuring and insolvency litigation, we expect it to become much more sophisticated and complex.” Another trend is for transactions to involve litigation from the outset, with funds using litigation as part of “workout” processes, lawyers say.

## Madrid's opportunity

López de Argumedo says that, when Spanish companies have disputes abroad, they find it preferable to go to arbitration instead of foreign courts. He adds that Madrid has an opportunity to establish itself as an arbitration hub, particularly considering the amount of arbitration involving parties in Latin America, which has the same language and a similar culture to Spain. However, other partners argue that there is a lot of mistrust among Spanish clients regarding arbitration.

However, one says that when it comes to disputes abroad, Spanish clients are willing to go to arbitration, "otherwise they have to rely on a court in an obscure jurisdiction". That said, lawyers also point out that, in the infrastructure sector, clients are more familiar with arbitration and therefore more willing to use it for resolving disputes.

Regarding arbitration, Obeso Pérez-Victoria says Spain "needs to think in global terms and not from a domestic perspective". He adds: "We should be able to refer to Madrid as an international arbitration hub as we have all the tools to achieve it: (i) our language, history and culture is the same as that of millions of people from many other countries; and (ii) we have a privileged geopolitical situation (as a member of the EU, with very strong connections to both North and South America and we are the nearest European country to Africa)." Obeso Pérez-Victoria continues: "There is no doubt that nowadays Paris is a reference in the arbitration world. Our challenge is to position Madrid as the next international arbitration hub in the coming years."

However, López de Argumedo argues that the number of arbitration cases is increasing in Spain and that the country is ranked fourth in the world, according to ICC statistics, in terms of jurisdictions supplying the most parties in arbitration cases. There are problems in the arbitration community in Spain in that the "same faces" are often seen in arbitrations and this "creates mistrust", according to Rodríguez. Fortún says that there needs to be more "due diligence" carried out when selecting arbitrators. He adds: "Continuing legal training is also a requirement for arbitrators as the quality of awards is not good - the parties should have a clear understanding of why they have won or lost the case."

Some lawyers say that one of the benefits of arbitration is that, compared to litigation, it is a quicker way of resolving disputes. However, others argue that arbitration does not necessarily mean a speedy end to conflicts. One partner at a leading Spanish firm says: "Arbitration is not quick, it can take two or three years, and that's not acceptable." He adds that the cost of arbitration can also act as a deterrent for some clients: "Arbitrators are not brave enough to impose costs on the losers."

## Great future for mediation?

Arbitration, and alternative dispute resolution (ADR) in general, is becoming a bigger source of revenue for law firm's dispute resolution departments. Fortún says that "two-thirds of the billable

## Portugal: What have been the major developments and trends in litigation and ADR in the last year?

"A shift from insolvency and restructuring-related litigation to disputes between shareholders, as well as conventional litigation and arbitration. This is due to the upturn in the economy. **Joaquim Shearman de Macedo, partner, CMS Rui Pena & Arnaut**

"In 2017, we witnessed an increase in cases related to white collar crime, mainly corruption, money laundering and tax fraud cases, most of them concerning high-profile people and former politicians. We have also seen an increase in cross-border disputes as a consequence of the arrival of many companies in Portugal." **Marta Duarte, managing associate, CCA Ontier**

"Consumer rights litigation and regulatory litigation. The banks are facing an increase in litigation concerned with mis-selling of hedging products. Also cybersecurity and data protection litigation have increased in the last year." **Filipa Ruano Pinto, partner, SPS Advogados**

"Domestically there has been a significant increase in the amount of litigation related to financial and derivative products - this was triggered by the collapse of some of the major Portuguese banks." **Sandro Polónio Matos, partner, AVM Advogados**

"An increase in commercial litigation and a decrease in insolvency-related litigation, as a consequence of economic growth. Also, the increasing acceptance by clients of arbitration procedures in any disputes arising out of contracts. There has also been an increase in professional liability claims." **Francisco Colaço, partner, Albuquerque Advogados**



hours generated by Cuatrecasas' dispute resolution department is ADR-related, (including arbitration)". However, the ratio in other major firms is closer to 50 per cent, lawyers say. Though it is not a major trend, clients are showing a greater tendency to consider mediation, says one partner. Rodríguez is convinced that mediation has a "great future" in Spain. "I think Spain will follow the path of the UK, though litigation is cheaper in Spain than it is in the UK," he adds. Clients embarking on major arbitrations increasingly ask their legal advisers what technology they will be utilising and whether or not they use project managers, Castresana says. "There will be a battle for time and cost efficiency," he adds. In addition, clients ask for fee estimates and, more specifically, they want fees charged for "each phase" of the work that is done, says one partner.

#### **Spain: What are the biggest opportunities for law firms in litigation and ADR?**

"To offer more cost-effective and innovative ways of managing contentious matters, including the use of technology and more flexible approaches to case management and charging. Clearly clients are increasingly looking for certainty as to the overall cost of litigating a case." **Carlos de los Santos, partner, Garrigues**

"The large amount of massive banking litigation and collective claims in the market has forced law firms to devote specific departments/teams to deal with the demand. It proves that this niche market is profitable, even for very big firms because of the large amount of claims involved." **Silvia García, partner, Deloitte Legal**

"Brexit advice and its consequences is currently a big opportunity, in particular in relation to international disputes and financial and regulatory services. Also, fintech, artificial intelligence, and big data." **Santiago Castelló, senior associate, Simmons & Simmons**

"The European Union intervention in the case of Banco Popular and its sale to Banco Santander has provided a big opportunity for Spanish law firms. Not only with regard to the aforementioned, but also in relation to the lawsuits brought by shareholders." **Jordi Calvo Costa, partner, Roca Junyent**

"Cases involving financial institutions related to issues linked to the economic recession, mostly concerning bankruptcy and litigation. However, recent years saw a fall in the number of procedures initiated as many companies did not have the economic resources available to allocate to legal disputes. As we are now experiencing a recovery in our economy, it is likely that many companies will choose to reopen cases." **Esther Cubillo, partner, Lupicinio International Law Firm**

"To focus on complex, top-tier claims that require knowhow and specialisation. Clients have to perceive the added value for their companies of high-level advice not only in transactional matters but in dispute resolution." **Rafael Montejo, partner, Osborne Clarke**

"It is now time to let litigation departments grow. Consequently, it is essential to significantly improve litigation management, in order to make it more efficient." **Yago Vázquez Moraga, partner, Pintó Ruiz & Del Valle**

"An increase in financial sector litigation and disputes." **Pablo Albert, partner, BDO Abogados**

International arbitration, particularly involving parties from Latin America, is a big opportunity for Spanish law firms, lawyers say. "One of the most exciting and promising trends in ADR is the rapid expansion of international arbitration," says Dechert partner Érica Franzetti. "Particularly noteworthy is the expansion of international commercial arbitration beyond the Western world and into a broader array of industries—including life sciences and financial services." Franzetti says that investor-state arbitration is also on the rise. "Some observers thought that the number of investor-state cases would dwindle in the face of political and social criticism," she says. "The fact that the reverse has been true speaks to the fairness, utility and efficacy of the investor-state system – Mexico's recent decision to join ICSID is a key illustration of this fact."

With regard to the increase in international investment arbitration, it will be important for law firms to create "pan-European teams" that are able to handle such matters, says Baker McKenzie partner José Ramón Casado. However, he adds that there is little interest in arbitration in the domestic Spanish market.

#### **Portugal: Class actions emerging**

There was considerable financial sector litigation in Portugal in the last year, says João Duarte de Sousa, partner at Garrigues in Lisbon. "The ongoing litigation in the wake of the collapse of Banco Espírito Santo has been one of the driving forces behind litigation in Portugal," he adds. Duarte de Sousa also says there has been a significant number of real estate-related disputes as a large amount of foreign investment has come into the sector. In addition, he says that, "while insolvency cases are

in decline, there is a high demand from clients for insolvency risk assessment, primarily for two reasons: firstly, many of the relevant transactions involved distressed or high risk assets; and secondly, the issues of the past are still fresh in everybody's minds, causing a dramatic rise in investors' fears and anxiety that counterparties will fail to honour their commitments".

Meanwhile, in the ADR arena, the number of disputes resolved through arbitration continues to increase, according to Duarte de Sousa. He says: "Among other factors, the efforts of recent years to include arbitration clauses in commercial contracts are now paying off." However, he adds there is little enthusiasm in Portugal for mediation to resolve commercial disputes.

Class actions are an emerging trend in Portugal, according to MLGTS partner Filipe Vaz Pinto. He says: "There are new small, sophisticated players in the legal market promoting collective actions against companies, they are commercially driven and inspired by class actions in the US." Vaz Pinto cites the example of investors launching "multiple coordinated actions" against banks and he predicts that there will be similar "collective actions or even class actions in the telecoms and energy sectors".

Class actions will also be given further impetus by those brought against car manufacturer Volkswagen in relation to diesel emissions, says PLMJ partner Pedro Metello De Nápoles.

Financial sector litigation is increasing because there is now a feeling that "anyone can go up against banks" in a dispute, according to Abreu Advogados partner Alexandra Nascimento Correia. And it is expected that financial sector litigation will continue to be a major source of work as banks will continue to "come under close scrutiny from regulators", says Uría Menéndez-Proença de Carvalho partner Alexandre Mota Pinto. Meanwhile, Vieira de Almeida partner Sofia Ribeiro Branco says that there could be an increasing number of antitrust private enforcement cases in future "if Portugal adopts the European rules governing actions for damages for infringements of the competition law provisions of the Member States and of the European Union Text". What is EU Text?

### Third party funders

There has been an enormous increase in court fees in Portugal in recent times, which has had the effect of dissuading clients from being litigious, says João Caiado Guerreiro, managing partner at Caiado Guerreiro. "Consequently, some clients are not willing to take on very big companies," he says. Caiado Guerreiro adds that court fees plus lawyers' fees can sometimes amount to as much as 4 per cent of the settlement.

There has been a notable trend of third party funders contacting major law firms in Portugal with a view to possibly funding legal disputes says Cuatrecasas partner Rita Gouveia. Vaz Pinto points out that third party funders are not only targeting clients that do not have the financial resources to pay for litigation: "Third party funders are also focusing on clients that want to manage litigation risk in a different way." Caiado Guerreiro says that there have been cases of third party funders from the UK and the US offering to advance sums of €1m to fund disputes in return for getting a bigger share of the eventual settlement.

Metello De Nápoles says that the use of arbitration is increasing in Portugal, but it can still be difficult to convince domestic clients that arbitration is a quicker way of solving disputes. He adds that one of the possible reasons why arbitration is not more popular among domestic clients is that litigation is cheaper in Portugal than it is in other jurisdictions. One of the biggest challenges for Portugal in the near future is to convert Lisbon into an attractive

#### Portugal: What are the biggest opportunities for law firms in these areas?

"We are convinced that in 2018 the banking and finance sector, as well as the real estate, retail, tourism and energy industries, will continue to generate a significant number of instructions for law firms, especially with regards to litigation and arbitration. Vanessa Antunes, senior associate, DLA Piper ABBC

"Apart from arbitration, parties are more willing to consider mediation as a method of resolving disputes. This is a good opportunity for law firms to invest in mediation." Pedro Sousa Uva, of counsel, PBBR

"Alternative dispute resolution methods in general, and arbitration more specifically, continue to present the largest opportunities for added-value work. With the transaction market picking up, in the near future more disputes may arise. One area that may be of interest in the near future is that of third party funding - though not very common in Portugal, it is now being discussed and may bring about more dispute resolution work." Sofia Martins, partner, Miranda & Associados

"Privacy and data protection. Specialisation in handling these kind of issues should be among law firms' biggest investments." Pedro Carreira Albano, partner, Pares Advogados

seat for international arbitration “involving parties from Portuguese-speaking countries”, says Duarte de Sousa. He adds: “This goal should be taken nationwide and underpinned by Portuguese public authorities, as the economy will not only benefit from it, but thrive.” Caiado Guerreiro says that finding the appropriate experts to participate in arbitration cases can be difficult: “Often the details are significant and it can be difficult to find someone to translate mining terms into Portuguese, for example.” Arbitration is criticised in some quarters because there is a view that it is “not based on fact, but rather on negotiation,” Gouveia says. She adds that some clients are requesting that contracts allow the possibility of appealing against arbitration rulings, while some are also asking for foreign arbitrators to be appointed.



## How are clients' demands changing with regard to litigation and ADR?

Clients are increasingly demanding value-added services, particularly related to a higher level of analysis of information related to massive litigation. This information is essential to aid management decision making. Clients are also making more requests for statistical information for predicting the outcome of court proceedings.

**Beatriz Rua Pelaez, head of the litigation & insolvency department, KPMG Abogados**

"We have recently noticed that clients now require a holistic approach to litigation, bearing in mind not only the specific case, but also the tax impact on other fiscal years, for example. Companies also demand to know details and the likelihood of different tax-litigation scenarios and outcomes." **Maximino Linares, partner, EY Abogados**

"Clients demand agility and expedite answers from lawyers, especially regarding data and risk analysis." **Cristina Camarero Espinosa, partner, Ontier**

"Clients that operate internationally, have always showed a disposition and, in some cases a preference, for using arbitration to solve disputes. Domestic clients are also considering this alternative to litigation (which has more confidentiality, faster procedures and specialist arbitrators) as a real alternative." **José Martínez Peña, partner, Cremades & Calvo Sotelo Abogados**

"Clients want their lawyers to make every effort to reach settlements and solutions whatever the stage of the proceedings, rather than remaining in endless litigation passing through endless instances." **Javier Fernández-Samaniego, managing director, Samaniego Law**

## Angolan arbitration

Arbitration where Angolan law is the applicable law is an "opportunity for lawyers in Portugal to cooperate with Angolan Lawyers", according to Vaz Pinto, particularly where arbitrations are "seated outside Angola". In this context, he highlights opportunities in the oil, construction, transport and infrastructure sectors. Meanwhile, with regard to Portugal, Vaz Pinto says there is a significant number of post-M&A disputes, particularly in relation to price-adjustment mechanisms and breaches in 'reps and warranties'

The complexity of cases in Portugal and the sophistication of the parties involved is increasing, and this means more demanding and challenging work for legal advisers, according to Linklaters counsel Ricardo Guimarães. He adds that, with regard to arbitration, there is "a perception that the associated costs are high". Guimarães continues: "But this is partly because, with arbitration, parties have to pay the court fees over a shorter period of time than when taking disputes before the state courts. The fact is that, in general terms, and above a certain threshold, arbitration can involve lower costs than litigation in state courts."

The issue of arbitration not offering the prospect of appeal could be one reason for its unpopularity lawyers say. Regarding the issue of whether arbitration should be permitted in proceedings related to public procurement, Caiado Guerreiro says there are doubts about whether it is "politically feasible" to do so. He cites the example of the head of the IMF, Christine Lagarde, being found to be negligent for not contesting a state pay out of around €400 million – following arbitration proceedings – to the businessman Bernard Tapie, when she was France's finance minister.

Ribeiro Branco says that the confidentiality of arbitration proceedings offers benefits for the parties involved. "In civil litigation conducted by the judicial courts, anyone can have access to sensitive information which can then be used against the parties," she adds. Gouveia says Cuatrecasas has a dedicated team for international arbitration as well as a team focusing on insolvency litigation. Meanwhile, Metello De Nápoles says around 30 per cent of the revenue generated by PLMJ's dispute resolution lawyers is arbitration-related.

Gómez-Acebo & Pombo partner Ricardo Campos says that his firm has separate teams for arbitration and litigation. He adds that, with regard to arbitration in particular, the firm has a very strong construction practice. "Construction cases are often very complex and always involve very technical

issues," Campos explains. He also says that international construction-related disputes, namely disputes related to FIDIC (the International Federation of Consulting Engineers) contracts, are usually



resolved by Dispute Adjudication Boards, which are composed of panels of impartial experts. Lawyers in Portugal acknowledge that major firms are often unprepared for defending class actions. “The larger firms are typically more focused on individual cases, but class actions may have to respond to 30 to 40 claims - this puts a lot of pressure on younger lawyers,” one partner says. While clients are increasingly demanding fixed fees from their legal advisers, they are willing to pay high success fees, lawyers say. One partner argues that price is not always the main concern of clients and that some place a greater emphasis on “credibility and experience of high-profile cases”. The increased investment in the Portuguese real estate and tourism sectors will inevitably lead to disputes, say lawyers. Other growth areas for law firms are anticipated to be litigation related to regulatory issues as well as infrastructure-related disputes. Meanwhile, sport arbitration is also expected to present significant opportunities for law firms, says Nascimento Correia. She adds that there is also the potential for post-insolvency disputes, as well as construction-related cases in Angola and Mozambique.