

## 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

Óscar 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 Álvaro 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**



argues that the number of arbitration cases is increasing in Spain and that the country is ranked fourth in the world, according to ICC statistics, in terms of jurisdictions supplying the most parties in arbitration cases.

There are problems in the arbitration community in Spain in that the “same faces” are often seen in arbitrations and this “creates mistrust”, according to Rodríguez. Fortún says that there needs to be more “due diligence” carried out when selecting arbitrators. He adds: “Continuing legal training is also a requirement for arbitrators as the quality of awards is not good – the parties should have a clear understanding of why they have won or lost the case.”

Some lawyers say that one of the benefits of arbitration is that,

compared to litigation, it is a quicker way of resolving disputes. However, others argue that arbitration does not necessarily mean a speedy end to conflicts. One partner at a leading Spanish firm says: “Arbitration is not quick, it can take two or three years, and that’s not acceptable.” He adds that the cost of arbitration can also act as a deterrent for some clients: “Arbitrators are not brave enough to impose costs on the losers.”

#### Great future for mediation?

Arbitration, and alternative dispute resolution (ADR) in general, is becoming a bigger source of revenue for law firm’s dispute resolution departments. Fortún says that “two-thirds of the billable hours generated by Cuatrecasas’

dispute resolution department is ADR-related, (including arbitration)”. However, the ratio in other major firms is closer to 50 per cent, lawyers say. Though it is not a major trend, clients are showing a greater tendency to consider mediation, says one partner. Rodríguez is convinced that mediation has a “great future” in Spain. “I think Spain will follow the path of the UK, though litigation is cheaper in Spain than it is in the UK,” he adds.

Clients embarking on major arbitrations increasingly ask their legal advisers what technology they will be utilising and whether or not they use project managers, Castresana says. “There will be a battle for time and cost efficiency,” he adds. In addition, clients ask for fee estimates and, more specifically, they want fees charged for “each phase” of the work that is done, says one partner.

International arbitration, particularly involving parties from Latin America, is a big opportunity for Spanish law firms, lawyers say. “One of the most exciting and promising trends in ADR is the rapid expansion of international arbitration,” says Dechert partner Érica Franzetti. “Particularly noteworthy is the expansion of international commercial arbitration beyond the Western world and into a broader array of industries – including life sciences and financial services.” Franzetti says that investor-state arbitration is also on the rise. “Some observers thought that the number of investor-state cases would dwindle in the face of political and social criticism,” she says. “The fact that the reverse has been true speaks to the fairness, utility and efficacy of the investor-state system – Mexico’s recent decision to join ICSID is a key illustration of this fact.”

With regard to the increase in international investment arbitration, it will be important for law firms to create “pan-European teams” that are able to handle such matters, says Baker McKenzie partner José Ramón Casado. However, he adds that there is little interest in arbitration in the domestic Spanish market.

**Portugal: Class actions emerging**  
There was considerable financial sector litigation in Portugal in

#### Spain: What are the biggest opportunities for law firms in litigation and ADR?

“To offer more cost-effective and innovative ways of managing contentious matters, including the use of technology and more flexible approaches to case management and charging. Clearly clients are increasingly looking for certainty as to the overall cost of litigating a case.” **Carlos de los Santos, partner, Garrigues**

“The large amount of massive banking litigation and collective claims in the market has forced law firms to devote specific departments/teams to deal with the demand. It proves that this niche market is profitable, even for very big firms because of the large amount of claims involved.” **Silvia García, partner, Deloitte Legal**

“Brexit advice and its consequences is currently a big opportunity, in particular in relation to international disputes and financial and regulatory services. Also, fintech, artificial intelligence, and big data.” **Santiago Castelló, senior associate, Simmons & Simmons**

“The European Union intervention in the case of Banco Popular and its sale to Banco Santander has provided a big opportunity for Spanish law firms. Not only with regard to the aforementioned, but also in relation to the lawsuits brought by shareholders.” **Jordi Calvo Costa, partner, Roca Junyent**

“Cases involving financial institutions related to issues linked to the economic recession, mostly concerning bankruptcy and litigation. However, recent years saw a fall in the number of procedures initiated as many companies did not have the economic resources available to allocate to legal disputes. As we are now experiencing a recovery in our economy, it is likely that many companies will choose to reopen cases.” **Esther Cubillo, partner, Lupicinio International Law Firm**

“To focus on complex, top-tier claims that require knowhow and specialisation. Clients have to perceive the added value for their companies of high-level advice not only in transactional matters but in dispute resolution.” **Rafael Montejo, partner, Osborne Clarke**

“It is now time to let litigation departments grow. Consequently, it is essential to significantly improve litigation management, in order to make it more efficient.” **Yago Vázquez Moraga, partner, Pintó Ruiz & Del Valle**

“An increase in financial sector litigation and disputes.” **Pablo Albert, partner, BDO Abogados**

the last year, says João Duarte de Sousa, partner at Garrigues in Lisbon. “The ongoing litigation in the wake of the collapse of Banco Espírito Santo has been one of the driving forces behind litigation in Portugal,” he adds. Duarte de Sousa also says there has been a significant number of real estate-related disputes as a large amount of foreign investment has come into the sector. In addition, he says that, “while insolvency cases are in decline, there is a high demand from clients for insolvency risk assessment, primarily for two reasons: firstly, many of the relevant transactions involved distressed or high risk assets; and secondly, the issues of the past are still fresh in everybody’s minds, causing a dramatic rise in investors’ fears and anxiety that counterparties will fail to honour their commitments”.

Meanwhile, in the ADR arena, the number of disputes resolved through arbitration continues to increase, according to Duarte de Sousa. He says: “Among other factors, the efforts of recent years to include arbitration clauses in commercial contracts are now paying off.” However, he adds there is little enthusiasm in Portugal for mediation to resolve commercial disputes.

Class actions are an emerging trend in Portugal, according to MLGTS partner Filipe Vaz Pinto. He says: “There are new small, sophisticated players in the legal market promoting collective actions against companies, they are commercially driven and inspired by class actions in the US.” Vaz Pinto cites the example of investors launching “multiple coordinated actions” against banks and he predicts that there will be similar “collective actions or even class actions in the telecoms and energy sectors”. Class actions will also be given further impetus by those brought against car manufacturer Volkswagen in relation to diesel emissions, says PLMJ partner Pedro Metello De Nápoles.

Financial sector litigation is increasing because there is now a feeling that “anyone can go up against banks” in a dispute, according to Abreu Advogados partner Alexandra Nascimento Correia. And it is expected that financial sector litigation will continue to be a major source of

work as banks will continue to “come under close scrutiny from regulators”, says Uría Menéndez-Proença de Carvalho partner Alexandre Mota Pinto. Meanwhile, Vieira de Almeida partner Sofia Ribeiro Branco says that there could be an increasing number of antitrust private enforcement cases in future “if Portugal adopts the European rules governing actions for damages for infringements of the competition law provisions of the Member States and of the European Union Text”. What is EU Text?

### Third party funders

There has been an enormous increase in court fees in Portugal in recent times, which has had the effect of dissuading clients from being litigious, says João Caiado Guerreiro, managing partner at Caiado Guerreiro. “Consequently, some clients are not willing to take on very big companies,” he says. Caiado Guerreiro adds that court fees plus lawyers’ fees can sometimes amount to as much as 4 per cent of the settlement.

There has been a notable trend of third party funders contacting major law firms in Portugal with a view to possibly funding legal disputes says Cuatrecasas partner Rita Gouveia. Vaz Pinto points out that third party funders are not only targeting clients that do not have the financial resources to pay for litigation: “Third party funders are also focusing on clients that

want to manage litigation risk in a different way.” Caiado Guerreiro says that there have been cases of third party funders from the UK and the US offering to advance sums of €1m to fund disputes in return for getting a bigger share of the eventual settlement.

Metello De Nápoles says that the use of arbitration is increasing in Portugal, but it can still be difficult to convince domestic clients that arbitration is a quicker way of solving disputes. He adds that one of the possible reasons why arbitration is not more popular among domestic clients is that litigation is cheaper in Portugal than it is in other jurisdictions.

One of the biggest challenges for Portugal in the near future is to convert Lisbon into an attractive seat for international arbitration “involving parties from Portuguese-speaking countries”, says Duarte de Sousa. He adds: “This goal should be taken nationwide and underpinned by Portuguese public authorities, as the economy will not only benefit from it, but thrive.” Caiado Guerreiro says that finding the appropriate experts to participate in arbitration cases can be difficult: “Often the details are significant and it can be difficult to find someone to translate mining terms into Portuguese, for example.” Arbitration is criticised in some quarters because there is a view that it is “not based on fact, but rather on negotiation,” Gouveia says. She adds that some clients are requesting

### Portugal: What are the biggest opportunities for law firms in these areas?

“We are convinced that in 2018 the banking and finance sector, as well as the real estate, retail, tourism and energy industries, will continue to generate a significant number of instructions for law firms, especially with regards to litigation and arbitration. **Vanessa Antunes, senior associate, DLA Piper ABBC**

“Apart from arbitration, parties are more willing to consider mediation as a method of resolving disputes. This is a good opportunity for law firms to invest in mediation.” **Pedro Sousa Uva, of counsel, PBBR**

“Alternative dispute resolution methods in general, and arbitration more specifically, continue to present the largest opportunities for added-value work. With the transaction market picking up, in the near future more disputes may arise. One area that may be of interest in the near future is that of third party funding - though not very common in Portugal, it is now being discussed and may bring about more dispute resolution work.” **Sofia Martins, partner, Miranda & Associados**

“Privacy and data protection. Specialisation in handling these kind of issues should be among law firms’ biggest investments.” **Pedro Carreira Albano, partner, Pares Advogados**



that contracts allow the possibility of appealing against arbitration rulings, while some are also asking for foreign arbitrators to be appointed.

### Angolan arbitration

Arbitration where Angolan law is the applicable law is an “opportunity for lawyers in Portugal to cooperate with Angolan Lawyers”, according to Vaz Pinto, particularly where arbitrations are “seated outside Angola”. In this context, he highlights opportunities in the oil, construction, transport and infrastructure sectors. Meanwhile, with regard to Portugal, Vaz Pinto says there is a significant number of post-M&A disputes, particularly in relation to price-adjustment mechanisms and breaches in ‘reps and warranties’.

The complexity of cases in Portugal and the sophistication of the parties involved is increasing, and this means more demanding and challenging work for legal advisers, according to Linklaters counsel Ricardo Guimarães. He adds that, with regard to arbitration, there is “a perception that the associated costs are high”. Guimarães continues: “But this is partly because, with arbitration, parties have to pay the court fees over a shorter period of time than when taking disputes before the state courts. The fact is that, in general terms, and above a certain threshold, arbitration can involve lower costs than litigation in state courts.”

The issue of arbitration not offering the prospect of appeal could be one reason for its unpopularity lawyers say. Regarding the issue of whether arbitration should be permitted in proceedings related to public procurement, Caiado Guerreiro says there are doubts about whether it is “politically feasible” to do so. He cites the example of the head of the IMF, Christine Lagarde, being found to be negligent for not contesting a state pay out of around €400 million – following arbitration proceedings – to the businessman Bernard Tapie, when she was France’s finance minister.

Ribeiro Branco says that the confidentiality of arbitration proceedings offers benefits for the parties involved. “In civil litigation

conducted by the judicial courts, anyone can have access to sensitive information which can then be used against the parties,” she adds. Gouveia says Cuatrecasas has a dedicated team for international arbitration as well as a team focusing on insolvency litigation. Meanwhile, Metello De Nápoles says around 30 per cent of the revenue generated by PLMJ’s dispute resolution lawyers is arbitration-related.

Gómez-Acebo & Pombo partner Ricardo Campos says that his firm has separate teams for arbitration and litigation. He adds that, with regard to arbitration in particular, the firm has a very strong construction practice. “Construction cases are often very complex and always involve very technical issues,” Campos explains. He also says that international construction-related disputes, namely disputes related to FIDIC (the International Federation of Consulting Engineers) contracts, are usually resolved by Dispute Adjudication Boards, which are composed of panels of impartial experts.

Lawyers in Portugal acknowledge that major firms are often unprepared for defending class actions. “The larger firms are typically more focused on individual cases, but class actions may have to respond to 30 to 40 claims - this puts a lot of pressure on younger lawyers,” one partner says.

While clients are increasingly demanding fixed fees from their legal advisers, they are willing to pay high success fees, lawyers say. One partner argues that price is not always the main concern of clients and that some place a greater emphasis on “credibility and experience of high-profile cases”.

The increased investment in the Portuguese real estate and tourism sectors will inevitably lead to disputes, say lawyers. Other growth areas for law firms are anticipated to be litigation related to regulatory issues as well as infrastructure-related disputes. Meanwhile, sport arbitration is also expected to present significant opportunities for law firms, says Nascimento Correia. She adds that there is also the potential for post-insolvency

disputes, as well as construction-related cases in Angola and Mozambique.

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

Clients are increasingly demanding value-added services, particularly related to a higher level of analysis of information related to massive litigation. This information is essential to aid management decision making. Clients are also making more requests for statistical information for predicting the outcome of court proceedings.

**Beatriz Rua Pelaez, head of the litigation & insolvency department, KPMG Abogados**

“We have recently noticed that clients now require a holistic approach to litigation, bearing in mind not only the specific case, but also the tax impact on other fiscal years, for example. Companies also demand to know details and the likelihood of different tax-litigation scenarios and outcomes.” **Maximino Linares, partner, EY Abogados**

“Clients demand agility and expedite answers from lawyers, especially regarding data and risk analysis.” **Cristina Camarero Espinosa, partner, Ontier**

“Clients that operate internationally, have always showed a disposition and, in some cases a preference, for using arbitration to solve disputes. Domestic clients are also considering this alternative to litigation (which has more confidentiality, faster procedures and specialist arbitrators) as a real alternative.” **José Martínez Peña, partner, Cremades & Calvo Sotelo Abogados**

“Clients want their lawyers to make every effort to reach settlements and solutions whatever the stage of the proceedings, rather than remaining in endless litigation passing through endless instances.” **Javier Fernández-Samaniego, managing director, Samaniego Law**

# Use of international arbitration increasing with help of third party funding

Arbitration teams can mitigate risk for clients at 'every stage of an investment' by working closely with project finance lawyers and other experts

The use of international arbitration to resolve commercial disputes is rapidly increasing, while third party funding is making this form of alternative dispute resolution more readily available to a larger number of clients, says Arif Ali, partner and co-chair of the international arbitration practice at Dechert.

International arbitration is increasingly being used to resolve commercial and investment disputes, with caseloads at the major international arbitration institutions increasing by almost 40 per cent in the past five years. Ali believes this is not only due to the expansion of the global economy in the aftermath of the 2008 financial crisis, but also because of the benefits of international arbitration. Ali says these benefits include "treaty-based frameworks for the enforcement of awards", as well as procedural neutrality and flexibility. In addition, he says arbitration also offers "cosmopolitan, multilingual and culturally sensitive decision-makers". Meanwhile, changes to third-party funding rules are easing financial pressures and making it possible for more claimants to bring cases. "Singapore and Hong Kong, both key arbitration centres, have recently approved the use of third party funding, and the International Centre for Settlement of Investment Disputes (ICSID) is adapting its rules to accommodate it as well," says Ali. He adds: "Access to justice is increasing due to the greater availability of third party funding, although this is raising new ethical and legal issues."

While the number of arbitration cases is increasing, the type of claims being brought before tribunals is also changing. "We are seeing more claims in the investor-state area where states are applying legislation and associated regulations retroactively to get around stabilisation clauses and without taking into sufficient consideration their obligations to accord investors fair and equitable treatment," says Ali. "Seldom are we seeing the police or army walk in to a power plant or factory and physically expropriate an investment, although this is still happening," he adds. "Some would say that states have become more sophisticated in how they expropriate, others will say that states are better balancing their duty to regulate in the public interest with their obligations to

protect foreign investment."

Companies looking to invest in a foreign jurisdiction should engage counsel with expertise in the host country's regulatory environment as this is key to avoiding problems at a later date. Ali says there are hundreds of arbitration cases in which clients could have avoided disputes if they had sought advice sooner.

## Exploiting natural resources

Working closely with project finance lawyers, international arbitration teams can mitigate risk for clients at every stage of an investment, according to Ali. "For corporate clients our advice includes: political risk assessment; structuring investments to benefit from investment treaties; negotiating sound investment agreements including solid arbitration clauses and stabilisation agreements; and managing relationships with government entities and other interested stakeholders," he says. Predictability is still an issue for clients, especially with regard to long-term investments. "Major undertakings involving the exploration and exploitation of natural resources, for example, often require a commitment that is decades in duration," says Ali. "During that time, politics, government, laws and regulations may undergo transformations which adversely affect the investment – as for host governments, a long term foreign investment may generate longer term issues related to the environment or indigenous communities."

Allegations of corruption are another challenge faced by investors, and Ali says that there are instances where states are alleging that the investment was procured through corruption and is therefore not entitled to protection under "investment protection mechanisms". Ali says Dechert recently won a landmark case in which the Government of Croatia alleged that Dechert client MOL Hungarian Oil and Gas Company had bribed Croatia's former Prime Minister in order to acquire controlling rights in Croatia's national energy company. Dechert was able to test the criminal allegations underlying Croatia's commercial claims by convincing the tribunal to incorporate certain principles of criminal law and procedure into the arbitration, with the result that MOL Hungarian Oil and Gas was cleared of all allegations.



Arif Ali

# Banking and consumer protection class actions increasing in Spain

Rules governing class actions are still in need of clarification, despite the efforts of Spain's Supreme Court – only then will third party funding of such cases really take off



Jesús Giner

Banking and consumer protection-related class actions are on the increase in Spain, though there are still flaws in the rules governing such cases which need to be addressed, says Lener litigation partner Jesús Giner. Meanwhile, Giner also says that the popularity of arbitration remains limited due to the high costs involved as well as the lengthy process for reviewing awards.

The economic crisis in Spain led to an increase in class actions, particularly in the areas of banking and consumer protection. Indeed, Giner highlights consumer protection and consumer class actions as two areas that represent significant opportunities for lawyers in Spain. "The next few years will see the continuation of the trend seen in recent years, that is, an exponential increase in civil proceedings arising from individual and collective actions related to banking contracts, products and investment services," he says.



Marisé Cosmea

## Floor clauses

Banking sector class actions have been brought in relation to what are known as "floor clauses", which limit the downward variations of interest rates on floating-rate mortgages. However, uncertainty in case law related to this issue makes it difficult for clients to make decisions on potential litigation, Giner says. In recent years the civil law chamber of the Supreme Court of Spain (Tribunal Supremo de España) has sought to bring more certainty but "sometimes the judgments have suffered from a lack of clarity or have been subsequently qualified or even rectified, as happened with the decision that limited the effects of the nullity of floor clauses" he explains. Consequently, there remain a number of issues that still require clarification, such as mortgage expenses, and mortgages where the interest rate is referred to the Mortgage Loan Reference Index (IRPH), says Giner.

There are a number of flaws in the current rules governing class actions, according to Gina and this is why they are currently limited in number, according to Lener banking litigation partner Marisé Cosmea. "As a result, cases arising from individual actions are far more numerous," she says.

With regard to alternative dispute resolution, Cosmea has identified

a notable trend for using dispute resolution methods that encourage "amicable settlements rather than judicial resolutions". Unfortunately, despite the significant potential advantages of not resorting to the court system, mediation has not, thus far, been particularly successful in Spain, according to Cosmea. She adds that this is partly due to the lack of uniformity in the applicable jurisprudence and the uncertainty of relevant case law, which has the effect of encouraging litigation.

## Arbitration problems

Meanwhile, the progress made in increasing support for arbitration as a dispute resolution method has been limited. The high costs associated with arbitration are one contributing factor. Also of significance, according to Cosmea, are recent decisions made by Spanish courts that have had the effect of making the process of reviewing awards more extensive. This has had the effect of making the process more lengthy, and this is problematic given that the aim of arbitration is to resolve disputes more speedily than would be the case if they involved litigation.

Third party funding of disputes is becoming more common on a global scale, though Cosmea notes that the trend is only just beginning in Spain. However, she adds that the success of third party funding will depend on "correcting the inefficiencies of class actions".

Another global trend relates to advances in technology and this is having a significant impact on the way law firms operate. Cosmea says the impact of such developments is positive. "Technological developments will make work more efficient and reduce the daily administrative workload, allowing lawyers to focus on value-added work," she adds. Cosmea says that types of technology relieving certain administrative burdens include "computer tools designed for the mass processing of documents and data, especially for due diligence processes".

What types of lawyers do clients want now? Cosmea says: "Clients need innovative lawyers that optimise the client's opportunities, are aware of relevant technological advances and have solid experience in their specific area."

## Use of mediation in Portugal set to increase

Few clients currently resort to mediation in Portugal, but its popularity in other jurisdictions means that it will become a more common method of resolving disputes

Mediation is not yet common in Portugal for cultural reasons, but it will start to become increasingly popular due to it being frequently used at international level, says José Jácome, partner at AAA Advogados in Lisbon.

"Despite being a form of alternative dispute resolution that is followed worldwide, mediation is not really used in Portugal as yet," he says. "There are practically no mediation procedures and few clients resort to it."

Given that major international clients are familiar with mediation, it was thought that Portuguese clients would also use it to settle disputes, according to Jácome.

However, this has, so far, not been the case. "Our clients prefer using arbitration and the courts, which isn't entirely logical because in fact, mediation could be a good solution for many cases."

The fact there is little demand from Portuguese clients for mediation means the nation's lawyers do not have much

experience of this method of resolving disputes, says Jácome. He

believes the lack of willingness to use mediation as an alternative to litigation is due to cultural traits specific to Portugal. "I think it is a cultural particularity that has something to do with the fact that our country is small and the legal community is small as well," he explains. "And because we all know each other, there is just not sufficient distance – mediation is very face-to-face."

However, given that mediation is widely used internationally, Jácome expects this mindset to finally start changing. "For the time being, mediation remains quite new to Portugal, but I definitely think we will start seeing more activity," he says. "It is certainly starting to be discussed within our legal community, the reason being that if mediation is a good thing for most developed legal communities around the world, then it should work for Portugal as well."



José Jácome

## Defending class actions in a cost effective way is challenging for law firms

Defending financial sector clients against class actions can be a challenge for law firms in that legal teams have to be organised to handle hundreds of claims in a cost effective way, says Caiado Guerreiro managing partner João Caiado Guerreiro.

"In the last year, there have been a lot of financial sector class actions coming to court," says Caiado Guerreiro. "There are hundreds of claimants suing companies, and of course individually the cases are not big, but in sum they add up to big numbers and it's a challenge to organise teams to defend these cases."

Meanwhile, Caiado Guerreiro says there has been a significant increase in regulator-related litigation. "Some of the biggest opportunities will come in the regulatory area," he adds. "Regulators such as Anacom, Bank of Portugal and CMVM are taking more decisions and their fines are big."

Arbitration related to matters

in Africa and South America is also expected to be a growth area for law firms in Portugal. "There will be plenty of arbitration matters related to Angola, Mozambique and Brazil," Caiado Guerreiro says. He adds: "Portugal is seen as a low cost venue for big cases."



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## Real estate, insurance and banking sectors generating disputes, but cases not resolved quickly

'Sharing economy' also generating opportunities for dispute resolution lawyers as conflicts arise between traditional businesses and their newer competitors



Patricia Gualde

Though the Spanish real estate, insurance and banking sectors in Spain are providing a steady flow of disputes for litigation lawyers, lengthy judicial proceedings can mean they are not resolved quickly, according to Patricia Gualde, partner at Broseta.

"The real estate sector is growing," Gualde says. She adds that investors are continuing to acquire real estate assets and this is leading to litigation related to the enforcement of lease contracts, mortgage foreclosures and the collection of unpaid rent.

In addition to real estate disputes, banking and insurance sector litigation is also creating significant work for lawyers in Spain, according to Gualde. "There are many banking disputes – financial institutions and banks are litigating in relation to matters such as the validity of clauses and conditions of contracts." Litigation related to property financing is also generating work for law firms, says Gualde.

Meanwhile, the improving economic

conditions are likely to lead to more litigation in future, according to Gualde. "The economic and business growth of recent years will surely generate the signing of more contracts between companies that could bring up more disputes related to contractual litigation."

The 'sharing economy' is also creating opportunities for dispute resolution lawyers, Gualde says. She adds that, until the sector is fully regulated, it will continue to generate conflicts between the "traditional businesses and new business formulas that arise day after day". Gualde highlights cases such as those brought against Uber and BlaBlaCar, and says that there will be "many more such disputes in the future".

However, a problem that continues to plague the resolution of disputes in Spain is the length of judicial proceedings. Gualde says courts continue to "suffer delays and the current implementation of alternative dispute resolution methods that allow the resolution of conflicts in shorter times remains a pending issue."

## Companies better able to fund legal disputes as economy improves



Esther Cubillo

Improving economic conditions mean companies will now be more likely to have the finances to spend on settling long-standing disputes, according to Esther Cubillo, partner at Lupicinio International Law Firm.

"In recent years, the Spanish legal sector has been dominated, for the most part, by cases involving financial institutions because of issues caused by the economic recession – this led to activity largely related to bankruptcy and litigation," she says. "However, this period also saw a fall in the number of cases as many companies did not have the economic resources to allocate to legal disputes." But the situation is now changing, according to Cubillo.

"As we are now experiencing a recovery in our economy, as well as in a number of economies throughout Europe, it is likely that many companies will choose to reopen cases with the aim of resolving disputes using arbitration and

mediation, alongside litigation."

Cubillo says that one of the biggest challenges clients face in relation to litigation and ADR is that technological advancements mean companies must now have reliable documents and data to act as evidence to support their claims.

She adds: "Often, the vital evidence comes in the form of email correspondence and if a record of this is not kept accordingly, important information could be lost." That said, the use of technology in the legal sector means that there is now less room for error in relation to the presentation of written communications between the relevant parties and the courts, Cubillo says. "This allows for a more thorough and accurate interpretation of such documents and better coordination between all those involved in a case," she explains.

## Portuguese clients increasingly trying ADR to settle disputes

The timescale and costs associated with litigation means clients are showing a greater tendency to consider mediation and arbitration

Clients in Portugal are making a greater effort to resolve their disputes via methods of alternative dispute resolution (ADR) rather than becoming involved in litigation, says SPS Advogados partner Carla Azevedo Gomes.

She adds that clients are increasingly looking to settle disputes before progressing to litigation due to the fact that court cases can take a long time to resolve and can be costly. In addition, Azevedo Gomes says the “rigidity and complexity” of court decisions is encouraging clients to turn to ADR to settle disputes.

“Clients in general, individuals or companies, are trying to avoid litigation by working through their problems directly,” says Azevedo Gomes. She adds that lawyers are also increasingly focusing on ADR work. “Recently, lawyers and law firms who realise that lawsuits are not always the most practical method for reaching a settlement are working hard in

arbitration and mediation, which are widely accepted as alternatives to civil actions in public courts.”

However, Azevedo Gomes also acknowledges that, despite the desire to use ADR to resolve disputes, such efforts are not always successful. “Attempts at ADR often fail leaving the courts as the only solution,” she says. She adds that a major challenge is convincing clients of the benefits of ADR. “Some clients need to move away from the court litigation mindset and consider alternative dispute resolution,” Azevedo Gomes argues.

With regard to the biggest opportunities for dispute resolution lawyers, Azevedo Gomes highlights consumer rights litigation, regulatory litigation, as well as contentious matters relating to data protection and cyber protection, as growth areas. “These areas are pushing lawyers to develop their technical capabilities,” she says. Azevedo Gomes adds that such matters will become ‘day-to-day’ work that law firms will do for clients.



Carla Azevedo Gomes

## Arbitration increasing in popularity, but mediation ‘can be much more effective’

The popularity of arbitration as a means of resolving disputes increased in 2017, according to Cristina Coto, partner at Ruiz Gallardón Abogados. However, she warns that the long-term damaging effects of disputes are always severe. “Whether arbitration or litigation, whether with a supplier or a competitor, conflict is never a good thing, and it affects a company’s competitiveness,” Coto says.

For this reason, Coto argues that mediation can be a much more effective solution. “If mediation manages to enter the corporate culture, that would be extremely positive,” Coto says. “Ideally, clients should see mediation as an authentic solution and not merely as a procedure.”

Coto says an important role for a litigator is to “help clients to see the true dimension of the problem, and guide them to get the best solution, which sometimes means reaching a

settlement”. This is the only strategy by which litigation departments can hope to win and retain clients, she adds. “There is no better formula for winning customers than earning their trust,” Coto says.

Meanwhile, third party funding of litigation is one of the new trends impacting on the global legal industry and it has now found its way to Spain, though clients should still consider mediation as an effective means of resolving disputes, says Coto.

Such a trend is having the effect of changing the litigation landscape in Spain, according to Coto. This “eruption of third party funding” provides claimants with the means for pursuing a claim they may not have otherwise had, she says. “It is a phenomenon that has been common in certain jurisdictions – such as the UK and the US – for some time, and it is now on the rise in Spain, particularly in relation to international disputes.”



Cristina Coto



**Alejandro Fernández de Araoz**, Araoz & Rueda

**Address:** Paseo de la Castellana 164, 28046 Madrid  
**Tel:** +34 91 319 02 33  
**Email:** [araoz@araozyrueda.com](mailto:araoz@araozyrueda.com) **Web:** [www.araozyrueda.com](http://www.araozyrueda.com)  
**Main practice areas:** Litigation, Arbitration, Corporate and Commercial



**Álvaro López de Argumedo**, Uría Menéndez

**Address:** Príncipe de Vergara 187, Plaza Rodrigo Uría, 28002 Madrid  
**Tel:** +34 91 586 03 95  
**Email:** [alvaro.argumedo@uria.com](mailto:alvaro.argumedo@uria.com) **Web:** [www.uria.com](http://www.uria.com)  
**Main practice areas:** Litigation and International Arbitration



**Arif H. Ali**, Dechert LLP

**Address:** 1900 K Street NW, Washington, DC, USA 20006  
**Tel:** +1 202 261 33 07  
**Email:** [arif.ali@dechert.com](mailto:arif.ali@dechert.com) **Web:** [www.dechert.com](http://www.dechert.com)  
**Main practice areas:** Arbitration and Mediation



**Borja Fernández de Trocóniz**, Linklaters

**Address:** Almagro 40, 28010 Madrid  
**Tel:** +34 91 399 60 00  
**Email:** [borja.ftroconiz@linklaters.com](mailto:borja.ftroconiz@linklaters.com) **Web:** [www.linklaters.com](http://www.linklaters.com)  
**Main practice areas:** Litigation & Arbitration, Restructuring and Insolvency



**Carla Azevedo Gomes**, SPS Advogados

**Address:** Rua General Firmino Miguel 5, 11, 1600-100 Lisbon  
**Tel:** +351 21 720 00 02  
**Email:** [carla.azevedo.gomes@spsadvogados.com](mailto:carla.azevedo.gomes@spsadvogados.com) **Web:** [www.spsadvogados.com](http://www.spsadvogados.com)  
**Main practice areas:** Litigation and Insurance Law



**Clifford J Hendel**, Araoz & Rueda

**Address:** Paseo de la Castellana 164, 28046 Madrid  
**Tel:** +34 91 319 02 33  
**Email:** [hendel@araozyrueda.com](mailto:hendel@araozyrueda.com) **Web:** [www.araozyrueda.com](http://www.araozyrueda.com)  
**Main practice areas:** International Arbitration & ADR, Banking & Finance, Corporate & Commercial and Cross-Border Transactions



**Cristina Camarero Espinosa**, Ontier

**Address:** Paseo de la Castellana 55, 28046 Madrid  
**Tel:** +34 914 31 30 00  
**Email:** [ccamarero@ontier.net](mailto:ccamarero@ontier.net) **Web:** [www.ontier.es](http://www.ontier.es)  
**Main practice areas:** Arbitration, Litigation and Mediation

Sponsored section: A selection of law firms recommended within the internationally recognised directories and / or by clients.

**Cristina Coto**, Ruiz Gallardón Abogados

**Address:** Velázquez 48, 28001 Madrid  
**Tel:** +34 91 088 23 08  
**Email:** [cristina.coto@ruizgallardon.com](mailto:cristina.coto@ruizgallardon.com) **Web:** <http://ruizgallardon.com/>  
**Main practice areas:** Public Law, Litigation & Arbitration, Compliance, Tax Disputes and Corporate Crime

**Eduardo de León**, Araoz & Rueda

**Address:** Paseo de la Castellana 164, 28046 Madrid  
**Tel:** +34 91 319 02 33  
**Email:** [leon@araozyrueda.com](mailto:leon@araozyrueda.com) **Web:** [www.araozyrueda.com](http://www.araozyrueda.com)  
**Main practice areas:** Dispute Resolution and Administrative Law

**Esther Cubillo**, Lupicinio International Law Firm

**Address:** Avenida Diagonal 520, Barcelona 08006  
**Tel:** +34 93 488 28 02  
**Email:** [ecr@lupicinio.com](mailto:ecr@lupicinio.com) **Web:** [www.lupicinio.com](http://www.lupicinio.com)  
**Main practice areas:** Banking & Finance, Litigation

**Fernando Aguilar de Carvalho**, Uría Menéndez - Proença de Carvalho

**Address:** Edifício Rodrigo Uría, Praça Marquês de Pombal, 12, 1250-162 Lisbon  
**Tel:** +351 21 092 01 25  
**Email:** [fernando.aguilar@uria.com](mailto:fernando.aguilar@uria.com) **Web:** [www.uria.com](http://www.uria.com)  
**Main practice areas:** Litigation and Arbitration, International Arbitration and White Collar Crime

**Frederico Gonçalves Pereira**, VdA

**Address:** Rua Dom Luís I, 28, 1200-151 Lisbon  
**Tel:** +351 21 311 34 60  
**Email:** [fgp@vda.pt](mailto:fgp@vda.pt) **Web:** [www.vda.pt](http://www.vda.pt)  
**Main practice areas:** Litigation, Arbitration, Insolvency and Restructuring





**Jesús Giner Sánchez**, Lener









**Address:** Paseo de la Castellana 23, planta 1, 28046 Madrid  
**Tel:** +34 91 391 20 66  
**Email:** [jesusginer@lener.es](mailto:jesusginer@lener.es) **Web:** [www.lener.es](http://www.lener.es)  
**Main practice areas:** Banking, Corporate & Civil Litigation, Arbitration and Insolvency

**João Caiado Guerreiro**, Caiado Guerreiro

**Address:** Rua Castilho 39, 15, 1250-068 Lisbon  
**Tel:** +351 21 371 70 00  
**Email:** [jguerreiro@caiadoguerreiro.com](mailto:jguerreiro@caiadoguerreiro.com) **Web:** [www.caiadoguerreiro.com](http://www.caiadoguerreiro.com)  
**Main practice areas:** Corporate & Commercial, Arbitration, Banking & Finance, Litigation and M&A

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	<p><b>Jordi Calvo Costa</b>, Roca Junyent</p> <p><b>Address:</b> Aribau 198, 08036 Barcelona  <b>Tel:</b> +34 93 241 92 00  <b>Email:</b> <a href="mailto:j.calvo@rocajunyent.com">j.calvo@rocajunyent.com</a> <b>Web:</b> <a href="http://www.rocajunyent.com">www.rocajunyent.com</a>  <b>Main practice areas:</b> Arbitration, Civil &amp; Commercial Litigation, Distribution Agreements and Insurance Law</p>
	<p><b>Jordi Muixí</b>, Osborne Clarke</p> <p><b>Address:</b> Avenida Diagonal 477, 08036 Barcelona  <b>Tel:</b> +34 93 419 18 18  <b>Email:</b> <a href="mailto:jordi.muixi@osborneclarke.com">jordi.muixi@osborneclarke.com</a> <b>Web:</b> <a href="http://www.osborneclarke.com">www.osborneclarke.com</a>  <b>Main practice areas:</b> Litigation</p>
	<p><b>José Jácome</b>, AAA Advogados</p> <p><b>Address:</b> Rua Alexandre Herculano 50, 8, 1250-011 Lisbon  <b>Tel:</b> +351 21 330 93 00  <b>Email:</b> <a href="mailto:jj@aaa.pt">jj@aaa.pt</a> <b>Web:</b> <a href="http://www.aaa.pt">www.aaa.pt</a>  <b>Main practice areas:</b> Arbitration, Litigation, Restructuring and Insolvency</p>
	<p><b>Luis Capiel</b>, Arias SLP</p> <p><b>Address:</b> Velázquez 18, 3D, 28001 Madrid  <b>Tel:</b> +34 91 781 35 50  <b>Email:</b> <a href="mailto:luis.capiel@ariasslp.com">luis.capiel@ariasslp.com</a> <b>Web:</b> <a href="http://www.ariasslp.com">www.ariasslp.com</a>  <b>Main practice areas:</b> International Arbitration</p>
	<p><b>Marisé Cosmea Rodríguez</b>, Asigno</p> <p><b>Address:</b> Paseo de la Castellana 23, planta 1, 28046 Madrid  <b>Tel:</b> +34 91 391 20 66  <b>Email:</b> <a href="mailto:marisecosmea@asigno.es">marisecosmea@asigno.es</a> <b>Web:</b> <a href="http://www.asigno.es">www.asigno.es</a>  <b>Main practice areas:</b> Banking Litigation and Insolvency</p>
	<p><b>Marlen Estévez Sanz</b>, Roca Junyent</p> <p><b>Address:</b> José Abascal 56, 7, 28003 Madrid  <b>Tel:</b> +34 91 781 97 60  <b>Email:</b> <a href="mailto:m.estevez@rocajunyent.com">m.estevez@rocajunyent.com</a> <b>Web:</b> <a href="http://www.rocajunyent.com">www.rocajunyent.com</a>  <b>Main practice areas:</b> Commercial &amp; Investment Arbitration, Civil &amp; Commercial Litigation, M&amp;A Deals, Construction &amp; Infrastructure and Distribution Agreements.</p>
	<p><b>Miguel Pinto Cardoso</b>, VdA</p> <p><b>Address:</b> Rua Dom Luís I, 28, 1200-151 Lisbon  <b>Tel:</b> +351 21 311 35 24  <b>Email:</b> <a href="mailto:mipc@vda.pt">mipc@vda.pt</a> <b>Web:</b> <a href="http://www.vda.pt">www.vda.pt</a>  <b>Main practice areas:</b> Litigation and Arbitration</p>
	<p><b>Nuno Libano Monteiro</b>, PLMJ – Sociedade de Advogados</p> <p><b>Address:</b> Avenida da Liberdade 224, Edifício Eurolex 1250-148 Lisbon  <b>Tel:</b> +351 21 319 73 00  <b>Email:</b> <a href="mailto:nuno.libanomonteiro@plmj.pt">nuno.libanomonteiro@plmj.pt</a> <b>Web:</b> <a href="http://www.plmj.com">www.plmj.com</a>  <b>Main practice areas:</b> Litigation and Dispute Resolution</p>

	<p><b>Pablo Albert</b>, BDO Abogados &amp; Asesores tributarios</p> <p><b>Address:</b> Paseo de Recoletos 37-41, 28004 Madrid  <b>Tel:</b> +34 91 436 41 95  <b>Email:</b> <a href="mailto:pablo.albert@bdo.es">pablo.albert@bdo.es</a> <b>Web:</b> <a href="http://www.bdo.es">www.bdo.es</a>  <b>Main practice areas:</b> Insolvency, Restructuring and Litigation</p>
	<p><b>Patricia Gualde</b>, Broseta</p> <p><b>Address:</b> Goya 29, 28001 Madrid / Pascual y Genís 5, 46002 Valencia  <b>Tel:</b> +34 91 432 31 44 / 96 392 10 06  <b>Email:</b> <a href="mailto:pgualde@broseta.com">pgualde@broseta.com</a> <b>Web:</b> <a href="http://www.broseta.com">www.broseta.com</a>  <b>Main practice areas:</b> Arbitration, Litigation, Mediation, Bankruptcy, Restructuring and Insolvencies</p>
	<p><b>Pedro Rodero</b>, Ontier</p> <p><b>Address:</b> Paseo de la Castellana 55, 28046 Madrid  <b>Tel:</b> +34 914 31 30 00  <b>Email:</b> <a href="mailto:prodero@ontier.net">prodero@ontier.net</a> <b>Web:</b> <a href="http://www.ontier.es">www.ontier.es</a>  <b>Main practice areas:</b> Arbitration, Litigation and Mediation</p>
	<p><b>Rafael Montejo</b>, Osborne Clarke</p> <p><b>Address:</b> Paseo de la Castellana 52, 6, 28046 Madrid  <b>Tel:</b> +34 91 576 44 76  <b>Email:</b> <a href="mailto:rafael.montejo@osborneclarke.com">rafael.montejo@osborneclarke.com</a> <b>Web:</b> <a href="http://www.osborneclarke.com">www.osborneclarke.com</a>  <b>Main practice areas:</b> Arbitration and Litigation</p>
	<p><b>Rui Andrade</b>, VdA</p> <p><b>Address:</b> Rua Dom Luís I, 28, 1200-151 Lisbon  <b>Tel:</b> +351 21 311 34 88  <b>Email:</b> <a href="mailto:rsa@vda.pt">rsa@vda.pt</a> <b>Web:</b> <a href="http://www.vda.pt">www.vda.pt</a>  <b>Main practice areas:</b> Litigation, Arbitration and Labour</p>
	<p><b>Silvia García López</b>, Deloitte Legal</p> <p><b>Address:</b> Avinguda Diagonal 654, 08034 Barcelona  <b>Tel:</b> +34 93 280 40 40  <b>Email:</b> <a href="mailto:sgarcialopez@deloitte.es">sgarcialopez@deloitte.es</a> <b>Web:</b> <a href="http://www.deloitte.es">www.deloitte.es</a>  <b>Main practice areas:</b> Litigation</p>
	<p><b>Sofia Ribeiro Branco</b>, VdA</p> <p><b>Address:</b> Rua Dom Luís I, 28, 1200-151 Lisbon  <b>Tel:</b> +351 21 311 34 60  <b>Email:</b> <a href="mailto:srb@vda.pt">srb@vda.pt</a> <b>Web:</b> <a href="http://www.vda.pt">www.vda.pt</a>  <b>Main practice areas:</b> Litigation, Criminal &amp; Regulatory Litigation, Compliance and Investigations</p>
	<p><b>Vanessa Antunes</b>, DLA Piper ABBC</p> <p><b>Address:</b> Largo de São Carlos 3, 1200-410 Lisbon  <b>Tel:</b> +351 21 358 36 20  <b>Email:</b> <a href="mailto:vanessa.antunes@dlapiper.com">vanessa.antunes@dlapiper.com</a> <b>Web:</b> <a href="http://www.dlapiper.com">www.dlapiper.com</a>  <b>Main practice areas:</b> Litigation and Arbitration</p>

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