

Consumer conflict

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.

Banks selling NPLs

Oscar 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 Alvaro 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.

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

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

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