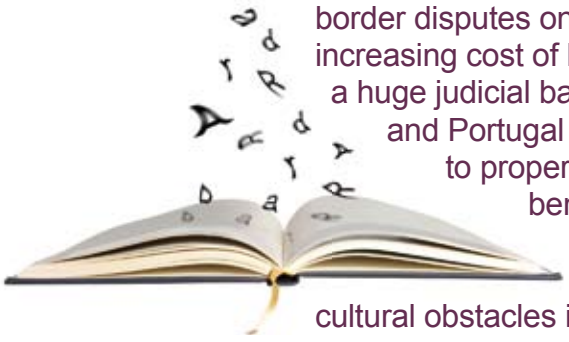
Opening up to ADR



With both domestic and cross border disputes on the rise, the increasing cost of litigation and a huge judicial backlog, Spain and Portugal are beginning to properly explore the benefits of ADR. But while both countries face cultural obstacles in doing so, recent regulations and moves by their respective Governments could prove a turning point in dispute resolution going forwards.

En estos tiempos, la conflictividad se convierte en un elemento cada vez más habitual para las empresas. La crisis, nos conduce a situaciones aún más contenciosas, con un incremento de demandas judiciales y arbitrajes. Pero con los sistemas de resolución alternativa de conflictos en crecimiento exponencial en países de derecho común, parece que en las jurisdicciones civilistas, como las de España y Portugal, estos métodos no acaban de consolidarse. La nueva legislación implantada y el apoyo gubernamental quizás consigan el aliciente necesario para sacar partido a estos métodos de resolución alternativa de conflictos.

These days, conflicts are an increasingly normal part of day-to-day business for any corporation. But the crisis is propelling us into even more contentious times, with a huge increase in the number of lawsuits and arbitrations.

2013 is seeing Iberian economies continuing to deteriorate, resulting in a steep rise in disputes over breaches of contractual obligations. Also bankruptcy, insolvency and restructuring proceedings, are leading to highly disputed litigations and lengthy negotiations involving banks and financial institutions.

The costs associated with traditional litigation, and inefficient court systems with cases that can drag on for years, have prompted Iberian companies to explore the possibilities of a new and ever increasing range of dispute prevention and resolution options – alternative dispute resolution (ADR).

But while ADR is booming in common law jurisdictions, it continues to lag behind in civil law ones, particularly in the Latin jurisdictions like Spain and Portugal, says Clifford J. Hendel, Partner at Araoz & Rueda. New legislation and governmental support, however, may just provide the push that is needed for non-judicial resolution of disputes to really get off the ground.

Contentious times

Across Iberia, lawyers see individuals and organisations more likely to resort to litigation to resolve their disputes. "Our professional experience is that in 90 percent of claims, the decision is taken in court and 10 percent are decided by ADR," says Jordi Calvo Costa, Litigation Partner at Roca Junyent.

In Spain, the downturn has led to an increase in litigation fuelled by the recent restructuring of the banking sector. And the services sector has seen a rise in contract-related litigation and arbitration, says Jesús Remón, Head of Litigation and Arbitration at Uría Menéndez. "A diminishing growth outlook, coupled with tighter credit requirements, has forced companies into renegotiations, which often result in the early termination of contracts giving rise to numerous disputes."

Lawyers also point to an escalation in disputes regarding energy and telecoms, mis-selling of financial products, antitrust, unfair competition, insolvency and bankruptcy. And following the surge of takeovers and sale and purchase agreements during Spain's economic boom, they now see an increasing amount of disputes involving financially distressed purchasers seeking to reduce the price paid for the acquired companies.

In Portugal, lawyers are seeing clients more willing to litigate, in spite of the inherent costs. "Those who are not prepared to litigate are those who are insolvent," says João Saúde, Litigation and Arbitration Partner at Sérvulo & Associados. "However, for the same reason, they are also not prepared to negotiate."

Credit claims and restructuring debts are on the rise, alongside disputes against banks and financial institutions, generally for wrongful conduct or advice to clients, and litigation arising out of the termination of distribution and agency contracts, says Francisco Colaço, Head of Litigation at Albuquerque & Associados. "And this is a type of work that we expect to increase over this year."

There is a focus on restructurings, both on a corporate level and for employment matters, essentially through lay-offs and collective dismissals, says Sandra Ferreira Dias, Head of Litigation and Arbitration at Caiado Guerreiro. Lawyers are also seeing an increase in contractual liability cases. "This flows from the fact that parties face accruing difficulties in observing their contractual obligations," explains Joaquim Shearman de Macedo, Co-head of the Dispute Resolution Practice at CMS Rui Pena & Arnaut, "and eventually are led or forced to breach the contract".

But the biggest challenge is the huge judicial backlog, which lawyers blame on the inefficiency of the courts. To tackle this, the Government has recently approved the draft of a new Civil Procedure Code, intended to end the backlogs and address key challenges in the country's litigation system, which has been heavily criticised for unacceptable delays in cases being heard and difficulties in getting judgements enforced. The draft Code seeks to address these and other issues including enabling parties to enforce judgements without the sign-off of the presiding judge, an increased focus on pre-trial reviews, the shortening of deadlines for procedural acts, and new restrictions on the grounds for delaying proceedings.

Some are therefore suggesting that 2013 could prove a turning point for the Portuguese judicial system.

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Arbitration

The continuing crisis means that clients' budgets are no longer able to support long and expensive litigations. And with the rise of cross-border disputes, no one wants to litigate in another party's country either, agree lawyers. In many cases, parties choose arbitration contractually, says Ramón C. Pelayo Jiménez, Managing Partner of Ramón C. Pelayo Abogados, in order to solve their differences due to a lack of trust in foreign courts and their national legislation.

The advantage of arbitration, however, especially for multinationals operating worldwide, is that once you decide to go down that route, it takes away all the dangers and repercussions of litigation, says Miguel Ángel Fernández-Ballesteros, President of the Arbitration Court of Madrid. "In particular where you may have to litigate in various jurisdictions and a decision in one country could be detrimental to the rest."

Following the amendment of its Arbitration Law in 2011, Spain has seen a significant growth in the use of arbitration. There has been a surge of arbitrations relating to disputes between shareholders or in joint ventures, and arbitrations with a financial component , such as the Yukos case that was resolved through an investment arbitration at the Court of the Stockholm Chamber of Commerce, explains Antonio Hierro, Litigation and Dispute Resolution Partner at Cuatrecasas, Gonçalves Pereira in Madrid. "Also arbitrations resulting from transactions to buy or sell companies, frequently involving the invoking of hardship clauses."

There have been some high profile arbitrations before ICSID concerning Spanish investments in South America, most notably involving Repsol and Telefónica. And 2012 also saw the second ICSID claim ever brought against Spain, filed by a group of Venezuelan real estate investors under the Spain-Venezuela bilateral investment treaty of 1995.

Warming up to the alternative

But while lawyers agree that there is still a cultural obstacle to overcome in instilling a culture of ADR in Spain, clients are warming to it as they are increasingly seeking cost-effective methods of dispute resolution. "Mediation is increasing," says Gonzalo Stampa, Managing Partner at arbitration boutique Stampa Abogados, "but arbitration is leading by far, and in my opinion it will continue to lead in the future".

In Portugal, the approval of a New Arbitration Law last year has received a warm welcome from the legal community. It is applicable to all arbitrations taking place in Portuguese territory, as well as to the recognition and enforcement of Portuguese judgments in foreign arbitrations. "In terms of impact and independence, the new Arbitration Law is much better than before," says José Carlos Soares Machado, Head of Litigation and Dispute Resolution at SRS Advogados. "But there is now a real danger that we may have a court deciding that an arbitration decision is null for lack of independence of the arbitrator."

As a small country, this is a big concern. Arbitrators are either lawyers or professors, and so lawyers say it is very difficult to find somebody without a conflict of interest. And there is a serious lack of arbitrators, says Frederico Gonçalves Pereira at Vieira de Almeida & Associados. "The few that there are have taken on a huge number of cases each and are stretched to the limit."

But while arbitration is championed by lawyers, there is a misunderstanding in Portugal about what it can accomplish and which disputes it can resolve. "Arbitration is an excellent choice for some kinds of disputes," says Filipe Vaz Pinto, Senior Associate at Morais Leitão, Galvão Teles, Soares da Silva & Associados, "but it is not suitable to solve the problems of the Portuguese Justice system." Many arbitrations still end up in the courts to be fully resolved, so parties could end up finding themselves faced with the prospect of the costs, and delays, of litigation.

At an international level, the IBA Guidelines on Conflicts of Interest in International Arbitration are being revised in relation to arbitrator impartiality and independence, and Draft Guidelines on Party Representation in International Arbitration are being drawn up. These aim to create a set of guidelines addressing counsel professional behaviour within the framework of arbitration proceedings. "When both

projects are completed," says Félix J. Montero, Arbitration and Commercial Litigation Partner at Pérez-Llorca, "two of the most important personalities in the arbitration process – the arbitrators and counsel – will have a defined set of unified principles addressing their respective duties *vis-à-vis* the parties, other counsel and arbitral tribunals."

Mediation

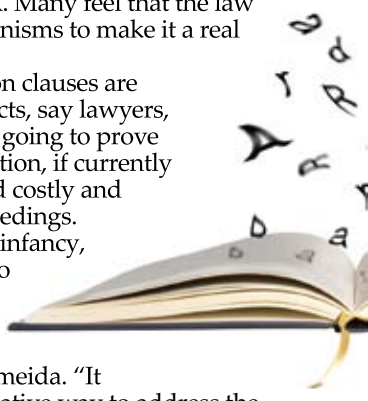
While arbitration is now a well-established method of resolving disputes in Spain, the same cannot be said for mediation – ie the use of a third party neutral to facilitate resolution between parties. However, its 2012 Mediation law does put it a little further down the road than Portugal, where this is still no legal framework in place to support it.

The new Law came into force last year, establishing a general regime applicable in all domestic civil and commercial matters as well as to cross-border disputes. Further, on October 10th, 2012, a collaboration agreement was signed between Spanish judges and the Chambers of Commerce to promote mediation as an alternative to litigation. As a result, commercial and first instance courts can refer cases to the Chambers of Commerce for mediation. "Moreover, a unified commercial mediation services system will be implemented in all 88 Spanish Chambers of Commerce," explains Carlos de los Santos Lago, Head of Litigation and Arbitration at Garrigues in Spain, "for which model regulation and a standard training programme for mediators have been developed".

For some, however, the New Law has not had the desired effect. "This is probably for two reasons," says Francisco Málaga, Head of Litigation at Linklaters in Madrid. "We still don't have a culture of mediation like in other countries and, also, under the New Law, judges cannot force parties to go to mediation. That said, some judges are doing a great job of convincing parties at preliminary hearings to go to mediation."

Lawyers note a significant difference between domestic and international clients, as while international clients are familiar with mediation, Spanish companies are reluctant to solve their disputes using ADR. Many feel that the law does not contain sufficient mechanisms to make it a real alternative to litigation.

Going forward, more mediation clauses are expected to be included in contracts, say lawyers, but it is still too early to see if it is going to prove to be a successful and popular option, if currently seen as a poor alternative to avoid costly and lengthy court or arbitration proceedings.



In Portugal, mediation is at its infancy, and there is no legal framework to support it. "Although we are noticing a trend in the market asking for mediation," says Gonçalves Pereira at Vieira de Almeida. "It should be considered as an alternative way to address the high costs of litigation and arbitration as it is much less

Cross-border trends

One of the biggest coming out of the crisis has been the significant increase in Iberian companies internationalising. This has caused not only a considerable rise in cross-border litigation, but also arbitration, say lawyers. "And this will inevitably lead to an increase in international arbitration, not only because companies will try to avoid having to litigate in the opponents´ jurisdiction, but also because their legal systems tend to be slow, complex, expensive and less reliable when compared to arbitration," says Fernando Aguilar de Carvalho, Litigation and Arbitration Partner at Uría Menéndez-Proença de Carvalho.

In particular, lawyers are seeing a rise in cross-border commercial disputes including breaches or renegotiations of existing contracts, distribution and financing agreements, loss of interest and investment in certain countries and markets, insolvencies and the need to restructure businesses in light of the crisis.

Cross-border disputes have become commonplace for the increasing number of Spanish companies investing overseas, say lawyers, with a rise in international disputes work in relation to projects, engineering, construction, energy and telecoms, oil and gas, distribution agreements and aviation. All of which, they say, tend to use arbitration over litigation.

And there has also been a growth in cross-border disputes using arbitration in the construction and infrastructure sectors, say lawyers, due to the fact that in the Spanish Real Estate Market boom years the trend was to include arbitration clauses in project contracts.

The expropriation of certain Spanish investments in Latin America has also led to major conflicts for breach of bilateral investment treaties, says Gonzalo Ardila, Litigation and Arbitration Partner at Gómez-Acebo & Pombo in Madrid. And the vast majority of these disputes use international arbitration over other means of dispute resolution, including litigation. Many are being resolved under the UNCITRAL Rules or the International Centre for Settlement of Investment Disputes (ICSID), adds José María Alonso, Head of Litigation and Arbitration at Baker & McKenzie in Madrid. And with much Spanish investment having been made in key sectors in Latin America, lawyers predict the region will be an ongoing battlefield for litigators.

Portugal has also seen a growth in international disputes in particular in renewables, construction, communications and public works. And the real estate sector, hit hard by the crisis, has a noticeable peak in litigation with international investors.

As Portuguese companies have increasingly chosen Africa as a destination for their internationalisation strategies and investments, most notably Angola and Mozambique, consequently cross-border disputes are normally linked to these jurisdictions, says Sandra Teixeira da Silva, a Partner at AVM Advogados. Particularly the investment vehicles used by the investors in those countries, commercial, land or labour disputes. Here lawyers are seeing an increasing use of international arbitrations in this area, often with the arbitration seat in Lisbon.

expensive."

Unlike in other countries, lawyers note that the culture is absent in Portugal and mediation is seen as somehow 'giving up'. "As litigation attorneys," says Ana Grosso Alves, Senior Associate at Gómez-Acebo & Pombo in Lisbon, "we should do our best to change the mindset so that the client does not see the use of mediation as a sign of weakness and understands that it can be used effectively to solve disputes."

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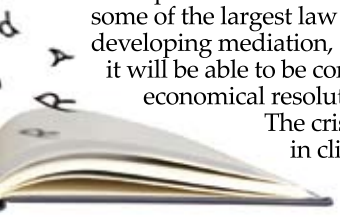
Moreover, says Rui Tabarra e Castro, Senior Associate in Dispute Resolution at F. Castelo Branco & Associados, some of the largest law firms in Portugal have been developing mediation, anticipating that, in the near future, it will be able to be consolidated as an effective and economical resolution of some disputes.



The crisis has also prompted a rise in clients resorting to settlement proceedings, say lawyers, which closely resemble the mediation process, so there is the hope that this could open up the country to the possibilities of mediation. But until there is a legal framework to support it, lawyers don't see mediation truly coming on the Portuguese agenda anytime soon.

Litigation v arbitration

While the debate of arbitration versus litigation is old news, the reality today is that companies are tired of arbitrations that last for years. "We need to find new ways of solving litigation," says Bernardo Cremades, Founding Partner of B Cremades & Asociados. "That's the hot topic for discussion these days."

Lawyers are increasingly seeing a demand for dispute resolution services that offer creative solutions, even if that means clients not pursuing all of their claims. "While it is clear that the crisis is causing clients to rethink how to solve disputes in a fast and cost-effective way, I don't think that this is necessarily reducing court litigation and promoting ADR," says Montero at Pérez-Llorca, "but I have the perception that settlements are now being pursued with more interest".

A client's decision on whether to litigate or use ADR does very much depend on the circumstances of each case, agree lawyers. Often, the problem is not about the method parties choose for the dispute resolution (arbitration or litigation), says Raúl Da Veiga , Head of Litigation and Arbitration at GOLD Abogados, but they prefer that judgment or the award will be fully effective.

In Spain, certain factors have played a part in clients being more reticent to use conventional forms of dispute resolution, explains Manuel Rivero, Of Counsel in dispute resolution at Herbert Smith Freehills in Madrid. The recent increase in court fees and the financial situation of clients means that they have less budget set aside for litigation and are therefore interested in exploring other options, with a greater need for a quick resolution.

Lawyers also notice an increasing trend for including ADR clauses in most contracts. "The slowness and lack of specific commercial and corporate skills of the first instance judges make it advisable to use ADR in these situations," says Fernando Martínez Comas, a Partner at Deloitte Abogados. "Conflicts are solved quicker using ADR than before the courts."

But Spanish clients remain reluctant, in general, to pursue non-judicial methods of dispute resolution. Arbitration has a certain acceptance, says Hendel at Araoz & Rueda, but principally for international disputes and contracts, where in practice there is no real alternative.

While clients in Portugal used to just push for litigation, more recently they are taking time to negotiate and study all the options available to them before filing, says João Maria Pimentel, Head of Litigation and Arbitration at Campos Ferreira, Sá Carneiro & Associados. Clients are now very active in looking for viable alternatives.

Medium-size businesses prefer to resolve disputes out of court, says Ana Cláudia Rangel, Head of Litigation and ADR at Raposo Bernardo, even if they have to give up certain rights or benefits. "Clients intend to get a resolution quickly, at a lower cost and without risks."

Costs have always played a part in the debate. But while in the past you could just increase the client budget, lawyers now find clients want reliability of fee estimates – and that is very difficult to provide in litigation. "One has to ensure to explain to clients the potential costs involved in litigation," says Camila Pinto de Lima, Litigation and Arbitration Counsel at CMS Rui Pena & Arnaut, "as most aren't aware of what they may have to pay in the end".

Civil and commercial litigation costs can be huge when compared to the economic value of the case itself, adds Nuno Líbano Monteiro, Head of Litigation at PLMJ . "And while judges do have the power to decide on the final amount payable, for the most part they do not seem to pay attention to the escalating costs of litigation."

Therefore, whenever there is a possible litigation ahead, the first thing clients ask for is a 'cost benefit' analysis. Nowadays, this is the most critical factor related to the decision to litigate, says Pedro Cabral, Senior Associate in Litigation and ADR at Macedo Vitorino & Associados. Even given the crisis, clients are not always willing to accept conciliation or mediation as the cheaper options.

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Law firms are therefore finding themselves confronted with a necessity to use fixed fees, as in-house lawyers are increasingly reluctant to accept assumptions, which is a serious inconvenience when it comes to maximising the profit of litigation work. "This comes at a time when disputes are becoming even more complex," says José Luis Huerta, Managing Partner of Hogan Lovells in Spain, "and despite law firms' efforts to introduce alternative fee arrangements (AFAs) and provide creative estimates, the reality is that most in-house lawyers are only willing to accept fixed or capped fees".

But despite being more agile than resorting to national courts, arbitration is still seen as more expensive with a higher initial disbursement. But the costs system of state civil courts can be misleading. "During the course of proceedings you pay very little, but then at the end you get a huge bill," says José Jácome, a Founding Partner of AAA Advogados. "With arbitration you must pay up front and thus you must prepare and know exactly what you are going to pay at the start."

In fact, across Iberia, lawyers agree that the costs of litigation and arbitration are almost on a par. But the difference is that in arbitration there is the possibility for a certain level of control. "When you go to an arbitration you can control costs," says José Maria Corrêa de Sampaio, Co-Head of Arbitration and Mediation at Abreu Advogados, "and this is especially in the case of ad hoc arbitrations where parties can set out their own procedures."

Ultimately, however, the relationship between client and law firm has to be transparent, adds Natália Garcia Alves, Co-Head of Litigation also at Abreu Advogados, where the client is aware of every stage in the proceedings so they understand all the costs involved.

Alternative possibilities

Therefore, with disputes on the rise and showing no signs of stopping, Iberia's Governments and its legal communities are actively encouraging and taking steps to foster the culture and use of ADR. Whether such efforts will be successful in establishing a solid culture remains to be seen, say lawyers, but at least it is firmly on the agenda.

"I strongly believe that it will take some time until our Spanish clients start to have trust in ADR as an effective method to resolve a potential dispute," says Rafael Murillo, Litigation and ADR Partner at Freshfields Bruckhaus Deringer. "But it also took some time and many common efforts from the legal community to develop an arbitration culture in the Spanish legal market and I am inclined to believe that ADR will follow the same path."

The same can be said for Portugal, where lawyers feel ADR still has limited acceptance and is far from living up to its potential. The lack of any framework to support mediation is a huge obstacle that needs to be addressed sooner rather than later. But, according to João Duarte de Sousa, Head of Litigation and Arbitration at Garrigues in Portugal, it is increasingly being seen as a highly-rated, neutral and swift form of cross-border dispute resolution.

With litigation increasingly being seen as a last resort as the crisis still has a firm grip on client budgets, lawyers hope that the Iberian market will continue to push for ADR, and not just as an 'alternative'.

Handling international disputes

With international disputes on the rise, lawyers must ensure they are in a position to handle all their clients' needs, domestic or otherwise. Law firms must respond to the market accordingly and convince their clients that international disputes can be, and should be, handled by their Iberian offices.

"Increasingly, in-house counsel of Spanish companies are more international and better understand the different procedural systems," says Fernando González, International Dispute Resolution Partner at Squire Sanders. "In transnational litigation, it is essential to reconcile the different legal cultures to succeed in the process. The secret is to form international teams to start planning the litigation strategy from the outset of litigation."

While some believe the secret is in strengthening ties with foreign firms, facilitating cooperation through integrated-teams, others feel the only way to truly secure the work is to open your own offices.

In order to properly handle international disputes it is of the utmost importance that law firms internationalise their business by opening offices in other jurisdictions and recruiting local lawyers, says Carlos Soares, Senior Associate in Dispute Resolution at Gómez-Acebo & Pombo in Lisbon, which recently opened in New York. Law firms must follow the same transformation processes as their clients have in the crisis, in other words, move from a domestic law firm business model into a truly international one.

"In my opinion, it is essential to show that the firm has solid and consistent litigation capabilities in the relevant jurisdictions, rather than just alliances with other firms or small representation offices," says Francisco Málaga, Head of Litigation at Linklaters in Madrid. "For obvious reasons, international law firms are especially well placed in this race."