

IBERIAN LAWYER

January/February 2017

Running the risk
The perils of tax advice

Getting squeezed
Coping with class actions

The dealmakers
PwC storming M&A



Crying on the inside

Bullying and sexual harassment in law firms

Getting squeezed

Law firms that defend clients in class actions are buckling under the weight of the thousands of claims they have to contend with – consequently they face the choice of turning down work due to lack of resources or bolstering their teams to meet demand

Class actions are becoming increasingly popular as the public seek to hold financial institutions, in particular, to account for alleged misdemeanours. This phenomenon is enabling law firms that represent plaintiffs to dramatically increase their revenue, but for the firms that represent defendants in such cases, it is a trend that is proving difficult to adjust to. The sheer volume of claims being made in class actions means that some firms admit that they simply do not have the resources to provide their client with the service they expect. And this situation is going to get worse before it gets better



“Very sophisticated, well-heeled global entities are financing very large claims.”
Clifford Hendel
Araoz & Rueda

– various financiers have spotted an opportunity to make money by financing class actions and have identified Spain in particular as having significant potential in this respect. Hence, lawyers report that potential investors are busily trying to identify what other financial products could potentially be the subject of a mass consumer lawsuit. Meanwhile, in Portugal, dispute resolution lawyers are still overwhelmingly occupied with untangling the mess left by the collapse of Banco Espírito Santo.

Consumer cases rising

Disputes relating to restructuring and pre-insolvency matters are creating a lot of work for lawyers, according to Miguel Virgós, partner at Uría Menéndez.



He adds that, during the crisis, there were fewer transactions completed and consequently, there is now less M&A-related litigation, though it is growing. However, Virgós says there has been a “huge rise in consumer-related litigation”. He continues: “In the financial sector, there have been many class actions and also thousands of individual claims being made against the same defendants – to the point that this has created a new brand of law firm, which will be here for a long period. We think that there will also be more disputes in the field of competition law.”

José María Alonso, managing partner of Baker McKenzie says that an increase in class actions against banks has seen some law firms – that survive on contingency fees – build up huge structures with around 300 lawyers. He claims that there has been an increase in “post-M&A claims” due to an increase in transactions involving mid-sized companies. Meanwhile, white collar crime cases are also generating dispute resolution work for lawyers.

Another trend is for certain groups to see opportunities in class actions and therefore they seek to “invent new types of claim” that could involve telecoms companies or insurance companies, for example, according

to Ontier’s Spain managing partner Pedro Rodero. He adds that it can be very problematic for a law firm that is defending a major client against a class action because of the volume of claims. Rodero says that there is a “real industry building up in class actions – investment funds are trying to find opportunities to finance massive class action claims.” Araoz & Rueda partner Clifford Hendel says there is a trend of “very sophisticated, well-heeled global entities financing very large claims” with a particular focus on the Spanish market. Alonso says that new firms handling class actions could create a problem for law firms that defend clients in such cases in that they “will be forced to add more resources, paralegals included, to properly support such clients”. Meanwhile, Pérez-Llorca partner Guillermina Ester says a series of rulings from the European Court of Justice have encouraged increases in consumer litigation.

However, some law firms are having to scale down the size of their dispute resolution teams due to decreases in activity in certain areas, according to Linklaters partner Francisco Málaga. “There has been a fall in banking litigation as well as a decline in insolvency cases, so law firms will have to adapt to this new environment,” he says.

Public suspicion

Every few years, a new sector is hit by massive consumer claims, says Cuatrecasas, Gonçalves Pereira partner Alberto Fortún.

Consequently, the Supreme Court in Spain has an important role to play in “closing the gates” and stopping more such claims, he says. There is a “certain public suspicion” of financial institutions, says Linklaters partner Borja Fernández de Trocóniz. He adds that this mood has led to a wide variety of claims against all kinds of financial products, even of the “plain vanilla” variety. Fernández de Trocóniz also says that real estate litigation is a growing trend. According to Fortún, with regard to class actions, Cuatrecasas has a pool of lawyers across Spain which it uses to handle claims. He adds that class actions are raising issues with regards to the “type of work we accept in order to ensure that clients get added value”.

The next wave of claims will relate to expenses clauses and the Supreme Court is “opening the doors to this,” says Allen & Overy partner Javier Mendieta. He adds: “For example, clients are looking at expenses incurred when they were granted mortgage deals.” Mendieta says that mass litigation will continue because it is cheap in Spain and “everyone [involved in those type of lawsuits] thinks they will win”. He says another current trend in litigation is claims for damages related to infringements of competition law.

Managers at companies in Spain have to be educated about the benefits of mediation, according to some lawyers. However, one partner argues that clients are now “more willing to listen and learn about how mediation works”. The partner adds that, in 2016, there was an increase in the number of construction-related cases where parties considered mediation. But other lawyers argue that there needs to be a change in the law before parties in Spain begin to start using mediation – however, this is unlikely to happen soon as it is “not currently a priority” for Spain’s Ministry of Justice, one partner says.

There is huge competition for dispute resolution work among law firms in Spain. Major corporations are more likely to put work out to tender, lawyers

observe, and this is added to the fact that increasingly, procurement professionals at companies are responsible for buying legal services rather than general counsel, the problem being that procurement professionals may have a less detailed understanding of legal services than in-house lawyers. As one partner comments: “When I started, clients were loyal to one law firm, but now clients want three or four offers. Law firms now have to adapt their cost structures as they need to maintain their margins, partners need to be involved in matters and this is more expensive – when we talk to people within companies [responsible for buying legal

services], they often know nothing about law.” As a consequence, such companies often base their buying decision purely on price. One partner at a leading

“ There has been a fall in banking litigation as well as a decline in insolvency cases. ”

Francisco Málaga
Linklaters



international firm in Madrid comments: “They only realise their mistake when things go south and they find the work they did was shoddy; choosing the cheap solution may end up being more

Spain: What are currently the biggest opportunities for law firms in litigation & ADR?

“We see arbitration as an excellent avenue for solving disputes abroad – it offers an excellent opportunity to defend our clients in international disputes, especially in energy and infrastructure.” **Eduardo Soler-Tappa, partner, Herbert Smith Freehills**

“More litigation activity related to the foreign trade sector – it is certain that opportunities in related litigation areas will increase, such as arbitration and international procedural law.” **Fernando González, partner, Squire Patton Boggs**

“Increasing efficiency by using technology to make mass litigation cost efficient. Adding value for our clients, and taking a proactive rather than a reactive approach.” **Beatriz Rúa, partner, KPMG Abogados**

“Offering services related to mediation and other ADR, with the idea of satisfying clients requirements in terms of efficiency, costs and time.” **Silvia García López, partner, Deloitte Legal**

“As class actions are restricted in Spain, there are many funds which offer litigation funding.” **Jordi Ruiz de Villa, partner, Jausas**

“Collective and class actions are increasingly growing in Spain. Several big collective cases have been brought before the Spanish Courts in recent times, mostly in connection with banking products. In this regard, even though the current procedural rules and our legal tradition are not in line with this new trend, and are not suitable to foster this new type of litigation, the reality and market demand is impacting on the legal framework.” **Yago Vázquez Moraga, partner, Pintó Ruiz & Del Valle**

“Corporate disputes, particularly with regard to mediation in family-run-businesses, and arbitration and mediation in disputes relating to contracts agreed between firms subject to different legislation.” **Fernando J. García Martín, partner, AGM Abogados**

“We believe there are big opportunities to increase ADR, but the clients still prefer litigation against banks, which has been a major trend in the last 12 months.” **Manuel Saez, partner, Casals Advocats**



Portugal: What have been the major developments and trends in litigation and ADR in the last 12 months?

“Following the sovereign debt crisis and the intervention of the IMF in Portugal, foreign and national investment has decreased and that led to an increase of litigation and debt collection matters. Today, the levels of confidence in the Portuguese market are increasing and the measures taken to attract foreign investment are resulting in an increase of multijurisdictional litigation. The collapse of one of the major Banks in Portugal, BES, contributed to a long-term litigation trend as there are a significant number of lawsuits involving auditors, regulatory bodies and board members that are still pending.” **João Caiado Guerreiro, managing partner, Caiado Guerreiro**

“There are more and more cases related to the resolution measures applied to BES and Banif. Other financial firms are still struggling and this will also increase litigation. Arbitration continues to grow even though problems related to the independence of arbitrators are raising more and more issues.” **José Jácome, partner, AAA Advogados**

“The implementation of the new Civil Procedure Code, and the significant change in the Portuguese court structure.” **Gonçalo Malheiro, partner, pbb**

“The reform of the Justice System performed by the Judicial System Organisation Law (Law Decree No. 86/2016). Major changes made by this law affect the courts’ territorial jurisdiction. Civil disputes are addressed in first instance at the district courts. These courts are organised in chambers and some of them include specialised chambers for commercial and civil matters. The judgments of the district courts may be appealed to the Courts of Appeal, whose area of competence is defined by reference to the district courts. Finally, the Supreme Court of Justice, a state court, may review the decisions of the Courts of Appeal in matters of law.” **Vitor Marques da Cruz, founding partner, MC&A**

“As clients become more aware of the advantages of ADR, they increasingly resort to these instruments.” **Pedro Carreira Albano, partner, Pares Advogados**

expensive, but it can be difficult to convince clients to pay double the fee because they are receiving better advice.”

The need to say ‘no’

There is also a perception that Spanish clients are more likely to negotiate hard with law firms in Spain than they would with international law firms. “Spanish clients don’t discuss fees with US or UK firms,” says one partner. Another partner adds: “It’s a case of Spanish clients knowing the marketplace in Spain, they are scared in the US market, there they think that if they choose [and pay for] the best, if things go wrong it won’t be their fault.”

Some lawyers say there is a difference between Spanish clients and international clients when discussing fees and that it is often “easier” to deal with international clients.

Other lawyers argue that law firms need to be prepared to turn down work if the proposed fee is too low. “Sometimes clients want you to be innovative, but you need to say ‘no’ sometimes. Clients may say they know another firm that is offering their service at half the price, but dumping prices harms the whole sector,” says one partner. As another partner remarks, when clients ask their legal advisers to be “innovative” it generally means they want their legal advisers to reduce their fees. Meanwhile, another partner at a leading law firm in Spain says some international companies “choose three law firms and put them under an umbrella contract and then say, for example, ‘if we give you more than €1 million of work, you will then give us a discount’ – this creates a conflict”.

However, some lawyers claim that declining rates represent an opportunity for law firms. “This is an

opportunity to know ourselves better – law firms need to criticise and study their business model,” says one partner. A leading Madrid-based litigator adds: “In some cases, lowering fees might be justified, for instance if it is a new client, but generally when it comes to law firms working for a lower price, they should instead drop cases.”

“New products will be found to claim against.”
Javier Mendieta
 Allen & Overy



Mendieta says he expects litigation to grow, particularly consumer-related claims. “New products will be found to claim against,” he says. Meanwhile, Mendieta says there will also be an increase in restructuring-related disputes in the coming year. Gómez-Acebo & Pombo partner Javier Izquierdo says he is optimistic that work will increase in the next 12 months. “There will be work representing financial entities and probably also real estate litigation,” he adds. Virgós says that events such as Brexit mean we are in “times of change”, but he adds: “The uncertainty they [such events] bring about, though bad for society, is creating new opportunities for the legal profession.”

There will be less restructuring and banking-related litigation and more disputes relating to M&A and



white collar crime, says Málaga. "Some major firms are currently not handling white collar crime disputes but they will need to because they will boom," he adds. Meanwhile, Hendel says third party funders will stimulate large, innovative cases "not only in traditional areas such as investment claims or mass consumer claims, but also in areas such as bankruptcy, competition law and IP". In addition, there will be an increase in international investment arbitration, according to Fórtun.

Portugal: D&O cases increasing

Much of Portuguese law firms' dispute resolution work relates to the collapse of Banco Espírito Santo (BES) three years ago, explains PLMJ partner Nuno Líbano Monteiro. "There are new cases starting, many of which are complex and high value," he adds. Líbano Monteiro says there is significant litigation related to clawback [for example, payments to senior employees that need to be returned in instances where a company goes bankrupt]. Such conditions have led to a large number of complex directors and officers (D&O) cases, he says, some of which involve directors of banks and telecoms companies. In addition, Líbano Monteiro says there has been significant growth in arbitration work in the last 12 months.

Disputes involving Portugal Telecom – which relates to financial mismanagement at the company linked to the collapse of BES and the way former board members ran the business – has been a

trend in the last year, says Frederico Gonçalves Pereira, partner at Vieira de Almeida. He adds that another new trend has been litigation

related to the international expansion of Portuguese companies, specifically disputes involving public works in some African countries. "There has been litigation connected to bank warranties related to investments in a number of

countries," Gonçalves Pereira says. He continues: "We are seeing more international investment arbitration, while arbitration relating to public works in Angola is another opportunity."

Francisco Proença de Carvalho, partner at Uría Menéndez –

Spain: What have been the major developments and trends in litigation and ADR in the last 12 months?

"The volume of litigation is increasing – especially in areas such as finance where litigation in connection to mortgages has skyrocketed. Third party funding is more present in Spain and funders have started to invest in major international arbitrations. Clients are increasingly aware of investment treaties and the possibility of bringing arbitral claims against governments." **Antonio Vázquez-Guillén, partner, Allen & Overy**

"Cross border litigation has been significantly affected by several reforms, such as: the so-called Brussels I bis Regulation, which changed several rules on international jurisdiction and enforcement of foreign judgements within the EU countries; the new Spanish Law on International Legal Cooperation, which is considered one of the most advanced worldwide and which provides efficient solutions to cross-border litigation issues; or the reform of the international jurisdictions rules contained in Law on the Judiciary, which are in line with the trends and solutions provided by EU international private law." **Pablo Berenguer, counsel, Bird & Bird**

"The growing involvement of Spanish companies in infrastructure projects abroad means we are seeing an increase in traditional mechanisms of dispute resolution in these areas. Meanwhile, in addition to arbitration procedures, the implementation of other alternative formulas such as dispute boards is increasing." **Mercedes Fernandez, partner, Jones Day**

"An increase in claims related to company conflicts between partners, D&O responsibility, unfair competition and other claims related to the fulfilment of contracts." **Juan Manuel de Castro, partner, RCD – Rousaud Costas Durán**

"The recent judgments on mortgages, especially in regard to base clauses, the amendment to the Bankruptcy Act, and the judgement of the Supreme Courts regarding the case of Bankia's shares." **Eduardo de León, Araoz & Rueda**

"Judgments that condemn banks in mortgage matters related to (i) the effects of absolute retroactivity arising from the invalidity of 'floor clauses'; (ii) the nullity of the expenses assumed by the customers for the granting of loans; (iii) the nullity of the clause of universal responsibility of the debtor; or (iv) entities returning commissions for negative account balances." **Ramón Fernández-Aceytuno, partner, Ramón y Cajal Abogados**

"Clients are increasingly using the pitch model and ask a number of law firms for a quotation. Fortunately, they do not only look at the price as firms are now very specialised, even within litigation and arbitration departments, and the question is not only whether you have excellent litigators but whether you have expertise in a specific area, or even sector, of dispute resolution." **Rafael Montejo, partner, Osborne Clarke**

"The new standard regarding the evaluation of, and compensation for, damage in personal injury is a revolution with regard to the evaluation of claims, whether related to accidents at work, medical malpractice, air crashes or road traffic accidents." **Jesús Pérez Morilla, associate, Cremades & Calvo-Sotelo Abogados**

"Spanish and EU judicial resolutions regarding certain financial products such as preferred bonds, the listing of Bankia's shares on the Stock Exchange and issues relating to clauses used by financial entities, such as floor clauses." **Manuel Moreno Martínez, partner, Prol y Asociados**



Proença de Carvalho say that litigation and ADR is a major growth area for the firm. “We



“ Financial institutions still resist arbitration and seem to feel safer with litigation.”
Miguel de Almada
MLGTS

now have seven partners [in Portugal] working in this area – a lot of the work relates to financial institutions and includes white collar crime and civil litigation, while there is also litigation relating to insolvency, restructuring and real estate, as well as international arbitration.”

There was an “explosion of civil litigation” in 2016, according to MLGTS partner Miguel de Almada. “The BES issue has shaken the market, and companies, investments and projects have been affected and there are more disputes,” he says. “There has been steady growth in alternative dispute resolution (ADR) work, though financial institutions still resist arbitration and seem to feel safer with litigation.” Nuno Pena, partner at CMS Rui Pena & Arnaut says financial institutions often refuse to enter into arbitration because of the issue of transparency. He adds: “There is a concern that the public will see it as things being cooked behind closed doors.” However, Linklaters counsel Ricardo Guimarães says clients are increasingly using ADR because some court cases are “still taking too long and clients do not wish to perpetuate their disputes”.

There has been an increase in professional liability disputes relating to company directors and officers, but also in relation to other professions such as doctors, lawyers and engineers, says Maria José de Tavares, partner at SRS Advogados. She adds: “We are also advising on an increasing

number of disputes between companies – in the pharmaceutical, oil, and telecoms sectors – related to indemnity claims connected to the violation of competition laws. Abreu Advogados partner Natália Garcia Alves says there has been a rise in professional liability cases involving doctors and hospitals. Meanwhile, Pena says the EU Directive on Antitrust Damages Actions will present opportunities for lawyers.

The resolution of the Portuguese bank Banif will result in litigation, according to Líbano Monteiro. He adds that there will also be disputes involving non-performing loans. In addition, Líbano Monteiro says there will be telecoms-related disputes, while there has also been a significant

increase in class actions and mass litigation related to pollution and the environment.

Investing in litigation

Law firms are investing a lot in their litigation departments, says Guimarães. “Firms’ litigation and arbitration departments have bigger workloads and therefore need bigger and more specialised teams to handle these matters,” he adds. Guimarães says there are more professional negligence cases and this is a trend that is likely to grow. He also says that, with regard to compliance, there is growing demand for legal advice because of stricter regulations. In addition, the “Brexit effect” could also lead to more litigation and arbitration work, according to Guimarães.

Fees are going up, according to one partner at a leading firm in Lisbon. “Fees are not as problematic,” he says. “Clients are

Portugal: How are clients’ demands changing with regard to litigation and ADR?

“Fast solutions and fixed costs – a great challenge for us that implies a reinvention of our structures and methods.” **André Navarro de Noronha, partner, Telles de Abreu e Associados**

“Clients are increasingly demanding certainty regarding the outcome of a lawsuit, civil or criminal, and lawyers need to be clearer and more aware of the opinions they convey to clients. Justice in Portugal is increasingly expensive and clients more than ever are asking for more economical solutions, which leads to alternative dispute resolution proceedings.” **Marta Duarte, associate CCA Ontier**

“Clients are looking for better, more efficient and faster advice. One of the most interesting trends is the use of success fees and fee caps, as clients want to be more certain about the legal expenses they will incur. Although lawyers completely understand the financial worries of clients, it is often difficult for the legal team to fix a budget that corresponds to the reality. Pricing is a key factor for clients and that means having a more flexible structure to accommodate such demands.” **João Guedes, partner, ABBC**

“Clients need a legal opinion on the chances of success, thus seeking an additional service from law firms in order to not incur costs that do not match the predicted results.” **Ana Cláudia Rangel, senior associate, Raposo Bernardo**

“With regard to arbitration of public procurement disputes, clients demand great expertise from the lawyer, since public procurement law is becoming increasingly more complex because of the effectiveness of EU Law (for example, the three directives on public procurement).” **Nuno de Oliveira Garcia, partner, Nobre Guedes, Mota Soares & Associados**

“Clients seek to avoid court disputes and do everything in their power to find a non-judicial solution.” **Luís Almeida Carneiro, lawyer, Espanha e Associados**

more aware of the importance of a good lawyer and good lawyers cost money – we have lost some cases on price, but we have won others with little discussion on fees; Portuguese entities recognise the importance of a good lawyer.” Lawyers say mortgage-related litigation will be an opportunity in the coming, while it is anticipated that class actions will also increase. “Class actions are coming to Portugal, it is cheap to file a class action here,” says one partner.

There will be a steady growth in litigation in the next 12 months and there will be more lateral moves between law firms involving litigators, according to some lawyers. “Forty per cent of our firm’s revenue comes from litigation – firms will try to reinforce their departments in the coming year,” says one partner.

MLGTS’ De Almada says his firm is increasingly involved in international disputes, including arbitration with no direct relation to Portugal. The prospect of Portugal having to have a second

European Union/International Monetary Fund bailout is a concern among lawyers. “If there was a new bailout for Portugal, that could mean more litigation,” says Rui Tabarra e Castro, associate at FCB Sociedade De Advogados. He adds: “Fees might become a problem [for litigation and ADR work], clients want capped fees.” Pena says he is “concerned about the possibility of a second bailout for Portugal, the last bailout deterred investors in Portugal”.

Disputes related to debt transactions represent an opportunity for law firms, according to Garcia Alves. She adds: “Compliance is also leading to an increase in litigation because regulators are becoming more effective, especially in areas such as health and hospitals.” Cuatrecasas, Gonçalves Pereira partner Miguel Esperança Pina

says: “The number of cases will decrease [in the coming year]; there will be a decrease in arbitration activity – I don’t see the Portuguese economy growing, though I think the real estate sector will generate more work.” However, De Tavares says litigation departments will

“Disputes related to indemnity claims connected to the violation of competition laws are increasing.”
Maria José de Tavares
SRS Advogados



keep growing, but the number of disputes will decrease. She adds: “Our work is not only related to the courts, we also analyse [for clients] the risk of disputes, as well as liability, in relation to transactions.”

Use of arbitration in Portugal in decline

While there has been an increase in court disputes in Portugal – particularly in relation to banking and capital markets – the use of arbitration in the country is in decline, according to Miguel Esperança Pina, partner at Cuatrecasas, Gonçalves Pereira.

He explains that the decrease in the amount of arbitration is largely due to the absence of major transactions in Portugal. Disputes relating to large deals are generally the types of cases that go to arbitration, with small scale contentious matters more likely to go to court, according to Esperança Pina. “We are feeling the consequences of the economic crisis now due to the lack of big transactions and contracts,” he says. “Although companies are in favour of alternative dispute resolution (ADR) and include arbitration clauses in their contracts, the decrease in large deals in the Portuguese market means there is little arbitration taking

place.” Esperança Pina adds that the strict confidentiality rules associated with arbitration open it up to a lot of political criticism and, consequently, there is a lack of governmental support.

However, Esperança Pina believes there is strong support for ADR among legal professionals and clients alike. This is partly because of the challenges litigation poses for clients, such as the increase in court fees in recent years and the fact it is a more lengthy process, which makes it a more expensive choice. That said, the increase in real estate investment in Portugal has resulted in greater demand for litigation lawyers. “Most of our work used to originate from corporate matters but now we are finding a wider range of work related to banking, capital markets and real estate, for example.” Meanwhile, Esperança Pina says that, in addition to the domestic market, Portuguese litigation lawyers are also in demand in other Portuguese-speaking jurisdictions.



Miguel Esperança Pina