

MIS-SELLING: RECENT EUROPEAN CASES AND SOLUTIONS - SJBERWIN

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The recent outburst of mis-selling claims filed by financial products consumers against banks due to deceptive sale of certain financial products represents an important legacy of the global financial crisis. This litigation increase has taken place not only in Spain but also in several EU

jurisdictions, albeit with different levels of success.

In particular, Spanish courts as well as German and French, have tended to be favourable to consumers in such claims, while in countries such as England or Scotland, they take a stance on helping banks.

Among the main arguments put forward by the Spanish courts when ruling for retail investors and against financial institutions we can highlight the following: failure to comply with the contract by the financial institutions, either because the Bank has badly informed the investor regarding the risks involved and the product features or because it has sold products that were not in accordance with the investor's profile; and, nullity of contract due to an error in the consent given by the retail investor as a consequence of the fact that the bank did not inform him properly.

Meanwhile, in Germany, Courts understand that financial institutions are responsible for losses suffered by investors because when advising them, the banks didn't inform their customers about the following issues. The precise details of a particular financial product, adverse or negative news concerning the investment, the percentage of investment capital not guaranteed or the benefit obtained by the Bank for that same investment. However, the level of demand for this duty of information depends on the specific facts of the case and on the complexity of the product in question.

In France, where there is an abundance of case-law in relation to this issue, courts are demanding financial institutions that sell financial products to provide their customers with clear and precise information avoiding all possible confusion, to warn their clients against the risk of losing their investment, to advise whether it is a risky investment as well as the type of investment best suited to their profile.

On the other hand, the English Courts, in cases as *Springwell* and *MF Global*, have established that in order to declare the Bank responsible, the agreement clauses must be very carefully analysed, as well as the level of sophistication of the investment. Also, in England, certain terms of the contract, such as non-reliance or other exclusion clauses, may also prevent a claimant from relying on any representation by the bank that led to the claimant's misunderstanding the risks of the transaction.

Aside from taking civil actions, we must point out that in many European countries, such as Belgium, Luxembourg and Germany, retail investors are also filing criminal actions against financial institutions due to wrongful banking practices. Particularly, in Germany, many investors file this type of proceedings, in order to have access to information collected by the prosecutor within the framework of criminal proceedings and whose access would be unfeasible in the context of civil proceedings. On the contrary, in Spain, the starting of criminal proceedings against this type of product is not so usual, an example being the frequent complains of investors before regulatory institutions such as the Bank of Spain or the CNMV.

Finally, regarding the perspectives of the increase in these types of proceedings, we must point out that, at least in Spain, the forecast is the increasing of mis-selling claims over the next years. Even if the term for filing an action for tort liability in Spain has a limitation period of one year, and the voidability action of the contract has a four-year limitation period, the truth is that recently there has been a change in the Spanish retail investor strategy. They have begun to file actions with larger limitation periods, such as the action of contractual liability, the limitation period for which is 15 years, or the radical nullity of the contract, which has no limitation period.

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