



## **Litigation & ADR annual report 2017**

Getting squeezed

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## 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  
Aroz & 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.” Aroz & 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

## BES-related disputes will engulf financial litigators in Portugal for another two years

The cases related to the bank are so complex that even experienced litigators find it challenging to fully understand all the relevant products and structures



Frederico Gonçalves Pereira

Disputes related to the collapse of Portugal's Banco Espírito Santo (BES) – which failed in 2014 after once being the country's largest listed bank – as well as the associated Grupo Espírito Santo, will dominate financial litigation in the country until at least 2019, according to Frederico Gonçalves Pereira, litigation and arbitration partner at Vieira de Almeida (VdA).

Fallout from the collapse of BES accounts for "about 50 per cent of the sophisticated financial litigation in Portugal today," Gonçalves Pereira says. "This group and the bank were responsible for between 5 and 10 per cent of Portuguese GDP," he adds. Outlining the scale and reach of the task now facing Portugal's litigators, Gonçalves Pereira says: "It [BES] did a lot of business in Portugal and abroad, in Switzerland, Brazil, South America, Bolivia and Paraguay, for example."

### Highly complex

Gonçalves Pereira admits that handling the Espírito Santo cases has been a challenging experience as it has required lawyers to co-operate across disciplines. "The [legal] questions are so specific that it's not easy for a litigation lawyer, even a seasoned litigation lawyer in terms of banking and capital markets, to go into the detail of the products and structures," he explains. "So the challenge is the need for strong coordination between the groups in the firm." By way of example, litigators have had to work closely with capital markets, finance and securities lawyers in order to fully understand the financial products and arrangements that were used by the failed lender.

The fact that VdA has increased its headcount in recent years – partly with the aim of boosting the firm's international presence following Portugal's IMF/EU bailout in 2011 – has also helped. "You need to have a lot of lawyers involved in these cases," remarks Gonçalves Pereira. He adds that two rounds of hires – including a team from Linklaters' Lisbon office in 2014 and one from Miranda Correia Amendoeira & Associados the following year – were not solely for the purpose of handling BES litigation "but it was helpful".

Another significant opportunity for law firms in Portugal is the growth in international litigation. "We have a very extensive interest in Africa relating to oil and gas, projects and infrastructure investment and so on," says Gonçalves Pereira. "So we opened a new line of litigation in Africa related to these areas – we are now having a surge in the number of cases of this type in several African countries."

There is tough competition for litigators with relevant international experience, adds Gonçalves Pereira: "The market is small and everyone is trying to do the [international] move, that's clear," he says. According to Gonçalves Pereira, there are opportunities for Portuguese law firms to expand further in African countries. VdA currently has nine offices/partnerships in Africa, but there are more planned. "We will probably develop in French-speaking countries," he says. "We are already in Cameroon and Congo and I think we will [move] into other countries."

### Domestic arbitration decrease

Gonçalves Pereira anticipates that dispute resolution work in Africa will compensate for a predicted drop in domestic arbitration cases in Portugal. Such cases surged after new arbitration laws were introduced in 2011, he says, but they are expected to decrease as a result of a lack of domestic investment following the country's bailout. Gonçalves Pereira adds that, with little investment in the country – either public or private – since 2011, this means that there is likely to be a decrease in major disputes going to arbitration in the coming year. "We are not experiencing it yet, but it is logical that it will drop off," he says. "But on the other side, you have a very important new field emerging that relates to arbitration in the public works sector; this has been growing since Portuguese companies increased their investment abroad after 2011 – we are now seeing the first disputes from that, for example in Cape Verde, Angola and Mozambique. I think it will more than offset the decline in domestic arbitrations."

But Gonçalves Pereira acknowledges that there is fierce competition between Portuguese law firms. He adds: "It's always hard to win work – the Portuguese market is quite sophisticated."



## Litigation is no longer the ‘ugly duckling’

Dispute resolution teams are now major generators of revenue for law firms in Portugal, but before the crisis, litigators were often overshadowed by M&A and real estate lawyers

Prior to the global economic crisis, litigation was sometimes seen by law firms as the “ugly duckling” in that it was less profitable than M&A and real estate work; but following the downturn, that changed, according to Rui Tabarra e Castro, associate at FCB Sociedade de Advogados.

A significant proportion of the revenue of law firms in Portugal is now generated by litigation, says Tabarra e Castro. “The downturn happened and suddenly it was M&A and real estate that had less work, whereas the litigation teams were able to keep some firms going,” he adds.

### Growing dispute resolution team

Now, with clients such as the Portuguese bank Novo Banco facing a high volume of credit recovery lawsuits [pertaining to the collapse of Banco Espírito Santo], Tabarra e Castro says that his firm’s dispute resolution team has significantly increased in size. “Back in 2006, if

you had asked trainee lawyers if they wanted to work in M&A, real estate or litigation, they would have chosen the first two sectors,” he says. “Now, they can see we have a lot of work in litigation and that the proceedings demand a lot of multidisciplinary skills – this has changed things.”

However, in a practice area traditionally associated with lower fees, with many of these lawsuits taking two to four years to play out, litigation lawyers now face the ongoing challenge of clients wanting to reduce fees.

### Lower rates

“Clients understand that they have to hire specialised lawyers as it is very complex work,” Tabarra e Castro says. “At the same time, they want to know how much they are going to spend at the outset and ask for lower rates and fee proposals – this means we’re always having to convince them that paying for a good lawyer is important in order to have a good case.”



Rui Tabarra e Castro

## Frustration with litigation and ADR leading clients to use ‘unregulated methods’ for resolving disputes

Due to the fact that it can take many years for a dispute to be settled via litigation, some parties are seeking to resolve conflicts through arbitration and other, more informal, unregulated channels, says Paulo de Moura Marques, Partner at AAMM & Associados in Lisbon.

“Over the last few months, we have seen a considerable amount of clients choosing to solve many issues through arbitration, especially in public law,” De Moura Marques says. “Arbitration is preferred because, not only is it private, but also because of its focus on the matter that is being dealt with at the time, often without putting other parts of the contractual relationship at risk.” However, while arbitration should be an expeditious way of solving a dispute, it is not always the case, according to De Moura Marques. “A court case can take anything from two to five years, while an arbitration

can take as much as two to three years to be decided, and that is too long, particularly in the case of arbitration, says De Moura Marques. “We can’t say it’s fair justice if it’s not quick justice,” he adds. “And we’re not taking the necessary measures to provide some kind of quick response.” As a result, De Moura Marques says businesses are getting frustrated and are “being invited to resort to unregulated methods for resolving disputes”.

Across Europe it is now commonplace for commercial organisations – particularly those that normally handle insolvency and recover credit – to offer services similar to mediation and conciliation, services that should be referred to someone with proper training, according to De Moura Marques. “These companies do not even have qualified barristers or lawyers and this is putting people at risk of misrepresentation, conflicts of interest and most importantly, it means there will be no court ruling to impose a decision [if needed].”



Paulo de Moura Marques

## Professional liability claims increasing in the Portuguese banking and telecoms sectors

Directors and officers litigation is generating significant fees for law firms in Lisbon as the European trend for suing company directors begins to sweep Portugal



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An increase in professional liability claims is one of the current trends in the Portuguese market, according to Nuno Libano Monteiro, partner at PLMJ in Lisbon. "It is important to stress that banking and finance litigation was very important in 2016,

but I also saw an increase of D&O [directors & officers] litigation related to the liability of directors of companies," he explains. "I wouldn't say it's a massive trend, but it is very important and high-value litigation."

### Auditor liability

Given that such claims are already common elsewhere in Europe, Libano Monteiro says he is not surprised that there have been significant professional and civil liability disputes in Portugal – he adds that it goes beyond the massive cases related to the liability of directors of banks, having extended to the telecoms sector as well. Libano Monteiro also anticipates that increasing litigation related to the liability of auditors of major companies in Portugal will represent an opportunity for law firms. He adds: "If law firms adapt themselves to the new trends in the market, as well as the new demands of the market, I think 2017 will be an important year."



## Court rulings on mortgages causing wave of litigation



Eduardo de León

A series of court rulings have overhauled the Spanish mortgage market and created the "biggest litigation issue" in Spain, according to Eduardo de León, partner at Araoz & Rueda.

Following the aftermath of the 2008 financial crash, legal judgements from a number of courts - including the European Court of Justice – have found that Spanish lenders exercised "unfair" terms and undermined consumer rights, De León explains. He adds that this culminated in this year's Royal Decree ordering Spanish banks to repay consumers' past mortgage overpayments. De León says the next major issue related to mortgages will be the question of "the mortgagee's fees charged to the debtor as well as the general liability of the mortgagor not limited to the value of the mortgaged property".

Litigators are preparing for a fight. "The problem is that some of the banks

have decided they are not going to accept [the decree] because they maintain the terms of the mortgage were clear enough, were not unfair and were very well explained to consumers," says De León. "The Spanish mortgage market is changing, not because the banks or lenders want it to, but because the court officials are changing the system." He adds: "There's a clear evolution. It's now not enough to have an agreement between both parties. It's about how banks - and companies - can obtain an understanding with the consumer."

Another growing area of work for litigators stems from Spain's 2003 bankruptcy act. De León says: "When the crisis started, we realised the [bankruptcy] system was not perfect." De León explains that, consequently, there have been amendments to legislation, with some impacting on refinancing, "especially pursuant to the additional fourth provision of the Spanish Bankruptcy Act".

## M&A and capital markets disputes on the rise

A key challenge facing lawyers is being able to handle a new wave of mass consumer litigation, which involves using innovative technology to manage information

Litigation related to M&A and capital markets is on the increase, according to Pedro Rodero, managing partner of Ontier in Spain. "We're seeing more litigation with regards to M&A transactions, post-M&A, corporate conflicts disputes and also litigation related to the capital markets industry," he says.

Rodero adds that one of the key challenges facing Spanish lawyers is ensuring they are prepared to meet the demands associated with major litigation. He says a significant proportion of law firms' dispute resolution work will in future be "built on massive litigation and consumer litigation". Indeed, some law firms – backed by financial investors – are preparing huge class action claims. "These claims are not only in the financial sector but also in relation to insurance, airlines and energy companies, as well as with regard to professional liability issues," Rodero says.

Law firms need to be prepared to manage major litigation in which the management of documents and information needs very innovative technology, Rodero says. "We have to be able to solve those complicated disputes and problems from a technological and logistic point of view," he adds.



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## Surge in Portuguese litigation negatively impacting corporate valuations

While the increase in litigation in Portugal may be good for lawyers, it is having an adverse effect on corporate valuations, particularly in the banking sector, says João Caiado Guerreiro, partner at Caiado Guerreiro.

"People litigate more and more," Caiado Guerreiro says. "The recent increase in litigation relates directly to the crisis – we have plenty of work defending the banks."

Banks remain one of the biggest targets for claimants, and this risk of litigation is a significant impediment to growth and investment. The delayed privatisation of Portugal's second largest bank, Novo Banco, which emerged from the ruins of Banco Espírito Santo (BES), is a clear example of how the risk of litigation can deter investors – a legal action was brought by a group of investors





related to losses on €2bn-worth of Novo Banco bonds. This is one of the main reasons the Portuguese government is unlikely to recoup the €4.9bn it spent rescuing the bank.

"The problem is existing claims," says Caiado Guerreiro. "When you look at the privatisation of Novo Banco, what you are seeing is that you can't sell it without guarantees because of the litigation risk."

Access to new and cheaper technology is also expected to give rise to class actions, albeit not on the same scale as in the US, Caiado Guerreiro says. "Companies are a lot more protected here than in America, but entrepreneurial law firms are finding ways to work with significant numbers of clients," he adds. "It is very much internet-based in terms of communication – costs are decisive, if you expect to be awarded a third of the settlement and the verdict is a big one, you can be happy fighting it in terms of the success fee."



João Caiado Guerreiro

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