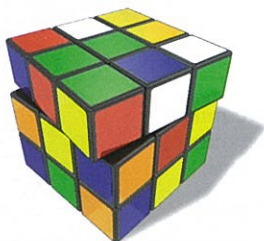


# Putting all the pieces together



There is no doubt that the economic downturn is bringing new challenges to business across Spain and Portugal, say litigation and arbitration experts. Less consumer demand, cost cutting and tougher lending and borrowing conditions, mean that many are increasingly less certain about future growth prospects or revenues, and more willing to enter into formal disputes to affirm positions or secure money owed.

"There has been an upturn in disputes across all sectors and an increased use of litigation as a 'tactical' weapon. Litigation and arbitration are being used to force companies back to the negotiating table. We see more parties unable to meet contractual obligations as a result of the financial stresses they are experiencing," says David Arias, Head of Litigation and Arbitration at Pérez-Llorca.

Alongside an inevitable increase in insolvency-related disputes, lawyers report rising tensions among company shareholders over strategic differences and values, and a huge rise in claims against banks and financial institutions for mis-selling products, including relating to the Madoff scandal and Lehman Brothers' collapse.

"From our experience, there has been a clear increase in litigation related to financial products, opposing clients and financial entities, and real estate. On top of this the number of insolvencies involving restructuring of companies and assets has increased significantly," says Frederico Gonçalves Pereira, Head of Litigation at Vieira de Almeida.

Nuno Libano Monteiro, Head of Litigation at PLMJ agrees. "There is a constant flow of restructuring, insolvency and disputes work and we expect this to increase in 2011."

Yet to come, say lawyers, is the fall-out from the budget cuts and austerity measures imposed by the Spanish and Portuguese Governments, including the cancellation or delay of major projects, and specifically in Spain the reduction of the tariffs paid to some energy producers.

"Put simply, the economic situation is generating more disputed negotiations, more disputes and more difficulty in resolving disputes amicably," says Cliff Hendel, partner with Araoz & Rueda in Madrid.

## Forced arguments

Among the most significant trends emanating out of the downturn is companies litigating in situations which they would not have only a few years ago. "In some cases, we see companies literally digging up old contracts to bring claims. The result is often complex disputes based on forced arguments which require very intense work and dedication when confronted in court" says José Luis Huerta, Head of Disputes and Managing Partner at Hogan Lovells in Madrid.

All sectors have been affected and almost all clients have faced an increased need to resort to dispute resolution in order to collect credits, says Francisco Colaço, partner at Albuquerque & Associados in Lisbon. Litigation is also increasing in business sectors less affected by the downturn.

"Over the past two years we have seen increased commercial disputes especially in the pharmaceuticals sector, where the fight between innovative and generic manufacturers is the order of the day, likewise in intellectual property," says Sandra Ferreira Dias of Franco Caiado Guerreiro.

Despite the evident larger number of actions being launched, some however question how many claims are actually progressing to final judgement. "The number and relevance of judicial and arbitral disputes has not been as significant as one would have expected. In this respect, we have noticed that many clients try to find faster and cost-effective solutions even if that implies having to waive some of their claims," says Carlos de los Santos Lago, Head of Dispute Resolution at Garrigues in Madrid.

The situation is the same in Portugal, believes José Alves Pereira, Managing Partner of Alves Pereira & Teixeira de Sousa. "The crisis has not given rise to a significant number of cases actually before the courts, where fees are notoriously expensive and a high value dispute requires a significant amount to be paid upfront, huge delays and an unpredictable result."

## International resolutions

The financial crisis and economic downturn at home may have helped push more Spanish and Portuguese companies to new international markets, but some of these opportunities will ultimately come undone. A rise in international business leads to a rise in international disputes, but lawyers note that businesses are not planning for a "worst case" scenario.

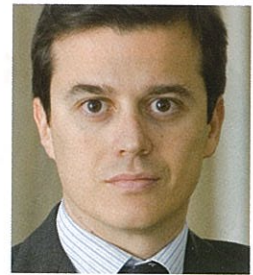
"We see relatively little evidence that international businesses are preparing for any negative eventualities. In this respect, General Counsel are often very 'reactive'. It is only when a dispute arises that they look at how to manage the issues that have arisen," says

Según los expertos en Derecho procesal y arbitraje, la crisis financiera ha traído nuevos retos a las empresas de la Península ibérica y ha aumentado el número de conflictos en las negociaciones y los contratos. Para los abogados, está claro que los clientes están más dispuestos a recurrir a mecanismos formales de resolución de conflictos para renegociar términos contractuales.



“Litigation and arbitration are being used to force companies back to the negotiating table. We see more parties unable to meet contractual obligations as a result of the financial stresses they are experiencing.”

David Arias, Head of Litigation & Arbitration, Pérez Llorca



Miguel Virgós, disputes partner with Uría Menéndez in Madrid.

His firm is now advising clients to adopt an *ex ante* dispute resolution policy. “This is an effective way to anticipate and control issues that are otherwise difficult to manage in the complex international scenarios that companies inevitably face.”

Clients may prefer to refer to arbitration for cross-border disputes, but many times the jurisdictional or arbitration clauses are poorly drafted, do not take into account the nature of the dispute, the seat or the applicable law.

Latin America has been a long-time focus of both Spanish and Portuguese businesses, and it is within the region that lawyers see the most consistent number of international disputes. But besides the everyday challenges of operating in such markets there are also political risks.

The “creeping nationalisation” policies enacted by Governments in Bolivia, Ecuador and Venezuela mean businesses have to be alive to both commercial and administrative changes, says Bernardo Cremades, of B Cremades & Asociados in Madrid. “It is no coincidence that the greatest number of new arbitration claims initiated before ICSID last year related to South America. Nearly a third of all cases involve Latin America, double what they were in the previous year.”

The dynamism of the Brazilian economy, and the infrastructure boom ahead of the 2014 World Cup and 2018 Olympic Games, is acting as an almost irresistible magnet, say lawyers. But so too are continuing growth of markets like China and India.

“We have had clients with arbitration proceedings in China and Brazil that have not only raised complex legal problems – can an award really be enforced in China against a Chinese company – but also cultural issues, such as how to best tackle evidence or cross-examinations and depositions,” says Alejandro Fernández de Araoz at Araoz & Rueda.

Brazil is inevitably a point of focus for Portuguese companies, but so too are African lusophone countries like Mozambique, Cape Verde and particularly Angola. However, few major international arbitrations have emerged beyond the tourism and construction sectors, say lawyers.

### Taking on the world

A challenge for Iberian firms is therefore not only how to capitalise on the upturn in litigation and arbitration at home, but whether they have a role to play in the disputes that their clients increasingly face as they expand internationally. This is particularly so in Latin America, where the global UK and US firms have achieved prominence.

In disputes under Spanish or Portuguese law there is a clear need for Iberian lawyers, but this requirement is much less apparent where investments are structured under UK, US or local law; or in large international arbitrations drawing on Anglo-Saxon procedural principles, such as discovery and cross-examination in English.

For some leading arbitration firms, the emphasis has been towards building their arbitration expertise, working alongside local firms in places like Latin America as co-counsel, and adding “international” practitioners. Cristian Conejero, the former Counsel for Latin America and the Iberian Peninsula in the International Chamber of Commerce, now leads the Latin American arbitration practice at Cuatrecasas, while Uría Menéndez has recruited Virginia Allan as Counsel.

“Spanish firms in general are now prepared to act in emerging markets and to better utilise our networks,” says Borja de Obeso, partner at Gómez-Acebo & Pombo in Madrid.

Some suggest however that there is an inherent capability gap between the capabilities of domestic and international firms, with the latter inevitably better placed to manage multi-jurisdictional disputes. “The reason is obvious: it is much easier to work with a colleague from a different office than to liaise with a foreign law firm. We have had some recent experiences, both in litigation and arbitration, which have confirmed this impression,” says Francisco Málaga, a disputes partner at Linklaters but formerly with Cuatrecasas.

Despite the international growth of Iberian firms in recent years, others accept that more needs to be done to be able to compete for the largest multi-jurisdictional client mandates.

“International markets such as London, New York or Hong-Kong do not look at Iberian law firms as an option,” says Gonzalo Serrano Fenosolla, partner with Roca Junyent in Barcelona. “The best way for firms to demonstrate their ability to handle international disputes is to increase their presence in these markets, improve personal contacts with potential clients and try to compete on quality.”

Nonetheless, a number of arbitrators continue to stand out on the international scene in part because they have not focused on Spanish or Portuguese-led disputes, among the most prominent Bernardo Cremades and Juan Fernández-Armesto.

Spain has also notably seen the emergence of a number of dedicated litigation and arbitration boutiques, among them Hamilton Abogados and more recently Moscardó & Asociados – and as a result of the departure of co-founder Gonzalo Stampa, G Stampa Abogados. “It is important not only to be independent, but to be seen to be independent,” says Fernández-Armesto.

The international challenge is perhaps even harder for Portuguese firms. “Our focus must perhaps be more specific, toward disputes involving African countries, and not necessarily only the Portuguese speaking ones,” says Gonçalves Pereira at Vieira de Almeida.

It is Sub-Saharan Africa that now accounts for over a quarter of new claims before ICSID, and where a number of Portuguese firms have strong alliances or have established their own satellite offices. “For disputes in Portuguese-speaking countries, we are very well prepared to be a legal hub, for judicial and cultural reasons, especially regarding Brazilian, Angolan and Mozambique disputes,” says Paulo Farinha Alves, litigation partner at PLMJ.

### Alternative dispute resolution

Iberian companies’ appetite for arbitration internationally contrasts significantly with the domestic reality, admit lawyers. This is even though both the Spanish and Portuguese courts are currently awash with insolvency litigation, which has helped bring an already slow litigation process to a virtual standstill.

The creation in Spain of dedicated Commercial Courts in 2007 helped concentrate business claims before specialist judges but the same courts have jurisdiction over bankruptcy claims. Likewise in Portugal the Commercial Courts are





“The CEA is a forum and a think-tank for practitioners. We have no ambition to be an institution for resolving disputes.”

Antonio Hierro, Head of Arbitration, Cuatrecasas Gonçalves Pereira

overwhelmed, while the creation of a specialist arbitration forum like ARBITRARE for IP disputes, and new arbitration procedures for tax matters, have yet to take off, say lawyers.

In Spain, there is a continuing perception of high costs, a lack of impartiality of arbitration panels, and the award of more “equitable” and less “legal” judgements particularly in disputes with major Spanish companies or institutions, experts acknowledge. “The one-bite-at-the-apple approach of arbitration may also be off-putting to Spanish clients accustomed to a court system involving factual review at the appellate level, and thus in practice two bites at the apple,” suggests Hendel at Araoz & Rueda.

Arbitration institutions are however looking to react to users concerns. Madrid’s Arbitration Court (La Corte de Arbitraje de Madrid) and Barcelona’s Arbitration Tribunal (Tribunal Arbitral de Barcelona – TAB) have notably both made efforts to make their institutions more transparent, open up their lists of arbitrators, and get closer to business.

“Arbitration Courts need to explain clearly the value of their costs and highlight the importance of achieving a real termination to a conflict. With the current reduction of resources within the justice system, the deadlock of cases in the traditional Courts will increase so it is key to have alternative methods to resolve disputes,” says TAB President Jesús María de Alfonso.

In Portugal anecdotal evidence suggests a steady upturn in domestic disputes. “We feel that more businesses are

taking advantage of the flexibility of commercial arbitration to tailor dispute-specific processes that reflect the business priorities of the parties. Commercial arbitration can emulate court litigation if that is what the parties want, or if their arbitrator or their counsel is not familiar with the process,” says Pedro Metello de Nápoles, partner at PLMJ.

Spanish companies are particularly reluctant to resort to mediation and other alternative dispute resolution (ADR) methods because of cultural reasons, say lawyers. “Businessmen tend to believe that they resort to litigation when they have exhausted all possible solutions in negotiation, and it would probably be a waste of time to go through a new negotiation with the help of a mediator,” says Carlos de los Santos Lago, Head of Disputes at Garrigues.

The downturn may yet however help change this sentiment, suggest some. Spain’s Ministry of Justice is drafting a Mediation Act (implementing EU Directive 2008/52/EC, of 21 May 2008) that will for the first time legitimise the process and make agreements enforceable.

“International clients remain much readier than domestic clients to accept and explore alternative resolution methods such as arbitration and mediation, although some domestic clients are gradually accepting them, mainly in technical sectors,” says Fernando González, partner with Squire Sanders Hammonds in Madrid.

Conversely lawyers in Lisbon say that mediation is already more developed because of the inefficiencies of the court system. “There is a general trend towards adopting arbitration and mediation clauses; the novelty now is to resort to mediation as a dispute resolution method, following its success in common law systems – itself prompted by the increasing costs and ‘judicialisation’ of arbitration,” says José Maria Corrêa de Sampaio, partner with Abreu Advogados in Lisbon.

#### Client pressure

Opinions differ however whether Spain and Portugal have yet seen a peak in the volume

## Arbitration on the global stage

Lawyers agree that more effort needs to be made to promote arbitration not only among Iberian businesses, but also internationally. At the forefront of current efforts to promote Spain as a seat for international disputes, and the capabilities of Spanish law firms, is the Club Español del Arbitraje, which has sought to focus practitioner sentiment and promote awareness of Spain’s UNCITRAL-modelled 2003 Arbitration Law at home and abroad.

Having now achieved some of its domestic goals, in raising awareness of arbitration among domestic businesses, the CEA has now to be more ambitious, say some members.

But in promoting Spanish arbitration it must look to complement not compete with institutions such as the AAA, ICC or LCIA, or the major arbitration bodies now emerging across Latin America, says its President, and Head of Arbitration at Cuatrecasas Gonçalves Pereira, Antonio

Hierro. “Our goal is to promote Spanish-language arbitration, and Spain as a seat for international arbitration. The CEA is a forum and a think-tank for practitioners. We have no ambition to be an institution for resolving disputes.”

Much remains to be done before Madrid or even Barcelona are as well-known or as frequently-used seats as London, Paris or Geneva, but the combined efforts of the CEA has already helped raise the visibility of Spain internationally.

The challenge going forward however is how best to co-ordinate these international efforts and to work alongside other arbitration institutions, and arbitration communities, say some. The CEA has now established 15 international chapters – first in Lisbon, but subsequently across Latin America, in the US and now elsewhere in Europe.

“The establishment of international chapters is a step in the right direction. You cannot attract international disputes without becoming a truly international institution, you have to involve other relevant members from the international community,” says Álvaro Lobato, disputes

partner with DLA Piper in Madrid.

The international chapters have already helped contribute to the creation of an Iberian-American arbitration community, suggest some, drawing in lawyers well beyond Spain.

“This community will not in itself constitute competition to bodies such as the AAA or the ICC, provided that these are willing to abide with the ambitions and concerns of Iberian-American parties. Notably among these is ensuring that the arbitrators they appoint actually understand the language or are familiar with the law systems involved,” says Pedro Metello de Nápoles a partner with PLMJ in Lisbon.

For others, the CEA is already showing results. “We can see that the promotion of arbitration is achieving its objective of increasing the amount of international arbitration in Iberia, not by transferring disputes from other arbitration centres such as the ICC, but by increasing the number of arbitrations worldwide,” says Tito Arantes Fontes, partner with Uría Menéndez also in Lisbon.





of disputes emanating from the crisis. Some suggest that companies are still waiting for signs of a recovery before bringing actions; either because they cannot afford it or because enforcement will provoke the insolvency of the debtor.

In difficult economic times more companies may have more disputes but their ability to fund them is under greater pressure too, say lawyers. "This has produced a demand to find more creative solutions in the design of strategies aimed at facilitating parties' settlement discussions, without undermining their legal positions," says de los Santos Lago at Garrigues.

Such a scenario may yet therefore help push companies domestically towards more informal ADR methods, suggest others. Claims may be launched but relatively few General Counsel want to spend their legal budgets pursuing or defending them.

"The cost of proceedings is frequently no longer sustainable for some companies, which prefer settling on bad conditions than going on with fairly good cases. Arbitrators too are sometimes reluctant to order claimants to pay a deposit, meaning that we are seeing some file huge ill-founded claims in order to compel their competitor to allocate substantial financial resources to the proceedings," says Jean-Marie Vulliemin, who leads the Madrid office of Swiss firm Froriep Renggli.

Some lawyers are therefore looking for new ways not only to progress actions, but also to fund them. Some markets have already seen the arrival of investment funds, that will support litigation and arbitration claims, and buy enforcement awards.

Law firms may therefore be seeing an increase in the volume of work they are experiencing but economic pressures are changing the way clients want to retain their services. Litigation work may have increased substantially but its profitability has not. "Clients are seeking to negotiate closed budgets, while cost-cutting and doubts surrounding the solvency of the debtor make it more frequent for

“Conflict prevention is expected to be the buzz word over dispute resolution in the coming months.”

Nuno Libano, Head of Litigation, PLMJ



the parties to reach settlement agreements in terms that, in other moments, would not have been acceptable for the creditor," says Mercedes Fernandez at Jones Day.

Bankruptcy disputes may have been the major driver of disputes practices in recent years but the spread of "infection" across the wider economy has meant firms are now facing a broader range of disputes. "Even if firms have a naturally strong bankruptcy practice, litigation and arbitration practices are traditionally solid probably more than any other law service. There is now significant demand in sectors such as energy and telecoms, but also in areas such as antitrust and competition law where we have seen a notable increase of matters," says Raul da Veiga, partner at Gold Abogados in Madrid.

The wider acceptance of commercial arbitration and the rise in the number of experienced arbitrators and arbitration counsel represents an opportunity for Iberian businesses to more effectively manage their dispute budgets, and for Iberia's law firms to move further out into the international arena, say lawyers.

"Clients are cost conscious, with an eye on reducing costs and improved cost management when it comes to conflict management and resolution. Conflict prevention is expected to be the buzz word over dispute resolution in the coming months. However arbitration remains king in the international arena, all other dispute resolution methods are marginal," concludes Libano Monteiro at PLMJ.

## A question of enforcement

Alongside an upturn in disputes, the downturn has also brought an increase in the challenges parties face in enforcing awards, say lawyers.

"In many jurisdictions, Spain included, the instruments provided to achieve enforcement are clearly insufficient, and the result is the frustration of the client. Many debtors file for bankruptcy as soon as enforcement comes close," says Francisco Málaga, Head of Litigation at Linklaters in Madrid.

The enforcement of judgments in Spain also faces procedural barriers. The Judicial Office and, in particular, the Notification Service and the Investigation of Property Service are slow in processing awards, says Jesús Carrasco, partner with Squire Sanders & Hammonds. "In Madrid the Notification Service is so slow it causes the suspension of proceedings."

Most cases of opposition to enforcement in domestic litigation involve underlying insolvency situations, but the

strategy to be employed cannot be left to the very end of a case, and especially for international disputes, say others.

"The challenge for the enforcement of international awards remains convincing parties to consider the issue at the initial project phase – before even making an investment or drafting a contract," says Álvaro Lobato, a disputes partner with DLA Piper in Madrid.

The issue is particularly acute in emerging markets, agree others. "The enforcement of international awards in countries with a fragile court system always presents problems; some such as Angola still haven't signed the New York Convention on Enforcement of International Awards, which clients must be aware of when preparing and structuring investments," says José María Corrêa de Sampaio, partner with Abreu Advogados in Lisbon.

Angola does have a bilateral agreement with Portugal while similarities between Portuguese and Angolan legislation may help overcome some problems, say others. "Enforcement proceedings in Angola, like Mozambique, do not happen very often

but when they do it usually takes a long time, so alongside court proceedings alternative solutions are usually looked for," says Sandra Ferreira Dias, of Franco Caiado Guerreiro & Associados.

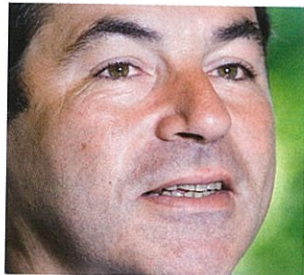
Mozambique now has a Centre for Commercial Arbitration, Conciliation and Mediation (CACM) but developing countries can be suspicious of enforcing foreign awards, says Sónia Teixeira da Mota, Co-Head of PLMJ's Africa Desk. "Angola is however relatively liberal in this respect compared with a number of other non-convention countries in Africa. The Government is aware that its non-convention status is not very well regarded."

But enforcement issues continue to arise elsewhere. "Much more attention has to be paid to those countries that have withdrawn themselves from the international legal landscape, such as Bolivia and Ecuador, which have withdrawn from ICSID and brought into question the ability to enforce awards adjudicated within the scope of international investments," says Manuel Barrocas, of Barrocas Advogados in Lisbon.



## Tariff changes energising claims against the Spanish State

Reductions in tariffs available to producers of solar photovoltaic energy are prompting many to consider legal action, say Miguel Riaño and Ignacio Díez-Picazo, partners with Herbert Smith



Miguel Riaño

The Spanish Government announced controversial plans last August contemplating a reduction in solar photovoltaic (PV) tariffs, previously among the most generous in Europe. This became a reality in November when a Royal Decree reduced the rates payable to new PV producers by up to 45 percent. A further Decree was announced just before the end of 2010 retroactively limiting the number of production hours that PV plants could qualify for the subsidies.

"There has understandably been a sense of shock among producers and sponsors of PV schemes as to the scale of the reductions and we have subsequently seen a lot of analysis on the impact, to both existing and planned future schemes," says Riaño, who leads Herbert Smith's Spanish energy practice.

A number of investors and investment funds have subsequently been organising themselves to ascertain what response, if any, they may have in light of the changes made, he says.

"Different options are clearly being explored including the potential for claims against the Spanish Government in the domestic Courts and through arbitration under the relevant investment treaties before international tribunals such as ICSID (International Centre for Settlement of Investment Disputes) in Washington DC."

The likelihood of the success of a claim has however to be considered very carefully, cautions Díez-Picazo, an international disputes partner in the firm's Madrid office. Despite strong headlines and the opinion of many industry commentators there may be no clear-cut cases.

"There is an evident desire among many investors to seek compensation. The underlying financials of many schemes have altered significantly as a result of the tariff reductions, even calling the viability of some into question. But there is no single solution. Different options have to be considered depending on operators' or investors' particular circumstances."

The general sentiment is that while

actions may yet be launched the relative chances of success depend not only on the strength of the claims made but also how any claim is initiated.

"There is a perception that the Spanish Government feels relatively comfortable with its position, and that at least in the domestic courts a successful action may prove challenging – in any event, there are a lot of technical and operational variables that have to be considered before an entity may subsequently be able to prove that the tariff changes have had a significantly adverse effect," says Riaño.

Parties may claim a breach of legitimate expectations, but factors including the specification, age and location of the plant will have an impact on any chances of success, they say, while there are also issues surrounding the jurisdiction of Arbitral Tribunals to hear any claims.

"Some parties may therefore find more options open to them in the international arena. The Kingdom of Spain is a party to a multilateral treaty under which a claim may be made. But reliance on such a mechanism may also depend on a party's own corporate structure, and significantly their own home country being a signatory to the relevant treaty," says Díez-Picazo.

Much thought will need therefore to go into the strategies employed to pursue a claim and in the relative merits of pursuing individual or collective actions. But in any event, any litigation or arbitration is likely to be challenging and drawn out not least because claims against the Kingdom of Spain may break new legal ground.

"There is no doubt that pursuing a claim either

domestically or internationally will involve a long battle and that certain parties will be in a stronger position than others.

To date however we have seen few investment arbitrations against Spain, and this is likely to bring added complexities and challenges," says Díez-Picazo.



Ignacio Díez-Picazo

Las reducciones en las "feed-in tariffs" (sistemas de prima regulada) están provocando que muchos productores de energía fotovoltaica se planteen emprender medidas legales contra el Gobierno español. Interponer una demanda supone numerosos retos legales para ambas partes, afirman Miguel Riaño e Ignacio Díez-Picazo, socios de Herbert Smith en Madrid.



## Finding ways around insolvency disputes

Companies have to be creative in finding new ways to manage creditors' demands if they are to avoid the initiation of insolvency proceedings in Portugal

For many businesses facing claims by creditors, the ability to find creative solutions can mean life or death for the company, says Luís Cortes Martins at Serra Lopes Cortes Martins & Associados.

"The general trend is an enormous increase in insolvencies driven by financial difficulties and the pursuit of creditors, with a good example being the real estate sector." Portuguese banks have to make provisions for losses incurred on loans in default, including mortgage-backed loans, and consequently many are now proving more willing to explore alternatives to filing insolvency proceedings, he says.

"We are seeing more negotiated settlements with banks preferring to find alternatives to entering into formal bankruptcy proceedings for companies with attractive assets. There are now more 'standstill' arrangements being agreed by lenders in order to give debtors more time to renegotiate their debts or restructure

their businesses."

Clients require both litigation and finance teams to work together to find viable solutions, which often requires the divestment of assets or the creation of new corporate structures, he says.

"The coming year will continue to be challenging but we are seeing different approaches being taken by the largest companies, those with good cash flows and credit ratings, and smaller and mid-tier companies with less room to manoeuvre."

The economic outlook may mean more disputes ahead but this may also open up new opportunities. "Credit difficulties and company insolvencies mean that we are seeing more assets change hands. Many businesses lack operating capital and with the banks more stringent in their lending criteria and more demanding against creditors in default, new market entrants can find unique opportunities to acquire very attractive assets."



Luís Cortes Martins

Para muchas empresas que se enfrentan a reclamaciones de sus acreedores, la capacidad de encontrar soluciones creativas puede ser la única manera de sobrevivir, dice Luís Cortes Martins, de Serra Lopes Cortes Martins & Associados en Lisboa.

## Disputing the complexities of bank mis-selling

With Spanish courts often favouring the plaintiff, defendant banks have been feeling the pressure over disputes relating to mis-selling

Araoz & Rueda is one of the few leading Spanish law firms that act against financial institutions in mis-selling claims. But unpicking the complexity of the issues involved in disputes has proved difficult, says Iñigo Rodríguez-Sastre, a litigation and insolvency partner at the firm.

"Before the financial collapse, Spanish banks were highly-respected and trusted institutions. This is now much less so due to the practices of some. Before 2008, some banks were selling products without giving all the correct information. People in the banks didn't even know what they were selling."

A lot of cases struggle with a lack of evidence. Unfortunately, many clients have not kept the correspondence that they had with the bank. "However, we are benefiting from a provision in Spanish law that puts the burden of evidence on to the banks to provide the documentation," says Rodríguez-Sastre.

In most cases the clients want to negotiate, but if a bank puts up a fight then the client will go to court. Conversely, an appearance in court is something the banks should "avoid", he believes.

"The courts are asking: 'Was he a professional investor? What has been the behaviour of the bank?' In most cases they have found that the clients were not professional investors and the products were not suitable for them."

Claimants have a four-year period in which to enter a claim and with most of the cases currently on Araoz & Rueda's books from products sold in 2007-08, many disputes have an imminent expiry date. What disputes will now begin to appear will depend on the outcome of the financial crisis, believes Rodríguez-Sastre.

"Previously we were seeing a lot of M&A disputes. But we are likely to see less of these. It is insolvency that will drive firms' litigation departments in the future."



Iñigo Rodríguez-Sastre

Los bancos están sintiendo una gran presión en los juicios por venta engañosa de productos financieros. La comparecencia en los juzgados es algo que se debería evitar, opina Iñigo Rodríguez-Sastre, de Araoz & Rueda.



## Opening up tax arbitration in Portugal – a pioneer regime

The Portuguese Tax Arbitration Act was recently published, after a draft primed by Gonalo Leite de Campos, tax partner at S rvulo & Associados



Gonalo Leite de Campos

La introducci n del arbitraje para asuntos fiscales en Portugal intenta ofrecer una manera m s eficiente de lidiar con el trabajo atrasado de los tribunales, explica Gonalo Leite de Campos, de S rvulo & Associados.

The Act is intended to offer taxpayers a faster and more effective means of asserting their rights and dealing with the backlog of tax assessment claims in the Courts, he says. "In effect, the statute sets out that an arbitration decision must be delivered within a maximum of six months from the date of the initial taxpayer request, although this may be extended for additional two month periods up to a maximum of one year."

The legislation takes into consideration the specificities of tax arbitration, determining that arbitrators must decide cases based on statutory law not equity, while the contentious issue of "non disposability" of taxes has also been settled. "The right to refer to arbitration is perceived as a prerogative of the taxpayer and not at the discretion of the Tax Authorities," says Gonalo Leite de Campos. Another important feature of the Act is that it allows taxpayers to present arbitration requests against non final pronouncements. "Upon the

commencement of proceedings, the Authorities will be suspended from stating a final tax pronouncement, if not issued before, or commencing enforcement proceedings. This avoids the payment of an illegal tax according to the solve et repete principle." However by filing an arbitration request, taxpayers automatically give up their right to a common administrative and judicial appeal against the final award, he notes, unless there are distinctly different petitions with different justifications.

Arbitration proceedings may however be conducted under the terms agreed by the arbitrators, who are in principle to be appointed from a given list. Alternatively, the taxpayer may opt for a system in which the parties may choose their own arbitrators, who in turn will appoint a third arbitrator (the president arbitrator), explains Gonalo Leite de Campos. "This process is yet to be tested, but such an option gives room for the appointment of international experts and even non-lawyer arbitrators."

## An independent approach to arbitration



Juan Fern ndez-Armesto

La expansi n internacional de las empresas espa olas se est  notando en el aumento de los arbitrajes transfronterizos; sin embargo, el recurso al arbitraje a nivel nacional sigue siendo muy inferior, dice Juan Fern ndez-Armesto, de Armesto & Asociados.

The rapid international expansion of Spanish businesses over the past decade is now reflected in the use by companies of arbitration in cross-border disputes, although domestic arbitration continues to play "catch-up" says Juan Fern ndez-Armesto, of Armesto & Asociados, one of Spain's most prominent arbitrators.

"The number of Spanish companies engaged in international arbitration is now concomitant to the country's economic weight – there has been a very significant engagement with the process as cross-border business has become more important to many of them."

Spanish companies now feature prominently among the parties in commercial cases before institutions such as the ICC but are also increasingly prominent in investor state disputes before bodies such as ICSID, he notes.

"This is a significant change but which is a truer reflection of both the scale of the business being done and the importance of places such as Latin America, as well as inevitably the challenges that may face companies internationally."

The situation outside of Spain contrasts with many companies' lack of enthusiasm for domestic arbitration, notes Fern ndez-Armesto. In part, because of a traditional lack of commerciality among some arbitration institutes as well as those who have led them.

"Change is happening structurally and among institutions' leadership, which seem to be finally listening to the concerns of users. More effort is clearly apparent in increasing the transparency of decision-making, institutions' efficiency and arbitrators' independence."

Significant in this regard is the "professionalisation" of the arbitrator role, says Fern ndez-Armesto. There has been a rise in the number of Spanish professionals with both a credible legal and commercial background.

"This may be more of an evolution than a revolution but there is a clear momentum in the right direction. There is a focus not only on being independent but on demonstrating this independence. It is an issue that goes to the heart of the significance of arbitration, at every level."



## Positioning Spain for new kinds of disputes

Spain may soon see the launch of the country's first class actions, say lawyers, while it continues to position itself as a venue for international Spanish-speaking disputes

There is an evident change in the nature of disputes which lawyers in Spain are experiencing as a result of the fall-out from the financial crisis. This is a process that is developing alongside the continuing efforts of the legal community to build on the country's perception as a venue for Spanish-speaking and Latin American arbitration, say Miguel Moscardó and Javier Díez-Hochleitner, partners at Madrid's Moscardó & Asociados.

"The volume of international arbitration work is increasing slowly but attracting more cases to Spain is not an easy or fast process," says Díez-Hochleitner, a former Dean and partner at Uría Menéndez.

He believes however that the stage is set for Spanish arbitrators to win work from Miami, the long-recognised dispute gateway for Latin America.

"The main seat for Spanish-speaking international arbitration used to be Miami but we think Spain, and Madrid in particular, has advantages: the culture, the courts, the familiarity of Spanish legal systems to those found across much of Latin America, and the facilities we have. International arbitration is growing – every year we have more cases."

Such a process will inevitably take time but evident successes can already be seen, says Moscardó. The ability and support of the legal community is undisputed, with the efforts of Spain's Club Español del Arbitraje (Spanish Arbitration Club) widely recognised, as well as the increasing international confidence in the willingness of Spanish judges to respect the arbitral system.

"But despite all of this, we still have to ensure that more companies include Spain as a venue or seat for an international arbitration in their contracts and that they then act on them when disputes arise," he says.

Moscardó & Asociados is one of many firms whose lawyers are determined to drive more international cases through Madrid and Barcelona. Created just over a year ago by Moscardó, a former head of litigation at Garrigues, the litigation and arbitration boutique is hoping to use its

experience to capitalise on medium and large multinational companies seeking a more personal service.

The firm specialises in disputes and advising on foreign investments: both foreign investments into Spain and Spanish investments abroad. In Moscardó and Díez-Hochleitner, the firm has a pair of experienced lawyers who have broken away from their large Spanish firms to offer a different, more personal service. "One of the advantages is that we can deal personally with every case and every client. We can also remain very competitive on price," says Díez-Hochleitner.

The firm does not accept cases that it does not feel "comfortable" taking on, they say, given its size and the relative abilities and experience of its lawyers – the emphasis is very much on ensuring they are able to offer a bespoke service to clients wherever their dispute.

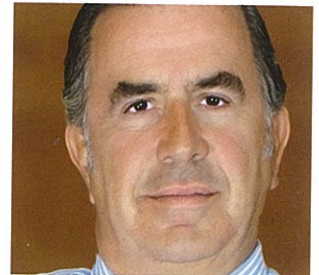
One potential area of practice growth they sense, for both litigators and arbitrators alike, and a potentially significant concern for businesses, is the likely emergence of class actions in Spain. "Despite there being provisions in Spanish law for claims from multiple claimants to be

drawn together, the courts have yet to see a major case but this looks likely to change," says Moscardó.

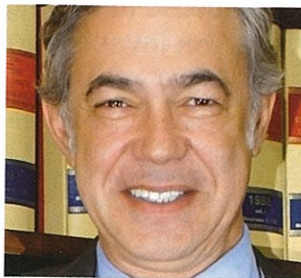
With the economic downturn provoking unrest from labour unions, trade associations and a rise in multiple claims against banks for mis-selling of complex financial products, class actions look set to emerge out of the crisis. The recent dispute by Spanish air traffic

controllers and the breadth of its impact, on passengers, airlines and other service providers, is an example of another type of event that might prompt the launch of class actions, he adds.

"We are absolutely sure these actions are close to being launched, and claims potentially involving thousands of people will likely have a good chance of success. Such scale, the volume of the damages incurred, and the significance of international disputes means that the profile of Spanish litigation and arbitration continues to rise."



Miguel Moscardó



Javier Díez-Hochleitner

Los abogados españoles han visto un cambio en la naturaleza de los litigios. Esto ha sucedido a la vez que la comunidad jurídica ha incrementado sus esfuerzos por consolidar la percepción del país como sede para los arbitrajes de habla hispana, opinan Miguel Moscardó y Javier Díez-Hochleitner de Moscardó y Asociados.



## Capitalising on local co-Counsel in Latin American arbitrations

The evolution of Latin American arbitration coupled with the increased volume of regional economic activity is prompting an increased confidence among local law firms



José Astigarraga

La evolución del arbitraje y el crecimiento de la economía en Latinoamérica generan una mayor confianza para los despachos locales en las disputas internacionales, según José Astigarraga de Astigarraga Davis en Miami.

Latin American law firms are increasingly acting alongside the more established players in international disputes, says José Astigarraga, partner at Miami-based arbitration firm Astigarraga Davis.

"There is significantly greater regional investment, bilateral investor treaties (BITs) have grown in importance, and now a number of Latin American law firms have built up the know-how to take on, and in some cases, lead international arbitrations."

The most prominent firms are no longer content or comfortable to merely hand over a client's major arbitration to another law firm, he says. The trend is acute in Brazil, where legal, linguistic and cultural barriers play a more obvious role, and where there remains a strong preference for domestic remedies, but there is evident growing confidence among arbitration practitioners throughout the region.

"We see many more firms now very interested in developing their expertise and ready to act in tandem with international

firms. From a clients' perspective the ability to draw on local know-how and market understanding is something to be embraced – the use of local co-counsel can present a very cost-effective alternative." Astigarraga Davis regularly acts with both.

Such a development is being encouraged by the region's Bars and arbitral institutions which are jostling for position to become more prominent as international arbitration centres, says Astigarraga. This trend coupled with an upturn in disputes emanating out of the financial crisis is likewise prompting an increased focus on clients' use of arbitration clauses.

"The jury is still out as to which, if any, of these will truly develop as a dominant venue and so for the time being centres such as Miami will inevitably remain significant. But we see an expanding tier of capable firms in the arbitration arena, and for certain types of disputes clients are more willing to choose a local alternative to the major international firms."

## Managing the information overload in regulatory investigations

Legal departments may need to draw on extra resources to manage the volume of data required in regulatory disputes and competition investigations



Roberto Barber

Los abogados son ya conscientes de la proactividad de la CNC y para afrontar sus procedimientos, de la gran cantidad de información necesaria, afirma Roberto Barber, director de ZyLAB Iberia.

Spain's law firms and in-house legal teams are only now awakening to the impact of an increasingly active Competition Commission – led by Joaquín Almunia – and the deluge of information needed to fight such cases, says Roberto Barber, director of ZyLAB Iberia, which provides discovery and information management services.

"There's a greater amount of information available to prosecutors than there was and, with deeper compliance and regulation requirements, there are greater risks," says Barber. "That mix isn't new, but the number of new cases has accelerated."

ZyLAB ensures companies are "litigation ready" by archiving their information. It also works with law firms on active cases, retrieving data from "mountains" of emails, documents and video and audio files.

But ZyLAB also helps in the event of "dawn raids" and data being confiscated. Computers, mobile phones, filing cabinets and diaries can all become evidence, leaving in-house legal teams in a state of panic as they try to prepare for litigation or an admission of guilt.

"When there is a need to act quickly, discovering information can be crucial to help produce a fast and accurate response," says Barber. "This is often what prompts a call to us."

The feedback from both in-house and private practice is clear: competition cases are on the increase. "Banks realise there are more risks, they are being watched more closely and many are involved in litigation. But also growing is the number of companies in other sectors being investigated in antitrust cases."

Spanish politician and lawyer Almunia succeeded Neelie Kroes as EC Competition Commissioner in February last year. If, as expected, Almunia continues Kroes' legacy of pursuing competition cases in the Commissioner's home nation, his appointment will mean an upsurge in Spanish competition activity.

"With the euro crisis, everybody is watching everybody. There will be much more transparency, less tolerance towards corruption and fraud, and investigations will be more aggressive," believes Barber.

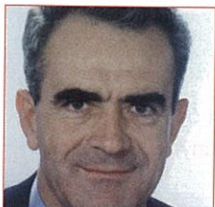
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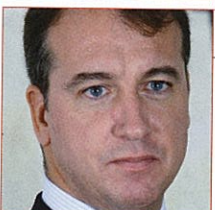
## GUIDE TO LEADING LAWYERS

**Álvaro Lobato**, DLA Piper

**Address:** Paseo de la Castellana, 35, 2º, 28046, Madrid  
**Tel:** +34 91 788 73 00 **Fax:** +34 91 319 19 40  
**Email:** [alvaro.lobato@dlapiper.com](mailto:alvaro.lobato@dlapiper.com) **Web:** [www.dlapiper.com](http://www.dlapiper.com)  
**Main practice areas:** Litigation, Bankruptcy and Insolvency

**Bernardo Cremades**, Cremades & Asociados

**Address:** Goya, 18, 2º, 28001, Madrid  
**Tel:** +34 91 423 72 00 **Fax:** +34 91 576 97 94  
**Email:** [bcremades-mad@bcremades.com](mailto:bcremades-mad@bcremades.com) **Web:** [www.bcremades.com](http://www.bcremades.com)  
**Main practice areas:** Litigation and Arbitration

**Borja de Obeso Pérez-Victoria**, Gómez-Acebo & Pombo

**Address:** Paseo de la Castellana, 216, 28046, Madrid  
**Tel:** +34 91 582 91 00 **Fax:** +34 91 582 91 14  
**Email:** [bdeobeso@Gomezacebo-pombo.com](mailto:bdeobeso@Gomezacebo-pombo.com) **Web:** [www.Gomezacebo-pombo.com](http://www.Gomezacebo-pombo.com)  
**Main practice areas:** Civil, Criminal & Contentious, Administrative Litigation

**Calvin A. Hamilton**, Hamilton Abogados

**Address:** Espalter, 15 - 1º Izq., 28014, Madrid  
**Tel:** +34 91 429 77 40 **Fax:** +34 91 420 39 06  
**Email:** [chamilton@hamiltonabogados.com](mailto:chamilton@hamiltonabogados.com) **Web:** [www.hamiltonabogados.com](http://www.hamiltonabogados.com)  
**Main practice areas:** Litigation & Arbitration, FDI in USA, Latin America, Africa and Caribbean

**Clifford J. Hendel**, Araoz & Rueda

**Address:** Paseo de la Castellana, 164, 28046, Madrid  
**Tel:** +34 91 319 02 33 **Fax:** +34 91 319 13 50  
**Email:** [hendel@araozyrueda.com](mailto:hendel@araozyrueda.com) **Web:** [www.araozyrueda.com](http://www.araozyrueda.com)  
**Main practice areas:** National & International Arbitration, Banking & Finance and M&A

**Fernando González**, Squire Sanders Hammonds

**Address:** Plaza Marqués de Salamanca, 3-4, 28006, Madrid  
**Tel:** +34 91 426 48 40 **Fax:** +34 91 435 98 15  
**Email:** [fernando.gonzalez@ssd.com](mailto:fernando.gonzalez@ssd.com) **Web:** [www.ssd.com](http://www.ssd.com)  
**Main practice areas:** Litigation & Arbitration and Intellectual Property

**Francisco Colaço**, Albuquerque & Associados, sociedade de Advogados

**Address:** Rua Victor Cordon, 21, 1200, Lisbon  
**Tel:** +351 21 343 15 70 **Fax:** +351 21 343 15 68  
**Email:** [francisco.colaco@albuquerque-associados.pt](mailto:francisco.colaco@albuquerque-associados.pt) **Web:** [www.albuquerque-associados.com](http://www.albuquerque-associados.com)  
**Main practice areas:** Litigation and Arbitration

**Francisco Málaga**, Linklaters

**Address:** Zurbarán, 28, 28010, Madrid  
**Tel:** +34 91 399 60 00 **Fax:** +34 91 399 60 01  
**Email:** [francisco.malaga@linklaters.com](mailto:francisco.malaga@linklaters.com) **Web:** [www.linklaters.com](http://www.linklaters.com)  
**Main practice areas:** Civil & Commercial, Litigation & Arbitration and Insolvency Law

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**Frederico Gonçalves Pereira**, Vieira de Almeida & Associados

**Address:** Av. Duarte Pacheco, 26, 1070-110, Lisbon  
**Tel:** +351 21 311 34 00  
**Email:** [fgp@vda.pt](mailto:fgp@vda.pt)  
**Main practice areas:** Litigation & Arbitration and Restructuring

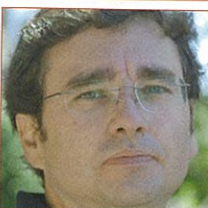
**Fax:** +351 21 311 34 06  
**Web:** [www.vda.pt](http://www.vda.pt)



**Gonzalo Serrano Fenosolla**, Roca Junyent

**Address:** Aribau, 198, 08036, Barcelona  
**Tel:** +34 93 241 92 00  
**Email:** [g.serrano@rocajunyent.com](mailto:g.serrano@rocajunyent.com)  
**Main practice areas:** Litigation and Arbitration

**Fax:** +34 93 414 50 30  
**Web:** [www.rocajunyent.com](http://www.rocajunyent.com)



**Gonzalo Stampa**, G. Stampa Abogados

**Address:** Pedro de Valdivia, 8, 28006, Madrid  
**Tel:** +34 627 48 77 24  
**Email:** [g.stampa@gstampa.com](mailto:g.stampa@gstampa.com)  
**Main practice areas:** Litigation & Arbitration, Corporate & Commercial and Mediation

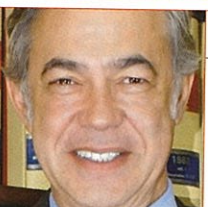
**Web:** [www.gstampa.com](http://www.gstampa.com)



**Ignacio Díez-Picazo**, Herbert Smith

**Address:** Paseo de la Castellana, 66, 28046, Madrid  
**Tel:** +34 91 423 40 00  
**Email:** [ignacio.diez-picazo@herbertsmith.com](mailto:ignacio.diez-picazo@herbertsmith.com)  
**Main practice areas:** Litigation and Arbitration

**Fax:** +34 91 423 40 01  
**Web:** [www.herbertsmith.com](http://www.herbertsmith.com)



**Javier Díez-Hochleitner**, Moscardó & Asociados

**Address:** Serrano, 6 - 1º 2, 28001, Madrid  
**Tel:** +34 91 781 50 89  
**Email:** [javier.diezh@moscardoabogados.com](mailto:javier.diezh@moscardoabogados.com)  
**Main practice areas:** International & Investment Arbitration and European Union Law

**Fax:** +34 91 575 32 29  
**Web:** [www.moscardoabogados.com](http://www.moscardoabogados.com)



**Jean-Marie Vulliemin**, Froriep Renggli

**Address:** 4 Rue Charles-Bonnet, CH-1211 Geneva 12, Switzerland  
**Tel:** +41 22 839 63 00  
**Email:** [jmvulliemin@froriep.ch](mailto:jmvulliemin@froriep.ch)  
**Main practice areas:** Arbitration

**Fax:** +41 22 347 71 59  
**Web:** [www.froriep.com](http://www.froriep.com)



**Jesús Carrasco**, Squire Sanders Hammonds

**Address:** Plaza Marques de Salamanca, 3-4, 28006, Madrid  
**Tel:** +34 91 426 48 40  
**Email:** [jesus.carrasco@ssd.com](mailto:jesus.carrasco@ssd.com)  
**Main practice areas:** Litigation & Arbitration and Intellectual Property

**Fax:** +34 91 435 98 15  
**Web:** [www.ssd.com](http://www.ssd.com)



**Jesús Remón**, Uría Menéndez

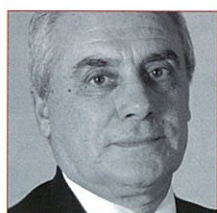
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**Tel:** +34 91 586 03 71  
**Email:** [jrp@Uria.com](mailto:jrp@Uria.com)  
**Main practice areas:** Litigation & Arbitration, Administrative Law, Constitutional Law and Commercial Law

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**José Alves Pereira, Alves Pereira & Teixeira de Sousa**

**Address:** Av. da Liberdade 38, 3º, 1250-145, Lisbon  
**Tel:** +351 21 370 01 90 **Fax:** +351 21 382 90 03  
**Email:** [jalpereira@alvespereira.com](mailto:jalpereira@alvespereira.com) **Web:** [www.alvespereira.com](http://www.alvespereira.com)  
**Main practice areas:** Litigation & Arbitration, Mediation, Corporate & Commercial, Labour & Employment, Aviation and Telecoms

**José Luis Huerta, Hogan Lovells International**

**Address:** Paseo de la Castellana, 51 - 6º, 28046, Madrid  
**Tel:** +34 91 348 82 66 **Fax:** +34 91 349 82 01  
**Email:** [jose Luis.huerta@hoganlovells.com](mailto:jose Luis.huerta@hoganlovells.com) **Web:** [www.hoganlovells.com](http://www.hoganlovells.com)  
**Main practice areas:** Litigation & Arbitration and Mediation

**José Maria Corrêa de Sampaio, Abreu Advogados**

**Address:** Av. das Forças Armadas, 125 - 12º, 1600-079 Lisbon  
**Tel:** +351 21 723 18 00 **Fax:** +351 21 723 18 99  
**Email:** [Jose.c.sampaio@abreuadvogados.com](mailto:Jose.c.sampaio@abreuadvogados.com) **Web:** [www.abreuadvogados.com](http://www.abreuadvogados.com)  
**Main practice areas:** Civil Litigation, Arbitration & Mediation, Commercial Litigation, Corporate, M&A, Banking & Finance Law and Real Estate Law

**José Miguel Júdice, PLMJ – Sociedade de Advogados**

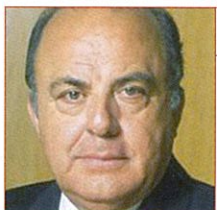
**Address:** Av. da Liberdade 224, 1250-148, Lisbon  
**Tel:** + 351 21 319 73 51 **Fax:** + 351 21 319 74 00  
**Email:** [josemiguel.judice@plmj.pt](mailto:josemiguel.judice@plmj.pt) **Web:** [www.plmj.com](http://www.plmj.com)  
**Main practice areas:** Arbitration

**Josep Maria Julià, DLA Piper**

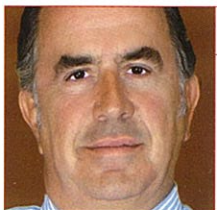
**Address:** Paseo de la Castellana, 35, 2º, 28046, Madrid  
**Tel:** +34 91 319 12 12 **Fax:** +34 91 319 19 40  
**Email:** [josepm.julia@dlapiper.com](mailto:josepm.julia@dlapiper.com) **Web:** [www.dlapiper.com](http://www.dlapiper.com)  
**Main practice areas:** Litigation & Arbitration

**Luís Cortes Martins, Serra Lopes, Cortes Martins & Associados**

**Address:** Rua General Firmino Miguel Nº 3 Torre 2 - 10º B, 1600-100, Lisbon  
**Tel:** +351 21 723 40 00 **Fax:** +351 21 723 40 29  
**Email:** [lcm@slcm.pt](mailto:lcm@slcm.pt) **Web:** [www.slcm.pt](http://www.slcm.pt)  
**Main practice areas:** Litigation & Arbitration, Corporate and M&A

**Manuel P. Barrocas, Barrocas Advogados**

**Address:** Amoreiras, Torre 2, 15th floor, 1070-274, Lisbon  
**Tel:** +351 21 384 33 00 **Fax:** +351 21 387 02 65  
**Email:** [info@barrocas.pt](mailto:info@barrocas.pt) **Web:** [www.barrocas.pt](http://www.barrocas.pt)  
**Main practice areas:** Litigation & Arbitration, Corporate & Commercial and M&A

**Miguel Moscardó Morales-Vara de Rey, Moscardó & Asociados**

**Address:** Serrano, 6 - 1º 2, 28001, Madrid  
**Tel:** +34 91 781 50 89 **Fax:** +34 91 575 32 29  
**Email:** [miguel.moscardo@moscardoabogados.com](mailto:miguel.moscardo@moscardoabogados.com) **Web:** [www.moscardoabogados.com](http://www.moscardoabogados.com)  
**Main practice areas:** Litigation and Arbitration

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**Miguel Virgós, Uría Menéndez**

**Address:** Plaza Rodrigo Uría, Príncipe de Vergara, 187, 28002, Madrid  
**Tel:** +34 91 587 08 31 **Fax:** +34 91 586 03 96  
**Email:** [mvi@Uria.com](mailto:mvi@Uria.com) **Web:** [www.Uria.com](http://www.Uria.com)  
**Main practice areas:** Litigation and International Arbitration



**Nuno Libano Monteiro, PLMJ – Sociedade de Advogados**

**Address:** Av. da Liberdade 224, 1250-148, Lisbon  
**Tel:** +351 21 319 75 21 **Fax:** +351 21 319 73 00  
**Email:** [nuno.libanomonteiro@plmj.pt](mailto:nuno.libanomonteiro@plmj.pt) **Web:** [www.plmj.com](http://www.plmj.com)  
**Main practice areas:** Litigation and Arbitration



**Paulo Farinha Alves, PLMJ – Sociedade de Advogados**

**Address:** Av. da Liberdade 224, 1250-148, Lisbon  
**Tel:** +351 21 319 75 30 **Fax:** +351 21 319 73 00  
**Email:** [paulo.farinhaalves@plmj.pt](mailto:paulo.farinhaalves@plmj.pt) **Web:** [www.plmj.com](http://www.plmj.com)  
**Main practice areas:** Litigation and Arbitration



**Pedro Metello de Nápoles, PLMJ – Sociedade de Advogados**

**Address:** Av. da Liberdade 224, 1250-148, Lisbon  
**Tel:** +351 21 319 73 14 **Fax:** +351 21 319 73 00  
**Email:** [pedro.metellodenapoles@plmj.pt](mailto:pedro.metellodenapoles@plmj.pt) **Web:** [www.plmj.com](http://www.plmj.com)  
**Main practice areas:** Litigation and Arbitration



**Raúl Da Veiga, Gómez, Olmo & Da Veiga (Gold Abogados)**

**Address:** Almagro, 31, 28010, Madrid  
**Tel:** +34 91 702 18 20 **Fax:** +34 91 391 53 21  
**Email:** [rdaveiga@goldabogados.com](mailto:rdaveiga@goldabogados.com) **Web:** [www.goldabogados.com](http://www.goldabogados.com)  
**Main practice areas:** Arbitration, Bankruptcy and Litigation



**Ricardo Guimarães, Sérvulo & Associados**

**Address:** Rua Garrett, 64, 1200-204, Lisbon  
**Tel:** +351 21 093 30 00 **Fax:** +351 21 093 30 01  
**Email:** [rg@Servulo.com](mailto:rg@Servulo.com) **Web:** [www.Servulo.com](http://www.Servulo.com)  
**Main practice areas:** Litigation & Arbitration, Public Law, Regulatory and Public Procurement



**Sandra Ferreira Dias, Franco Caiado Guerreiro & Associados**

**Address:** Rua Castilho n.º 39, 15º, 1250-068, Lisbon  
**Tel:** +351 21 371 70 00 **Fax:** +351 21 371 70 01  
**Email:** [sdias@fcguerreiro.com](mailto:sdias@fcguerreiro.com) **Web:** [www.fcguerreiro.com](http://www.fcguerreiro.com)  
**Main practice areas:** Dispute Resolution, Bankruptcy & Insolvency and Litigation (Civil, Commercial and Corporate Crime)



**Tito Arantes Fontes, Uría Menéndez - Proença de Carvalho**

**Address:** Edifício Rodrigo Uría, Rua Duque de Palmela, 23, 1250-097, Lisbon  
**Tel:** +351 21 030 86 84 **Fax:** +351 21 030 86 04  
**Email:** [tft@Uria.com](mailto:tft@Uria.com) **Web:** [www.Uria.com](http://www.Uria.com)  
**Main practice areas:** Litigation (Civil, Commercial and Corporate Crime) & Arbitration, Restructuring and Insolvency

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