An alternative work-in-progress

Recent years have seen profuse regulation of Portugal and Spain's ADR systems, with a clear target of boosting these methods and offloading cases from the Courts and Tribunals. But there is still a long way to go before 'alternative' is on an equal footing with 'conventional´.

The economic and financial situation of the last few years has acted as a double-edged sword towards the amicable settlement of disputes. On the one hand, clients look with more interest to the possibility of reaching a cost effective settlement, rather than involving themselves in cost and time consuming litigation, explains Guillermina Ester, Arbitration & Commercial Litigation Partner at Pérez-Llorca. "On the other, it is harder to reach such settlements due to the difficulty for parties to pay significant amounts of money to settle a dispute."

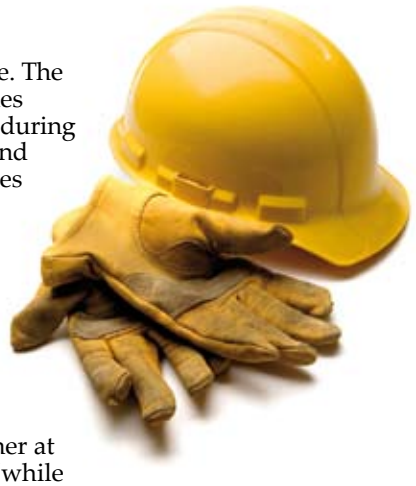
An increasing number of companies across the peninsula are warming to the advantages of solving their disputes through arbitration and are less reluctant to include arbitration clauses in their agreements, explains. João Duarte de Sousa, Head of Litigation and Arbitration at Garrigues Portugal. "It is an understandable process that comes from the common frustration with national court systems."

Litigious trends

The economy continues to drive Portugal and Spain into even more contentious times. But it has also brought a number of interesting opportunities, particularly in insolvency, restructuring and debt enforcement litigation, disputes on miss-selling of financial products, and employment matters, essentially through lay-offs and collective dismissals.

In Spain, there is a greater tendency for purely commercial litigation matters, such as unfair competition, breach of not merely financial contractual obligations and intellectual property rights, and less of breach of payment obligations or insolvency in general, explains Fernando González, Head of Litigation at Squire Sanders, Madrid.

Lawyers are also seeing an increase in the amounts in dispute in each case. The explanation could be that companies have tightened their legal budgets during the years of economic difficulties and have tried to avoid litigation in cases of less importance, which could be settled, says Mercedes Fernández, Managing Partner and Head of Disputes at Jones Day, Spain.



"From an international litigation perspective, we expect the number of internal and regulatory investigations to increase this year," says Rafael Murillo, Litigation and ADR Partner at Freshfields Bruckhaus Deringer, "while worries over whistleblowers allegations will continue, personal injuries are on the rise, particularly in the US, and financial disputes will continue to grow in number and value."

In Portugal, lawyers have witnessed an exponential increase in disputes related to financial products and investments, explains João Duarte de Sousa, Head of Litigation and Arbitration at Garrigues Portugal. "Therefore financial and banking litigation is boiling as opposed to other periods when the financial cycle ran less troubled and more quietly."

The economy still creates an accrual of work and increase of disputes – contractual liability cases, for example, either through litigation or through arbitration, says Joaquim Shearman de Macedo, Co-head of the Dispute Resolution Practice at CMS Rui Pena & Arnaut. "This flows from the fact that parties face accruing difficulties in observing its contractual obligations and eventually are led or forced to breach the contract."

Many market actors have adopted more conservative strategies, implemented, namely through the creation of provisions for doubtful debts. Such behaviour allows a brand new approach to litigation, in which claimants tend to accept rather significant haircuts in exchange for a quick resolution of the case and, consequently, the payment of amounts that, being already provisioned, can significantly improve the creditor's performance, explains João Pimentel, Head of Litigation and ADR at Campos Ferreira Sá Carneiro & Associados.

Arbitrary advances

The 2012 amendment to Portugal's Arbitration Law substantially changed

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> Sandra Texeira da Silva, AVM Advogados

the regulatory framework. It was strongly influenced by the UNCITRAL Model Law and with the goals of mitigating the structural problem of excess of pending litigation proceedings in State Courts, explains Natália Garcia Alves, Litigation Partner at Abreu Advogados, while promoting and developing the Portugal as a seat for international arbitration proceedings.

Considering the delay of the Portuguese Courts and the lack of specific knowledge of judges to legally address complex technical matters, lawyers have seen a rise in the number of arbitration proceedings being initiated. "We also believe that the increase of costs of judicial proceedings that results from the new Civil Procedure Rules may lead the parties to opt for arbitration," says Frederico Gonçalves Pereira, Head of Litigation and Arbitration at Vieira de Almeida & Associados.

Arbitration is now a common practice not only in commercial, contractual and consumer law, but also in other areas as automotive, civil construction, energy, insurance, IP, pharmaceutical and transportation, among others. "We have also been witnessing an increase of the use of tax arbitration," says Célia Dias, Associate Partner at A. M. Moura – Advogados, essentially due to the increase of Tax Authority inspections on both citizens and companies.

Nevertheless, arbitration is still a costly resource when compared with common judicial proceedings, explains Rui Tabarra e Castro, Senior Associate in Dispute Resolution at F. Castelo Branco & Associados, and so it is mainly used to resolve disputes in which considerable value is at stake, including those projects involving the Portuguese Government or other public entities.

There has been a significant increase in arbitration between international parties and, in parallel, a flourishing of Portuguese practitioners acting as arbitrators or counsel in international arbitrations, according to Sandra Texeira da Silva, Litigation Partner at AVM Advogados, mostly related to disputes in the Portuguese former colonies where Portuguese is the official language – Angola, Mozambique, Cape Verde and even Brazil.

The Portuguese State is also involved in many arbitrations in the tax, administrative and intellectual property, and that requires the intervention of an arbitration supervising entity, explains António Pinto Leite, Head of Litigation and Arbitration at Morais Leitão, Galvão Teles, Soares da Silva & Associados. "And in all major national or international contracts in which the State takes part, notably in industrial sectors, an arbitration clause is agreed upon and the parties choose an arbitral institution."

Alternative progress

International arbitration is suffering from the ill effects of success, says David Arias, Founding Partner of Arias SLP. "There is an unhealthy hypertrophy: briefs of hundreds of pages followed by thousands of exhibits, extensive production of documents, hearings of several weeks. The cost and time that all this requires is enormous and in many cases is not justified."

In a globalised economy international arbitration is increasingly common and there is a clear and growing trend towards internationalising disputes, says Jorge

A slow start

The most significant development in mediation are the new ICC Rules, which entered into force at the start of this year. They reflect modern practice and set clearing parameters for the conduct of proceedings, while recognising and maintaining the need for flexibility, says Javier Fernández-Samaniego, Managing Partner of Bird & Bird Spain. And Spain's domestic mediation legislation, which came into force in 2012, was recently amended to develop the formation of mediators, creation of an official mediator's registry, and liability of mediators and promotion of online mediation on disputes under €600.

Institutions, lawyers, the media, etc, must teach society that there are many ways to fix disputes, and then people can choose the way that provides them with the best solutions, says Francisco Javier Cabello, Litigation Associate at Adarve Abogados.

"Legislative changes are setting what mediation and mediators will be and it appears to be that changes are on the right direction, but it still has a long way to go."

But mediation is misused and misrepresented, says Gonzalo Stampa, Managing Partner at Stampa Abogados. It is a highly technical and delicate device, and to be effective it requires recognised professionals, who are keen on the substance of the dispute and know about psychology and other mediation skills.

An arbitration is only as good as your arbitrator, adds Carlos de los Santos, Head of Litigation and Arbitration Department at Garrigues, and the same goes for mediation,

For mediation to be able to take off in Spain, expert mediators are needed, says José Luis Huerta, Managing Partner and Head of Dispute Resolution at Hogan Lovells, Madrid. "And we have very few in comparison to the US, for example."

Mediation has the problem of not being easily enforceable, says Manuel Rivero, Co-Head of Dispute Resolution at Herbert Smith Freehills. "So unless you get something down in writing, it is a pointless exercise."

Realistically, there is little possibility of developing mediation in Spain, according to Antonio Hierro, Litigation Partner at Cuatrecasas Gonçalves Pereira.

"The Authorities were in a hurry to transpose the directive to domestic law, but the law has revealed itself useless as far as it does not provide the company in conflict with any of the advantages over litigation or arbitration that characterise mediation in the UK or US and that are the key to its success in those countries".

Aguirregomezcorta Oppelt, Head of Public Law and Regulated Sectors at KPMG Abogados, and companies are aware that certain cases can only be won before international bodies. An international Court of Arbitration clause is therefore quite relevant to preserve the rights of the investor in a foreign country, adds Luis García Del Río, a Founding Partner at García Del Río & Larrañaga Abogados.

In Spain the emerging trend is in favour of ADR as opposed to litigation, says Emilio Gude Menéndez, Deputy Director of Ceca Magán Abogados, due to the fact that ADR provides a faster decision, which in business terms is not only an advantage, but a necessity.

Attracted by confidentiality, speed and expertise, many clients, especially from the technology sector have opted to include arbitration clauses in relevant contracts with partners, technology providers and suppliers, according to Alejandro Touriño, Information Technology Partner at Ecija.

But there are mixed feelings in big corporates as to arbitration. "Clearly, when it comes to international disputes, arbitration is the preferred option – in domestic disputes the question is less clear," says Jesús Almoguera, Founding partner at arbitration boutique J Almoguera y Asociados. But if clauses are not included in contracts then there is no possibility for arbitration, adds Francisco Peña, Litigation and Arbitration Partner at Gómez-Acebo & Pombo, Spain, and many in-house are not familiar with arbitration and therefore disregard it.

Arbitration, therefore, has not taken off as expected in Spain. "Lawyers in particular are reluctant to use it, as it is much harder to explain to a client why they have lost an arbitration than a court case," explains José María Alonso, Managing Partner and Head of Litigation and Arbitration at Baker & McKenzie Spain.

One important problem that hasn´t been resolved is the payment of arbitration costs, according to Jordi Calvo Costa, Litigation Partner at Roca Junyent. When one party pays the price, if the other party doesn´t want to pay their share, then the first party is obliged to pay it all. If they don't they will not be able to continue with the procedure nor file a new claim in the court because there is a rule that the dispute must be submitted to arbitration.

> "Some people think that independence is better guaranteed by practitioners that only serve as arbitrators, whereas others think the opposite."
> Jesús Almoguera
> J Almoguera y Asociados

The independence of arbitrators is also a hot topic these days, says Jesús Almoguera, Founding partner at arbitration boutique J Almoguera y Asociados. "Some people think that independence is better guaranteed by practitioners that only serve as arbitrators, whereas others think the opposite."

It is often said that the arbitration process is only as good or as bad as the arbitrators hearing the cases, says Luís Cortes Martins, a Founding Partner of Serra Lopes, Cortes Martins & Associados. "Experience shows that many organisations are not always comfortable in pursuing arbitration because of the possible conflicts of interest from arbitrators."

The great advantage of arbitration, however, is the predictability of results. "And as lawyers, we need to sell that to our clients," says Francisco Peña, Litigation and Arbitration Partner at Gómez-Acebo & Pombo, Spain. "And we have to look at what we have done in 10 years with regards to arbitration since it was introduced 2003," explains José Antonio Caínzos, Head of Litigation and Dispute Resolution at Clifford Chance Spain. "There has been a fundamental culture change – but we need to do more."

"We have made big strides towards making

A new regime

In Portugal, up until now mediation has been hardly used. However, 2013 brought a new Mediation Law aimed at making it an attractive and reliable alternative. The new law applies to civil and commercial matters, excluding disputes that may be subject to family, labour and criminal mediation.

The long-awaited basic grounds for civil and commercial mediation are finally in place, says João Marques de Almeida, Co-Head of Dispute Resolution at Alves Pereira, Teixeira de Sousa & Associados (APTS). International standards of impartiality, equality of the parties, independence of the mediator and confidentiality, among others, have all been incorporated in the Law. And agreements signed during mediation become enforceable, adds Henrique Salinas, Head of Litigation at CCA Advogados. "For this reason, we now have a legislation that may be the necessary starting point to trigger a significant increase on the use of mediation."

An agreement reached through mediation in Portugal or in another EU Member State is also enforceable without the need for court approval, says Carlos Soares, Head of Litigation Department at Gómez-Acebo & Pombo, Portugal. "Moreover, proceedings are subject to confidentiality, notably the discussions in the sessions cannot be used in court or in arbitration."

The new Law, however, is not without its faults. There is a serious lack of awareness and incentives, and mediation remains a fully voluntary process, and parties may, at any time, unilaterally withdraw from the process.

Mediation faces two main obstacles in Portugal, says Nuno Ferreira Lousa, Head of Litigation and Arbitration at Linklaters Lisbon. A cultural obstacle, as companies and lawyers still tend to see mediation as an inefficient procedure and as a waste of time and money, and there is also no such thing as a 'mediation community'. The idea of mediation being a 'preparation for arbitration' must also be abandoned so that it can become a serious attempt of avoiding it or non-arbitrational litigation, says João Nuno Azevedo Neves, a Founding Partner and head of Litigation at ABBC.

Mediation still has a long way to go, but it is gaining in relevance day-by-day. "The right path is to continue to strengthen specialised training and promoting accurate information to companies, focusing on its advantages and how it works in practice, says Ana Cláudia Rangel, Head of Litigation at Raposo Bernardo. It also needs to be actively disseminated and publicised, not only among clients but also practitioners, who need to understand the benefits of mediation before they can suggest it to their clients, according to Fernando Aguilar de Carvalho, Dispute Resolution Partner at Uría Menéndez - Proença de Carvalho. "For mediation to work, both sides must be interested in a fast and definitive solution, which, when it comes to domestic disputes, is seldom the case."

> "In two years, Portugal will have one of the most competitive judicial systems in Europe, which is an enormous challenge both for judges and lawyers. The key word in Portugal is now 'management': both court and case."
> António Pinto Leite, Morais Leitão, Galvão Teles, Soares da Silva & Associados

arbitration a real ADR," says Eduardo Soler-Tappa, Co-Head of Dispute Resolution at Herbert Smith Freehills Spain. "The big question is how to advance it so that it is a method that is valued and used by clients."

Most of the problems with arbitration and ADR are not specific to Spain, but apply to dispute resolution worldwide. There is no denying that there has been real growth in recent years, says Clifford Hendel, International and Domestic Arbitration and Litigation Partner at Araoz & Rueda. "The growth in actual use may be less than dramatic, but the growth in consciousness is significant, and should lead to further growth in use in the future. In the end, it is a kind of 'virtuous circle' of feedback-loop: use should generate awareness and confidence, and awareness and confidence should generate further use."

Institutional issues

Selecting the correct arbitration institution is crucial, say lawyers, and criteria such as prestige, costs and delays, impartiality and professionalism are key.

"My recommendation is always to play special attention to the drafting of the arbitration sections included in contracts," says Santiago Hurtado, a Partner at Deloitte Abogados. Drafting a clear, concise and concrete regarding existing normative instruments, grants security and guarantee to the proceeding, controls and diminishes procedure costs and mitigates the challenges of a deficient Arbitration Agreement.

There are numerous international and domestic arbitration institutions, but in practical terms only a few deal with the majority of the cases, saw lawyers, such as the ICC and ICSID, the Madrid Arbitration Court, the Barcelona Arbitration Tribunal and Portugal's Commercial Arbitration Centre of the Lisbon Commercial Association. The existence of a plurality of institutions is not considered a disadvantage but rather as a benefit, according to Ana Martínez Obradors, Head of Litigation & Regulatory at DLA Piper Spain. This is because the parties can choose an institution in which they have more confidence either because of specialisation or its arbitrators.

Spain has a large number of arbitral institutions since many bar associations have their own arbitration institution with its own set of rules which are, on occasions, quite varied, says Antonio Vázquez-Guillén, Head of Litigation and Arbitration at Allen & Overy. In addition, the approach of institutions to complex procedural matters is not consistent nationwide, according to Iñigo Rodríguez-Sastre, Head of Litigation and International Arbitration at Olleros Abogados, impairing the recommendable savoir faire in any litigation process.

But the proliferation of institutions and panels is beneficial for the ADR institution as a whole. Some of the pioneer institutions of domestic commercial arbitration in this country will have to cope with this competition to administer cases in the most efficient and professional manner, says John Gustafson, Managing Partner and Head of Litigation Rivero & Gustafson Abogados. "Having a reputable list of arbitrators is not enough to be the preferred choice for professionals any longer. Institutions must be cost efficient and responsive, otherwise they will replicate some the inefficiencies of courts and tribunals."

Sometimes, arbitration should not be conceived only as a 'business', so it is not logical that several institutions compete in the same city for the same kind of disputes, says Raúl Da Veiga, Litigation and Arbitration Partner

Ongoing reforms

Dispute resolution lawyers are currently immersed in a rain of reforms, says Julio Garrido, Head of Dispute Resolution and Competition at AC&G Asesores Legales. "These require both lawyers and the courts to spend too much time on purely procedural aspects instead of focusing on the content of material rights, which lawyers are supposed to defend and courts and judges are supposed to resolve."

The criminal liability of legal entities – introduced in the Spanish Criminal Code by the 2010 Reform – is still the most significant legislative change of the past years, says Alfredo Guerrero, Dispute Resolution Partner at King & Wood Mallesons SJ Berwin. The implication for Spanish legal entities is that they can now be held responsible for criminal offences committed by individuals. And coming years will also bring a Reform of the Criminal Procedure Code.

The 2012 Court Fees Act has resulted in the creation of a barrier to access to justice, says Patricia Gualde, Litigation Partner at Broseta. The Act introduces the obligation to pay a fee to litigate, and received a severe backlash from the legal market as it makes proceedings more expensive and discourages small claims.

"We are aware that the Ministry of Justice is preparing significant legislative changes to be introduced in the coming months," says Francisco Málaga, Head of Litigation and Arbitration at Linklaters, Madrid. Changes to extraordinary civil appeals to the Supreme Court, for example, will apparently be very substantial.

There is also a project to amend certain articles of the Spanish Procedural Act. The first objective is to speed up certain steps or stages of court proceedings by allowing court agents to carry out certain acts of communication as well as some tasks involved in enforcement proceedings, explains Guillermina Ester, Arbitration & Commercial Litigation Partner at Pérez-Llorca. It also reforms oral proceedings by strengthening the rights and guaranties of the parties, and introduces amendments in the regulation of petitions for court payment requests.

at Gold Abogados. "It would be advisable to have some institutions specialised in some sector and/or area of law or to unify different institutions in order to have a unique and prestigious institution."

In Portugal it used to be very common to use ad-hoc arbitration rather than resort to arbitration centres, explains Fernando Aguilar de Carvalho, Dispute Resolution Partner at Uría Menéndez - Proença de Carvalho. "The prestige and reliability of the arbitration then rested entirely on the prestige and reputation of the arbitrators." Arbitration centres in Portugal began to gain relevance and importance over time and today the Commercial Arbitration Centre of the Lisbon Commercial Association is probably the best known and reputed.

"The challenge is to fight against a tendency to pass arbitral awards of a 'trying to please both parties' kind by arbitrators eager to avoid attracting animosity in a legal community where everybody knows everybody," says António Ribeiro, Commercial Litigation and Arbitration Senior Associate at AAA Advogados Lisbon.

Along with costs, availability and reduced number of registered arbitrators, there is an increasing concern about the risk of 'judicialisation' of arbitration. The perception is that the process of arbitration has become more regulated, says Sandra Texeira da Silva, Litigation Partner at AVM Advogados, and this appears to be a challenge considering that one of the main feature and advantage of ADR is supposed to be flexibility.

Another challenge is the specialisation of the arbitrators, explains Sandra Ferreira Dias, Head of Litigation and ADR at Caiado Guerreiro & Associados. "The Parties want to be sure that the arbitral decision is rendered by arbitrators that understand their business and the specific needs and characteristics of their field of expertise as well as the applicable law and regulations."

Civil strides

Portugal is going through an apparent revolution with a new Civil Procedure Code into force since September 2013, and a drastically new judiciary map jointly with a fairly new courts' management system. Both these reforms intend to put an end to the delays in the Portuguese judicial system and to get economic disputes solved as fast as possible, says António Pinto Leite, Head of Litigation and Arbitration at Morais Leitão, Galvão Teles, Soares da Silva & Associados. "In two years, Portugal will have one of the most competitive judicial systems in Europe, which is an enormous challenge both for judges and lawyers. The key word in Portugal is now 'management': both court and case."

Unnecessary bureaucracy and red tape have been a persistent worry in the past years. The basic expected implications of the Code are that litigation becomes simpler, faster and that the increased discretionary powers of the judges are used prudently. "Courts are under strong pressure to speed up decisions on their never-ending pending case list, explains João Macedo Vitorino, a Founding Partner at Macedo Vitorino & Associados, "unfortunately, this is leading to decisions that not always are duly pondered."

The premise underlying the Reform are celerity, establishing new terms and consequences for judges and lawyers for disrespect as well as punishing any delaying tactics, flexibility, attributing to the judges the power and discretion to adequate the proceedings to the specificities of the case, and simplification, foreseeing the new CPC a single kind of declarative procedure and abolishing several formalities and obligations, outlines Francisco Colaço, Head of Litigation at Albuquerque & Associados.

The new so-called 'Duty of Management Procedure' entrusts the judge with the obligation of actively driving the process for a fair and fast resolution, explains João Pimentel, Head of Litigation and ADR at Campos Ferreira Sá Carneiro & Associados, notwithstanding the parties' procedural duties and burdens. This duty further allows the judge to refuse every initiative that he considers frivolous or dilatory.

"Although it is too soon to get conclusions on how the new Code has brought effective changes to the practice of litigation," says Gonçalo Malheiro, a Partner at pbbr, "it is our opinion that it may be a useful instrument to deal with the current caseload in Portuguese Courts." At this stage, however, one of the objectives of the approval of a new Portuguese Civil Procedure Code has been achieved, adds Rui Tabarra e Castro, Senior Associate in Dispute Resolution at F. Castelo Branco & Associados – the immediate effect of reducing the number of enforcement proceedings pending in court.

Concluding arguments

In any market, the consumers choose the product, and base this on price and quality. If these do not become desirable then clients don't see a reason to change, and arbitration has to make itself more attractive if it wants to be businesses first choice, says Miguel Virgo, Head of International Litigation and Arbitration at Uría Menéndez. "Clients need to be convinced that, on balancing the risks, using arbitration will be worth it in the long-run."

And the reality in Spain is that arbitration has converted itself into a real alternative, says Antonio Hierro, Litigation Partner at Cuatrecasas Gonçalves Pereira, and there are nearly no obstacles to its use.

Across Iberia, law firms are expanding their arbitration teams – which is a sure sign of progress, say lawyers. And Portugal's shake up of its Civil Procedure Code had the clear intention of bringing it in line with the spirit of arbitration procedures, where the pursuit of truth, swiftness, streamlining and flexibility are paramount.

While mediation is lagging behind, the hope is that as both countries have established a regime this could be the start of creating a valid and effective alternative dispute resolution mechanism.

"We have to ask ourselves which of the two procedures – courts or ADR – will be prominent in the future," says Santiago Gastón de Iriarte, President of AC&G Asesores Legales. "There will exist always conflicts of interest that will need to be solved by public judicial authorities, mostly because arbitration and mediation courts haven't engendered enough confidence in capacity and impartiality as yet."

The question still remains as to which is truly the best alternative to litigation. "The jury is still out," says Hendel at Araoz & Rueda. "But the more options that are available to parties and their counsel, the better."