

Litigation & ADR annual report 2016: Money worries



The Iberian financial sector is generating plenty of disputes, but while this may be lucrative work for lawyers in Lisbon, it is less so for those in Madrid

Financial sector-related disputes are common in both Spain and Portugal at the moment. While class actions against banks are becoming more popular in Spain, the fallout from the collapse of major banks in Portugal continues. However, there is one important distinction between the two jurisdictions, while advising clients on disputes relating to the collapse of Portugal's Banco Espírito Santo, for example, are a rich source of work for law firms, banking-related cases in Spain are, in contrast, not particularly lucrative, though lawyers accept the work in the interests of maintaining good relations with clients. Lawyers specialising in dispute resolution in Spain generally find richer pickings in energy-related cases. With regard to alternative dispute resolution (ADR), uptake in Spain is particularly slow, however there is a feeling that Portugal is beginning to make some notable progress in this respect.

There is more litigation than arbitration in Spain, according to Gómez-Acebo & Pombo partner Francisco A. Peña. He adds that there is a significant amount of litigation in the areas of renewable energy and gas, with disputes occurring in the latter sector due to "difficulties in fulfilling long-term gas supply agreements". There are also many banking-related disputes, however the bad news for lawyers is that such cases do not amount to particularly lucrative work.

Class actions in fashion

Uría Menéndez partner Álvaro López de Argumedo points out that there are now more "multi-tier clauses" in contracts. Such clauses demand that parties negotiate, and, if that fails, proceed to mediation and then to arbitration. López de Argumedo adds that class actions are becoming "more fashionable" in the financial sector – highlighting the example of a recent case involving 1,200 consumers who are in dispute with banks in relation to terms and conditions relating to mortgages.

Lawyers have highlighted the introduction of a new law on international legal cooperation in civil matters as one of the major developments in the last year and add that it will create significant opportunities for law firms. The purpose of the new law (Law 29/2015, of July 30, 2015) is to establish rules on international judicial cooperation between Spanish and foreign authorities in civil and commercial matters.

In recent years, most litigation has fallen into two distinct categories – cases related to regulators and disputes involving consumers, according to Rafael Murillo, partner at Freshfields Bruckhaus Deringer. However, he adds that, in general, there has been a decline in appetite for litigation. Murillo says there has been a huge increase in claims by consumers and that, given the approach of courts has changed, a large number of consumer claims have been successful.

“ People are investing in legal business as there is less certainty about what outcomes can be expected in courts. ”
Iñigo Villoria
Clifford Chance



“ Prices are not increasing, we need to improve efficiency and knowledge management systems. ”

Financial institutions are now wondering whether they should try and reach an agreement in consumer disputes relating to mortgages, for example, because such claims are being accepted by the courts, explains Baker & McKenzie's Spain managing partner José María Alonso, who is head of the firm's litigation and arbitration department. He adds that, in such instances, legal costs are incurred by the financial institutions. However, Alonso says the defendants in such cases know that, if they do not



José María Alonso
Baker & McKenzie

continue fighting such claims, there will be a growing queue of people looking to bring similar cases. Meanwhile, he explains that the modification of the criminal code in Spain means lawyers are increasingly needed by clients to advise on compliance. Another new phenomenon is a rise in lawyers selling their services to consumers in an effort to generate legal work, according to Clifford Chance partner Iñigo Villoria. He adds: "People are investing in legal business as there is less certainty about what

outcomes can be expected in courts." Pérez-Llorca partner Guillermina Ester says that in 2016 we will see more decisions made by the European Court of Justice that will have a direct impact on ongoing cases in Spain, especially in relation to banking litigation.

Banking litigation can be divided into that brought by "common consumers" and disputes involving "sophisticated consumers", says Cuatrecasas, Gonçalves Pereira partner Alfonso Iglesia. With regard to claims brought by sophisticated consumers, banks have often strong defences, he adds. Iglesia also highlights the trend for disputes related to price amendments in public-private partnerships (PPPs), and says that some of such cases are "now being seen in the criminal courts because they are being presented as potential fraud".

Cultural barriers

Villoria says mediation is not working in Spain as it is in other jurisdictions, while Araoz & Rueda partner Clifford Hendel adds: "We don't yet see a lot of ADR in Spain, or in much of continental Europe – mediation is a long-term project, but when decision makers realise that 75 per cent of mediations tend to settle on the very day of mediation, they will begin to take notice. When they do, today's vicious cycle – and the view 'it will never work here' – could give way to a virtuous circle, where understanding leads to confidence and confidence leads to results." López de Argumedo says lawyers have "pressed hard to convince clients that mediation is one of the possible ways" with limited success. He adds: "Lawyers need to take the lead and show clients the benefits of mediation or judges must force parties to mediate." There are cultural barriers to using mediation in Spain, according to Alonso. "Unless the clients are big companies, they think that if the issue is not solved in a short meeting then it should be resolved in the courts," he adds. Murrilo says that, while lawyers have shown a commitment to promoting arbitration, there has not been the same effort at promoting mediation. He continues: "Clients have less appetite for mediation."

"One may think that there is little incentive for defendants in cases to go to mediation," says Ester.

"Litigation is not expensive, and clients may think [given the time litigation takes], it is better to pay in five years, for example, than pay now." Iglesia says another problem affecting efforts to promote mediation is that "many mediations do not end with an agreement accepted by both parties".

Law firms that settle a dispute via mediation can earn a reasonable amount in fees, says Alonso.

However, he adds that the challenge lawyers face in mediation is that they have to perform many different roles when serving their clients, such as acting like a "psychiatrist", for example. Hendel says that mediators in Spain face the problem of a lack of real-life experience and effective training: "Until they have had substantial, hands-on experience, they are not serious, sophisticated mediators – we have a situation where classroom-trained mediators are not developing their skills where they really can best be developed, in the conference room."

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

"The growth in arbitration as an alternative to common courts, the implementation of the new civil procedure code and the significant change in the Portuguese court structure." **Gonçalo Malheiro, partner, Pbbr**

"Arbitration has made progresses in Portugal, mainly in the area of pharmaceutical & life sciences, as well as in tax." **João Caiado Guerreiro, partner, Caiado Guerreiro**

"Insolvency and restructuring proceedings have been on the rise, as have enforcement proceedings. In relation to the Banco Espírito Santo issue, there has seen a significant increase in disputes involving shareholders, regulators and corporate bodies." **Sofia Martins, managing associate, Miranda**

"Two major Portuguese banks collapsed and caused an enormous trail of lateral criminal and civil litigation involving not only stakeholders but also a swarm of depositors that unfortunately had lost their life savings." **Martim Bouza Serrano, associate, CCA Ontier**

"The consolidation of the Civil Procedure Code's reform, and, regarding debt recovery, the consolidation of extra judicial procedure (PEPEX). In public law the biggest developments were the new administrative procedure code and the reform of the administrative processual code. In the last year, we have also seen the rise of arbitration, particularly in private law, commercial law and taxes." **Adelaide Moura, managing partner, A.M. Moura Advogados**

"Cases of insolvency and restructuring, recuperation of credits and breach of contracts." **Ana Cláudia Rangel, senior associate, Raposo Bernardo**

"Highly sophisticated financial services litigation increased due to the collapse of the Espírito Santo Group. Domestic and foreign investors have been challenging innovative bank restructuring measures implemented by the government and the Bank of Portugal." **João Maria Pimentel, partner, Campos Ferreira, Sá Carneiro & Associados**



“Some clients are open to paying fees that are higher than the standard, but they want efficiency, quality and results.”
Ricardo Guimarães
Linklaters

Regarding major opportunities in the future in the area of litigation and ADR, Murillo identifies insolvency proceedings, cases involving consumer associations, as well as criminal law cases. Hendel says that a notable trend in Spain has been the emergence of a “sub-industry” in which funds, for example, are financing insolvency claims. The coordination of international litigation in multijurisdictional cases is also a big opportunity for law firms, according to López de Argumedo, who also highlights Latin American arbitration as a growing area. There will be a considerable number of gas and electricity-related disputes in the coming year, according to Peña. He adds that shareholder disputes will also be on the increase: “There is a lot of co-investment and different institutions need to disinvest.”

Fees not increasing

Maintaining profits remains a significant challenge for law firms. “Margins are a real problem,” according to Alonso. “Prices are not increasing, we need to improve efficiency and knowledge management systems.” In reference to the political uncertainty in Spain, Ester says a scenario of political stability will lead to more M&A transactions. She adds: “If the economy recovers we will see an increase in disputes related to M&A.”

Law firms have to re-think their business models, according to Murillo. He adds: “Rather than having a huge office in Madrid, it may make sense for some firms to have a smaller office in Madrid and a cheaper location elsewhere for business services.” José Luis Huerta, partner at Hogan Lovells, says clients are now choosing legal services on price, so law firms need to have more flexible structures. He adds: “Now, when you talk to young people in law firms, you have to tell them their career path is not as predictable as it used to be.” On the issue of law firms needing more flexible structures, López de Argumedo highlights a new service called Lawyers on Demand, which involves lawyers providing legal services to clients on a short-term basis.

Criminal litigation is on the rise, according to Peña. However, he adds: “There are some problems in the criminal courts when they are dealing with cases that would previously have been considered civil litigation.” In addition, Peña says that law firms can earn fairly big fees for litigation related to intellectual property. Meanwhile, a number of significant disputes related to gas supply contracts are expected to go to arbitration.

The coming year will be a challenging one for law firms in Spain, according to one partner. “There has been a drop in litigation work, so we have to find new products.” Meanwhile, Hendel believes shareholder disputes, as well as energy litigation will continue to provide opportunities for law firms in 2016. However, he adds: “ADR is a concern as it has had a long period of gestation in Spain.”

Alonso expects an increase in criminal cases in the coming year, that is, in relation to the criminal liability of legal entities. He adds that there will be an increase in transnational disputes and, consequently, law firms will have a role to play in coordinating disputes in different parts of the world because Spanish companies are “moving to markets they are less familiar with”. However, Alonso says law firms face the challenge of trying to attract talent because it is getting “more and more difficult to become a partner at a law firm”.

Law firms do not face the challenge of commoditisation in the area of litigation and ADR whereas this is an issue in other areas of practice, according to Iglesia. He continues: “In complex cases, price is not the key factor for clients”.

Ester says she expects the level of insolvency cases to continue in the coming year, and also anticipates more consumer cases against banks. She adds that disputes relating to Spanish companies’ activities in Latin America should create opportunities for law firms. Huerta fears the political situation in Spain will slow down investment and this will have an impact on litigation and ADR. He adds: “Lawyers will have to recover their entrepreneurial spirit as we need to be innovative and find new products for clients – however, corporate disputes will increase as well as stand-alone and follow-on actions, compliance-related work will also increase.”

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Spain: What are currently the biggest litigation and ADR-related opportunities for law firms?

"Regulatory scrutiny in the financial sector as well as in antitrust compliance will increase. Likewise, it is foreseeable that criminal prosecution related with bribery and corruption will start to be more common." **Borja Fernández de Trocóniz, partner, Linklaters**

"Banking litigation, litigation fees are decreasing, though the workload is not. But law firms are creating more innovative ways of billing." **Santiago Hurtado, partner, Deloitte Abogados**

"Arbitration, especially in energy and infrastructure. Companies also need advice regarding pre-insolvency or insolvency proceedings. Mediation, as well, is gaining a lot of interest." **Eduardo Soler-Tappa, partner, Herbert Smith Freehills**

"Mediation can be seen as an opportunity to develop new mechanisms to satisfy clients' needs quickly and resolve their conflicts, as well as agree success fees allowing law firms to invoice and receive payment in a very short time." **Jordi Sánchez, partner, RCD – Rousaud Costas Duran**

"If M&A deals and real estate transactions keep increasing it could be a big opportunity as they are often the source of a lot of disputes." **Jordi Calvo Costa, partner, Roca Junyent**

"True specialisation in fields litigious by essence – for instance in construction, lawyers with engineering education." **Jean-Marie Vulliemin, managing partner, Froriep Swiss lawyers**

"Law firms have the opportunity to develop the necessary legal and technical skills to meet the requirements of lawsuits or arbitrations with the complexity and dimension that investment litigation usually entails." **Luis Javier Vidal, partner, CMS Albiñana & Suárez de Lezo**

"The wide variety of financial disputes is an important source of activity for litigation departments." **Fernando González, partner, Squire Patton Boggs**

"Providing Spanish companies with cross-border advice to prevent investment-related risk. International arbitration is a big opportunity too." **Rafael Montejo, managing partner, Osborne Clarke**

"The foreseeable economic slowdown creates business disputes that could finish before a court or an arbitral body." **Pablo Albert, head of litigation, BDO Abogados**

"The increase in class actions – related, recently, to banking disputes – will probably contribute to a wide increase in such actions with respect to disputes in other sectors, such as the telephone or insurance industry." **Cristina Camarero Espinosa, partner, Anter**

Portugal: BES fallout continues

In Portugal, the "tsunami" of litigation related to the collapse of Banco Espírito Santo continues, according to one partner, who adds that the disputes relate to a wide range of areas including, banking and finance, criminal law and public law. Meanwhile, the recent collapse of the Portuguese bank Banif will also lead to significant dispute resolution-related work for lawyers.

There is a significant amount of litigation related to transnational insolvencies involving Luxembourg, Switzerland and the Cayman Islands, PLMJ partner Nuno Libano Monteiro explains. He adds: "There are also cases related to the liability of boards of directors with disputes concerning D&O policies." With regard to arbitration work, in addition to matters related to the collapse of BES, there is also some major disputes in the pharmaceutical sector that are going to arbitration. Meanwhile, Fernando Aguilar de Carvalho, partner at Uría Menéndez Proença de Carvalho, says disputes relating to white collar crime continue to be on the rise.

Commercial mediation is making progress but it is still practically non-existent in Portugal, according to MLGTS partner Miguel de Almada, though he adds that, in contrast, arbitration is used more and more frequently. Meanwhile, Abreu Advogados partner Natália Garcia Alves says that the Portuguese civil courts are handling cases more quickly, but that there are still problems with enforcement courts. In the view of Rui Tabarra e Castro, associate at FCB Advogados, the judicial courts are not properly prepared to deal with some BES-related cases because some judges do not have the relevant experience.

This view is echoed by Sérvulo partner António Teles who says that sometimes commercial courts are worried that they will have to deal with particularly difficult cases. He adds: "There is the fear on the part of lawyers that courts will try to oversimplify these cases." Linklaters counsel Ricardo Guimarães says that judges in Portugal often take too long to decide disputes. "In some cases, after 10 years we're still waiting for the first decision," he adds.

Though there is pressure on fees in respect of litigation and ADR – as there is in other practice areas – Vieira de Almeida partner Frederico Gonçalves Pereira says that dispute resolution work is becoming a more important source of revenue for law firms. AAA Advogados partner José Jácome says that litigation is an important source of revenue for law firms: "The litigation department was the poor relation in law firms, but now it's one of the rich relations."

The market for legal services relating to litigation and ADR in Portugal is fiercely competitive, according to Aguilar de Carvalho. However, he adds that there are many foreign investors seeking legal advice, who are used to different fee structures and Portuguese firms are having to adapt: "This is both a challenge and an opportunity, particularly in the wake of the Novo Banco/BES-related litigation, with complex and high-level services being sought." If a law firm quotes very low fees for its services, it may deter some clients from using them, according to Jácome: "One US investment fund said some fees proposed by other firms were so low, they didn't think the law firms could be good."

Resolving conflicts

“The litigation department was the poor relation in law



partner, Oller

"Corporate compliance matters will be at the core of our strategy this year." **Íñigo Rodríguez-Sastre, partner, Oller**

"Given the growth of the real estate market, litigation in this area is probably a good opportunity – including eviction proceedings, construction damages, mortgage foreclosure proceedings, and asset recovery." **Patricia Gualde, partner, Broseta**

"Law firms shall develop new legal skills, being at the same time more accessible and transparent to clients, combining the best legal advice with an extraordinary service." **Yago Vázquez Moraga, partner, Pintó Ruiz & Del Valle**

Arbitration – arbitral proceedings are increasing in certain sectors and jurisdictions which were traditionally less prone to accept this practice (for example, the financial sector). Meanwhile, sectors and jurisdictions where arbitration is already common are witnessing further development and specialisation." **Dámaso Riaño, partner, Arias SLP**

"Corporate compliance is one of the major fields where expert legal advice is required, due to the novelty of the regulations and the lack of practical experience and case law in comparison with Anglo-Saxon jurisdictions." **Alfredo Guerrero, partner, King & Wood Mallesons**

"An increase in transnational and cross-border disputes. Meanwhile, the number of disputes resolved using ADR, rather than in traditional courts, might increase due to the caseload of traditional courts, the perception of lower costs and the shorter timescales." **Esther Domínguez, lawyer, Marimón**

"Disputes related to cybersecurity, labour and employment law, tax controversies and, in general, claims against the state and public authorities are expected to increase." **Roberto Giralt Leinweber, partner, Bufete B. Buigas**

"New concessions and case law concerning the unauthorised use of trademarks in internet search engines means that, in any related litigation, there will be an extraordinary burden of proof on claimants to provide evidence of the risk of confusion." **Javier Matanzo, partner, Lener**

Aguilar de Carvalho says one of the major challenges for law firms is "sorting out conflicts of interest", particularly in BES-related matters. He adds: "This is relatively new and has led to lots of firms having to say no to work they would have been keen to take on."

Improving efficiency is another major challenge facing

law firms, according to Guimarães. He continues: "Some clients are open to paying fees that are higher than the standard, but they want efficiency, quality and results". Jácome says that clients want to have certainty regarding what they will spend on legal fees and this means there is a "higher recourse to success fees". According to Líbano Monteiro, clients are demanding fee caps and "they want to cap the different parts of the case, such as the preliminary hearings, the trial and the appeal, for example".

Another difficulty law firms face is that clients' in-house legal teams are becoming stronger and more accomplished. However, the big opportunity for lawyers lies in more complex litigation because, in this area, clients generally do not have the expertise. An additional trend being observed in the market is clients now asking several law firms for a quotation when seeking to outsource work.

Determining fee caps can be problematic for lawyers, according to Teles: "It can be difficult to predict how a case will evolve – in a judicial court, a two-day hearing could end up lasting 60 days." But hourly rates are largely a thing of the past. De Almada says: "Arrangements based solely on hourly rates are almost dead." SRS Advogados partner José Carlos Soares Machado says the biggest concern for law firms with regard to pricing is "limiting the risk". He adds: "When clients want a capped fee, the risk is ours – the key is to omit unpredictable events out of the fee estimate, but it depends on the client, some want to know all the potential outcomes."



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Nuno Pena, CMS Rui Pena & Arnaut

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AAA Advogados



How are current market trends impacting on the litigation and ADR departments at law firms? Líbano Monteiro says that departments need to organise along industry sector lines, such as banking and finance, for example: "BES was proof that this was necessary." Soares Machado adds that pressure from clients means that law firms "need lawyers with a tendency to work in a particular area".

Gonçalves Pereira says the first challenge litigation and

ADR departments have is ensuring they have the correct leverage. He continues: "You need a strategic view of how to conduct litigation, you need partners, managing associates and then you need young associates – you also need specialisation, and you also have to work with other teams." Guimarães says that a key challenge is to "build the legal team you need for specific cases".

BES-related matters have represented a strange new world for banking and finance departments in law firms, according to Nuno Pena, founding partner of CMS Rui Pena & Arnaut. He

adds: “In six months, we have had three different legal regimes – we are dealing with new decisions and a lot of questions, our litigation team has been updating our banking and finance team [on the latest developments].”

One partner at a leading Portuguese firm expects a number of arbitrations involving private equity funds, though he identifies frequent challenges to arbitrators as a potential problem. He adds: “The market is small and the fear is that such behaviour will be repeated in arbitration concerning other sectors such as pharmaceuticals.” Jácome says the legal environment as well as the Portuguese state courts’ organisation is improving and all major litigation practices are doing better. He continues: “Lawyers are also more fairly paid, the question is are we up to the challenge of improving in relation to ADR, for example?”



“ Litigation and ADR departments can match the glory of the transactional departments – the challenge is to focus the competition on quality and not on pricing. ”
Miguel de Almada
MLGTS

‘Pessimistic outlook’

With political uncertainty in Portugal, there is a possibility that tax laws could change and privatisations could be reversed, says Aguilar de Carvalho. “This will create a lot of litigation opportunities, but it could be bad for law firms as a whole – Portugal’s economy depends on foreign investment and funding and the uncertainty may drive investors away and make funding more difficult,” he adds. Tabarra e Castro says that it is uncertain whether the current Portuguese government will last: “It’s difficult to explain to clients that this government will change the reforms of the previous government. However, I’m optimistic that we may get faster judicial court decisions.”

Pena says he is “completely pessimistic” about the outlook under the new government. However, he adds that law firms now have more complex and demanding work, though he says he does have concerns about courts in Portugal. “We have had no evolution in our courts,” says Pena. “You are lucky if you get a judge capable enough to deal with these complex cases, it is a complete mess – we should have a specialised commercial court for complex cases, such as cases related to the collapse of banking institutions.”

Garcia Alves says one of the challenges for law firms is to “make a difference”. She continues: “There are a lot of good law firms, clients will go to three or four firms before making a choice, and they may not decide on price, empathy with the client is important.” De Almada says that growth in arbitration and litigation will provide greater opportunities for law firms: “Litigation and ADR departments can match the glory of the transactional departments – the challenge is to focus the competition on quality and not on pricing.”

Political pessimism in Portugal is not necessarily bad for litigators, according to Soares Machado, who believes there will be a significant amount work related to financial litigation, insolvencies, restructuring and white collar crime in the coming year. He adds that the cases related to the collapse of BES and Banif will go on for another five or six years. “Proceedings will be faster as there has been a change in culture and in the way judges act – enforcement is getting faster and there is increased efficiency.”

The prospects for litigation teams are good, according to Gonçalves Pereira. However, he warns that the prospects for the Portuguese economy in the medium term are not so healthy: “Aside from the food distribution chain, we don’t have a lot of big companies – we need the economy to create new opportunities, but foreign investment will decrease.