

"MORE BUT BETTER LITIGATION"

Posted on 18/08/2007



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A new commercial reality in Iberia's increasingly contentious business arena.

Según algunos abogados, la creciente sofisticación e internacionalización de la economía ibérica, los cambios de modelos de negocio y la transposición de la legislación europea, se han combinado de manera que el volumen de litigios transpeninsulares también se ha visto incrementado. En base a esto, Iberian Lawyer planteó al Group of Experts (GoE) su visión sobre la creciente tendencia litigiosa en este sentido, y, si así fuera, ¿qué tipos de conflictos y en qué áreas del derecho se ven reflejados? ¿Cuáles son los riesgos y las oportunidades para los negocios que operan en semejante entorno?

Iberian Lawyer asked its Group of Experts (GoE) whether they see the use of litigation increasing across Iberia, and if yes, what types of disputes and areas of law are seeing an upturn, and what are the opportunities and risks for business operating in this environment?

"All the indicators state that litigation is growing every year," says Joao Paulo Teixeira De Matos, of Garrigues, Lisbon. "An increase that has provoked delays for the rendering of a final decision, and is now a challenge for the government, for the courts and for litigators."

Sophistication

The growing sophistication and internationalisation of the Iberian economy, changing business models and corporate strategies, and the transposition of European legislation, have combined to raise the volume of litigation across the peninsula, say lawyers.

"Spanish companies are increasingly making use of litigation. I ought to say that this is not only my personal view but, I am afraid, simply a fact of life," says Vicente Sierra of Freshfields Bruckhaus Deringer. Such an upturn, he believes, is the result not only of an increase in procedural measures, but also the fierce competition that is now a feature of the Spanish economy.

Javier Fernández Samaniego, managing partner of Bird & Bird in Madrid, points to the perceived over-regulation of many sectors, which he suggests is producing increased conflict between business and the bodies charged with overseeing them. Over 60% of his office's revenue, he states, emanates from contentious work.

Mercedes Fernández of Jones Day points to telecoms, energy, and potentially construction, as sectors experiencing an increase in proceedings – the result of increased liberalisation, deal-making and foreign investment. "Clearly where there are more operators, there are more possibilities for disputes."

The upturn in corporate litigation in Portugal is the result of an increased awareness of parties' rights, a belief that the courts are now better able to understand commercial disputes, and the increasing accountability of company directors, says João Soares Da Silva, of Morais Leitão Galvão Teles Soares Da Silva & Associados.

Is the use of litigation by Iberia's business becoming greater? If so, in what types of disputes / areas of law?

"Growth and a trend for concentration in certain sectors of economic significance have revealed litigation to be a useful tool in aggressive strategies for acquisitions or corporate defence." Josep Maria Juliá – DLA Piper

"At Garrigues we have felt a very strong boost on the volume on litigation in the last year, to the extent that our litigation department has grown significantly." Miguel Moscardó, Garrigues

"Areas increasing in my firm are patent, distribution, construction, shareholders agreements, rep and warranties, professional malpractice." José Miguel Júdece, PLMJ

✖ "The use of litigation is becoming greater in all sectors but this does not mean that is being more successful or fruitful." César Bessa Monteiro – ABBC Advogados

What do you see as the opportunity and/or risks for business of an increased use of litigation?

✖ "I do not see any risks in an increment of litigation (leaving aside, of course, the greater delay in the resolution of disputes); on the contrary, it implies a safer legal environment and a more controlled market, as it reduces the inclination to commit illegal acts." Lourdes Ayala – Araoz & Rueda

✖ "I do not believe the advice is complete without taking into account the enforcement/litigation angle." Javier Fernández Samaniego – Bird & Bird

"The use of increased litigation in corporate and economic transactions by companies as a way of exercising pressure and of acquiring a privileged position in their negotiation, can, in our opinion only

have the consequence of collapsing the already saturated Spanish courts.” Hugo Ecija – Ecija Abogados

“Still, there is a long way until clients look at the advantages and disadvantages of litigation as part of their business activity, more than an unusual burden and unnecessary cost,” states Antonio De Macedo Vitorino of Macedo Vitorino & Associados.

Alternatives

“As Portuguese companies become increasingly sophisticated, the law is increasingly perceived as a ‘sword’ and not only as a ‘shield’,” says Filipe Alfaiate of Clifford Chance. “More litigation but better litigation, seems to have become the motto these days.”

Miguel Castro Pereira of Abreu Advogados highlights his firm's recent involvement in transactions that have utilised litigation to achieve clients' goals. He nonetheless looks forward to impending procedural changes that may tackle the inefficiencies of the Portuguese court system, although he queries the impact it will have on judges' abilities to dispense justice.

Like others, César Bessa Monteiro of ABBC Advogados, highlights therefore the relative practicality of ADR. “All major agreements in Portugal now have arbitration clauses and many require a prior mediation procedure,” adds fellow partner Pedro Cardigos – a commercial necessity also highlighted by Iñigo Igartua at Gómez-Acebo & Pombo.

“In this respect, the response capacity is good, disputes are settled quickly and the time required to settle them is foreseeable,” adds Miguel Esperança Pina, partner at Gonçalves Pereira Castelo Branco & Associados.

Manuel Barrocas of Barrocas Sarmiento Neves highlights also the impact of ADR initiatives introduced by the Portuguese government, including the May 2006 Employment Mediation System (“EMS”) Protocol which covers all employment-related disputes. “Recent judicial statistics demonstrate that approximately 60% of employment court proceedings result in a settlement,” he explains.

Business reality

The transposition of European Union (EU) Directives on competition infringements will inevitably raise litigation levels, lawyers suggest. “I clearly see damages disputes for antitrust infringements as the most relevant area in terms of private enforcement growth,” says Juan Jimenez- Laiglesia of DLA Piper.

But positives can come from the threat of litigation say some. “An increased use of litigation will unfortunately imply higher costs for businesses, but will also improve the quality of their work,” believes David Arias of Pérez- Llorca.

“This will imply a major business analysis, and involvement of law firms in the negotiations, and at the same time to be more prepared to face potential conflicts,” adds Francisco Guijarro of Hammonds.

“As a matter of principle, litigation is not positive for any business. It is also true that our role as lawyers - even as litigation lawyers - is to try to avoid litigation and to help disputes settle amicably,” says Javier Fernández Samaniego. “But being realistic, disputes and conflicts are a day-to-day reality in business and when a conflict arises is when our clients need us the most.”

For José María Balañá, managing partner of Lovells in Madrid, another consequence is that as disputes become more complex, their resolution becomes more sophisticated. “Corporates are becoming increasingly aware that not every lawyer is able to deal with disputes and that expert

advice is a must."

Winners?

No one really wins in a litigious situation," states Paulino Fajardo of Davies Arnold Cooper. The emphasis he suggests must therefore be on ADR, to ensure parties remain focused on their business goals and retain confidentiality.

"Most of the disputes submitted to arbitration [in Portugal] relate to industry sectors that require solid indepth awareness and experience from both the advisors to parties and arbitrators – precisely the kind of qualities one will have difficulty finding in civil court judges," says Miguel Castro Pereira of Abreu Advogados.

Of great importance to the continued attraction of ADR, and particularly arbitration, therefore is that it continues to provide a serious response in a short time period, concludes José Antonio Caínzos of Clifford Chance.