Cooling things down

There are signs that attitudes to ADR are changing with more clients adopting such methods to avoid heated courtroom battles

While law firms report some growth litigation, the increase in arbitration has been much more dramatic. Traditionally, Iberian clients have taken a litigious approach to commercial disputes, but there is a feeling that a "cultural shift" is taking place as clients awareness of the benefits of various types of alternative dispute resolution (ADR) grows. However, improving client awareness of ADR remains one of the biggest challenges facing law firms.

Alfonso Iglesia, partner at Cuatrecasas, Gonçalves Pereira, says that, while there has been moderate growth in litigation and domestic arbitration, there has been an increase of international commercial arbitration cases and an "explosion" in investment arbitration, much of it relating to renewable energy. Meanwhile, Uría Menéndez partner Álvaro López de Argumedo says there has been an increase in financial litigation as investors become "more aware of their rights". According to Squire Patton Boggs partner Fernando González, there has been a tremendous increase in criminal litigation with "corruption affecting more corporations" as well as a lot of insolvency-related litigation. Iglesia adds that there is a tendency to criminalise shareholder conflicts.

Araoz & Rueda partner Cliff Hendel says he has seen, as both counsel and arbitrator, a significant number of disputes as a result of the "fall-out from the financial crisis". He adds: "There are a lot of shareholder and joint venture-related disputes and M&A disputes of all types, especially involving price adjustments and claims for breach of representation and warranty. In the boom years, when deals went sour, things were sometimes not bad at all for either party. When deals go sour in today´s environment, things are really bad, sometimes even for both parties."

Cultural change

On the issue of the use of arbitration, Freshfields Bruckhaus Deringer partner Vicente Sierra says a process of "cultural change" is taking place as arbitration is more widely accepted by clients in Spain. He adds that progress is being made and there are now more arbitration clauses in contracts. Meanwhile, Sierra says litigation is also on the increase: "We are seeing more and more since the economic downturn – there is a lot of insolvency litigation and shareholder disputes."

Pérez-Lorca partner Guillermina Ester says insolvency-related cases are starting to decrease although there are still many insolvency proceedings ongoing as well as many cases relating to restructuring and refinancing.

Meanwhile, López de Argumedo says there are more instances of clients in the hospitality sector seeking a reduction of rents in lease agreements, and highlights the recent judgment of the Supreme Court of 15 October, 2014 in relation to this. One partner says it will be difficult for businesses in the hotel sector to review rents because the crisis has passed, but he says that insolvency and restructuring-related matters create a lot of litigious work. González says that there needs to be amendments to the legal cost of mediation, so that it will be more "broadly used" in Spain.

Gómez-Acebo & Pombo partner Javier Izquierdo says that he has not seen a Spanish client ask for mediation yet, but mediation is something to be considered in the future. He adds that banking litigation will continue and that litigation lawyers will become even more involved in refinancing matters. Iglesia says that methods of alternative dispute resolution have been created "bottom up" by clients in the "common law countries". He adds: "It´s a less expensive way of resolving disputes, it has clear advantages and companies need to understand that this can be useful. If Spanish companies are exposed to these methods, it is likely that they will be keener to use them."

Rodríguez says that clients are concerned about confidentiality in that they are worried the opposing party may use information they have acquired if the matter is not resolved at the mediation. According to López de Argumedo, large international corporations tend to welcome mediation. He adds that while mediation is more efficient and cheaper, Spanish culture is "very adversarial". Linklaters partner Francisco Málaga says the issue with some clients is that, when their lawyer suggests going to mediation, they interpret it as the lawyer thinking they would lose the case in court. "I believe parties should be compelled to go to one session of mediation," he adds.

> "When deals go sour in today´s environment, things are really bad, sometimes even for both parties."
> Cliff Hendel
> Araoz & Rueda

Hendel argues that the most effective changes [in attitudes to mediation] come from society. "Legislation is not the answer, the most effective changes are bottom up, not top-down. In the US, institutions like CPR [the International Institute for Conflict Prevention and Resolution] have

successfully encouraged hundreds of companies to adopt a policy statement saying they will consider alternative dispute resolution [ADR]. Hendel adds that the simple, cost-free statement (the so-called 'CPR Pledge') has proven very effective in overcoming the "typical reluctance of an executive or in-house counsel to suggest an attempt at mediation, for fear that the suggestion might be considered an acknowledgement of weakness".

Lawyers say that the move to more inexpensive methods of resolving disputes is not bad news for law firms in terms of potentially declining revenues. As one partner says: "What's good for my client is good for me," while another remarks that "if you solve cases quickly, you solve more cases". Lawyers remark that, in the UK, there are extremely specialised, industry-focused litigators but, in contrast, according to Málaga, "in Spain, litigators are considered specialists in all fields". González adds that pharmaceutical litigation is very specialised and that litigators in this field need "certain skills not everyone can have". According to Ester, clients need their lawyers to understand their business and how it works. She adds: "Clients appreciate that their lawyers have expertise in that area of business and experience in handling similar cases."

Hendel agrees that international clients will increasingly look for specialist litigators, but adds that clients expect less specialisation from lawyers in Spain where clients tend to "greatly appreciate general expertise".

No major litigation in 2015

López de Argumedo says he expects revenue from litigation to plateau in 2015 as "big litigation will not be a feature of the coming year". Ester adds that pure commercial litigation is not yet increasing: "You need deals to have an issue and there haven't been many deals in the past, though this year there has been an inflection and the situation has changed." Meanwhile, López de Argumedo says that while dispute resolution teams currently have a "great burden" of financial-related litigation, this load will not increase as the volume of this type of litigation has now peaked.

Iglesia says that in the area of litigation and arbitration, there is an opportunity to grow abroad. López de Argumedo says that his firm, Uría Menéndez, is expanding abroad as demonstrated by its recent formal link-up with law firms Philippi and Prietocarrizosa, located in Chile and Colombia respectively, to create Phillippi, Prieto, Carrizosa & Uría.

González says there has been a growth in "commercial strategy-

Spain: What are the major challenges law firms face in relation to litigation and ADR?

"Continuing to provide excellent services while fees are decreasing due to strong competition, and some law firms dropping prices to gain work." **Íñigo Villoria, partner, Clifford Chance**

"In some cases, the international client may have no legal structure in Spain and may need to be managed very carefully. We have seen a necessity to do more work in terms of explaining the mechanisms of the legal system in Spain, as well as the legal work itself." **Mercedes Fernández, partner, Jones Day**

"Reconciling the intensive work required in meeting clients' expectations with cost optimisation." **Eduardo Soler-Tappa, partner, Herbert Smith Freehills**

"The main challenge would be to take advantage of the big opportunities that this complex area is offering – this can only be done by the creation and consolidation of consistent and highly experienced teams." **Alfredo Guerrero, partner, King & Wood Mallesons**

"In the arbitration and mediation sector, the issue is always to make clients aware of the advantages of arbitration for certain cases – it is our impression that Spanish clients are not very familiar with these formulas and it is not easy to persuade them to include arbitration or a mediation clause in a contract." **Alejandro Touriño, partner, Ecija**

"The biggest challenge is to persuade customers the advantages of ADR and achieve a professional reputation as arbitrators." **Patricia Gualde, partner, Broseta**

"Coping with the flow of new legislation and continued reforms, as well as delays caused by the workload of many courts and tribunals which frustrates all professionals in litigation." **John Gustafson, managing partner, Rivero & Gustafson Abogados**

"It's important to analyse, together with the client, the strategy to be followed and the steps to be taken – sometimes you should avoid court proceedings trying to close an agreement, other times you should recommend initiating court actions." **Pablo Albert Albert, legal director, BDO Abogados**

"Restrictions on budgets for any single proceeding, which are also largely linked to success fees." **Joan Vidal de Llobatera, partner, Jausas**

"Uncertainty regarding judicial resolutions – we have to take into account that those depend on First Instance Courts, which are pretty numerous – as First Instance Courts are rarely coordinated, their resolutions are highly unpredictable." **Santiago Gastón de Iriarte, president, AC&G Asesores Legales**

"Clients have become more assertive in their fee discussions – furthermore, firms must now align their economic interests with their clients, and alternative fee arrangements seem to be the preferred strategy." **Fernando Marín Riaño, partner, Mavens**

"Overcoming the client's reluctance to litigate due to increasing costs, which has given rise to a fee that needs to be paid in order to be able to exercise their fundamental right to things such as judicial protection." **Ignacio Benejam, partner, Rousaud Costas Duran**

"Being really able to meet clients' demands for sophistication, dedication, strategy, creativity, thorough legal counsels, and senior lawyers who roll up their sleeves." **Jesús Almoguera, partner, J Almoguera y Asociados**

"For big international firms, how to manage together the function of arbitrator and of counsel (conflict of interests) and, for national firms, how to be visible in an arbitration world where some leading firms are perceived as the most trustful because of their arbitral knowledge." **Jean-Marie Vulliemin, partner, Froriep**

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related" litigation. "Unfair competition matters will return," he adds. Allen & Overy partner Antonio Vázquez-Guillén says there has been a reduction in banking-related litigation, but that there are opportunities with new investment funds in Spain. Málaga says it is a "small club" of lawyers and firms that compete for major litigation work in Spain: "There´s always a big litigation cake, and all the firms have different perspectives on it." Rodríguez says that litigation is "very segmented" and that great lawyers are the ones that are very specialized.

González argues that banks are reducing the fees they pay litigators, while auditors have huge teams, which gives them an unfair advantage: "Auditors shouldn´t be allowed to compete in our area." According to López de Argumedo, there is a big opportunity for law firms in Latin America, particularly in relation to international arbitration. However, he adds that the challenge for firms is to become as efficient as possible.

Meanwhile, Hendel says the challenge for Araoz & Rueda is whether the firm can "leverage our boutique firm as we are competing with a lot of other firms". Hendel says the issue for Araoz & Rueda, as a small boutique, is whether the firm can continue to compete successfully with larger, more multidisciplinary firms with more specialised practitioners. "We have to make the most of every opportunity and treat every client, every dispute, and every transaction as if it is our last." Izquierdo says there are lots of opportunities presented by new market players, and that the challenge for law firms is to be as efficient as possible.

Vázquez-Guillén says that distressed debt transactions and investment treaty arbitrations are two growth areas, though banking litigation is beginning to slow down. Meanwhile, the commoditisation of some types of litigation work, as well as new players in the market are contributing to pressure on fees, he adds. International trade with the Middle East and Asia – in addition to international arbitration – will offer opportunities for law firms, according to González. However, delays in court proceedings present a significant challenge: "The court office is very slow," he adds. Rodríguez says there will be more restructuring-related matters, though competition is increasing, especially from boutique firms and the big auditors, and this means fees are a big challenge. "The link between client and their legal service provides is not always very strong," he adds.

Knowledge management and the use of technology are two key issues that law firms have to address, according to Iglesia. He adds that hiring and keeping the best talent, improving lawyers´ legal and non-legal skills and growing in the international arena are other big challenges. Málaga says getting clients from the other departments within Linklaters is a key priority, while differentiating the practice from competitors is another major challenge. Ester says: "Law firms need to come up with creative solutions and be part

> "Some clients assume unnecessary risk by choosing arbitration counsel based on offers that are aggressive on pricing."
> Vicente Sierra
> Freshfields Bruckhaus Deringer

How are the demands of clients in Portugal changing in relation to litigation & ADR?

"The most important concerns relate to the high judicial costs that parties must pay in a judicial proceeding. Furthermore, several courts remain slow and ill-prepared to respond to parties´ needs and demands." **Gonçalo Malheiro, partner, pbbr**

"In terms of cost control, clients are demanding closed budgets as they try to avoid allocating substantial financial resources in to judicial or ADR proceedings." **Francisco Colaço, partner, Albuquerque & Associados**

"Clients increasingly wish to avoid judicial proceedings and find other ways of solving their disputes – they demand viable alternatives that are faster, less costly and equally, or more, efficient." **Henrique Salinas, partner, CCA Ontier**

"They want their issues solved, meaning settled or decided, faster – if it is litigation in the public courts then they want to be fully informed and to have better understanding of the proceedings, if it is arbitration then speed is often an issue." **João Caiado Guerreiro, partner, Caiado Guerreiro & Associados**

"The rules have changed – I´ve seen a number of state contracts proposing ADR clauses for conflict resolution and this is a major departure from what we had in the past." **Paulo de Moura Marques, founding partner, AAMM**

"Clients´ requests have become increasingly more thorough and their concerns about cases have grown considerably. This results in more frequent requests for updates on developments and for clarification on the different stages of cases." **Rui Tabarra e Castro, associate, F. Castelo Branco & Associados**

"We must try and raise awareness among clients of the benefits of arbitration, in particular in relation to the expertise of arbitrators, the confidential nature of arbitration versus public disclosure of what is at stake, as well as trust and confidence in the arbitration decisions." **João Nuno Azevedo Neves, partner, ABBC**

"Clients have been demanding arbitration more often, perhaps influenced by the new arbitration law which came into force in 2012 – they are also more involved with the technical issues of the dispute, demanding lawyers able to keep up them." **Pedro de Almeida Cabral, senior associate, Macedo Vitorino & Associados**

of negotiations rather than just proceedings."

Aggressive pricing

Sierra says clients are becoming more pushy in terms of fees – in the last two years, he says there is a "clear tendency to ask for lower fees and lower rates". Sierra adds: "Usually clients who provide a greater volume of work get a higher discount. However, we see in the market that some clients assume unnecessary risk by choosing their arbitration counsel for a specific case largely based on offers that are exceptionally aggressive on pricing."

Baker & McKenzie partner José María Alonso says clients are more price-sensitive, demanding "higher value and more predictable pricing structures". He adds: "Consequently, client requirements demand pricing to be based not so much on hourly rates as on fixed or capped fees – additionally, clients now demand a closer relationship between the outcome of the case and the fees, with an increased use of success fees."

Ramón Fernández-Aceytuno, partner at Ramón y Cajal, says a major challenge facing law firms is "making their attorneys understand which factors make ADR appropriate and encouraging them to educate their clients and also assist them in choosing the most appropriate process".

Pedro Rodríguez Rodero, managing partner at Ontier, argues clients will need to change their culture to adopt ADR: "Litigation is the way to solve conflicts in Spain." Meanwhile, Cristina Coto, partner at CMS Albiñana & Suárez de Lezo, says when clients have to make a decision about investments, one of the first aspects they examine is the "state of justice". She adds: "They want to solve any litigation they might get involved in as fast and as secure a way as possible, with the clearest legislation – thus, they are demanding justice as a competitive factor.

Encourage mediation

Olleros Abogados partner Iñigo Rodríguez-Sastre says, with regard to new opportunities, the firm is focusing its efforts on corporate compliance-related matters. He adds: "In addition, we have invested substantial resources in intellectual property, litigation and media disputes as we think audiovisual cases will increase in the near future." Meanwhile, Santiago Martínez Lage, managing partner of Martínez Lage, Allendesalazar & Brokelmann, says: "I honestly believe that mediation is something we should encourage between everyone, clients and lawyers, for the benefit of everyone, including clients and lawyers." Pablo Calvo-Sotelo Ibáñez-Martin, partner at Roca Junyent, argues that increasing the use of mediation will involve spreading awareness, not only among clients, but also among members of the legal profession, that mediation is "an increasingly credible alternative to going to court". With regard to arbitration, Luis García del Río, partner at García Del Río, Larrañaga & Jimenez Bonilla Abogados, says clients are demanding a speedy procedure for "seeking provisional measures, based on an emergency arbitrator".

> "I honestly believe that mediation is something we should encourage between everyone, clients and lawyers, for the benefit of everyone, including clients and lawyers."
> Santiago Martínez Lage, Martínez Lage, Allendesalazar & Brokelmann

Gallego, Martos y Quadra-Salcedo Abogados partner Andrés de la Quadra-Salcedo says the "reactivation of international commerce is increasing litigation with an international nature and this will force medium and small law firms to look for best friends in other jurisdictions". He adds that, in the meantime, the expected increase in foreign investment will offer local firms more opportunities to "support foreign law firms and foreign clients in Spain". Julio Romero, director at Benow Partners, says the best method to resolve conflict is negotiation between the parties. He adds: "In our law firm we think that, if is possible, a negotiated solution is always the best thing for the customer. However, when such a solution is not feasible, arbitration is the best system of dispute resolution."

Portugal: BES litigation

Frederico Gonçalves Pereira, partner at Vieira de Almeida & Associados says the crisis involving Banco Espírito Santo (BES) and Grupo Espírito Santo (GES) has given rise to a considerable amount of litigation. He adds: "In fact, the crisis brought very different and technically complex disputes to the Portuguese market." PLMJ partner José Miguel Júdice says, in addition to BES-related litigation, there have also been a lot of insolvency and restructuring-related disputes. Meanwhile, he adds that alternative dispute resolution work will generate an increase in revenue in the coming year, particularly international arbitration and possibly also mediation.

Francisco Cortez, partner at Morais Leitão, Galvão Teles, Soares da Silva & Associados, says that one of the major recent trends has been a move "away from the billable hour", with lawyers assuming more risk, especially in the case of large firms representing larger corporate clients. He adds that clients want more predictability in legal spend, and alternatives to the billable hour, namely success fees and fixed fees.

Abreu Advogados partner José Maria Corrêa de Sampaio says there has been an increase in the use of ADR, particularly arbitration. "The use of ADR aims to reduce the number of litigation proceedings pending in state courts, while

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simultaneously making Portugal more attractive as an international arbitration seat", he adds. "Also we have the incorporation of new arbitration centers for commercial matters, which is very good for promoting arbitration, and decreasing arbitrations costs."

Fernando Aguilar de Carvalho, partner at Uría Menéndez-Proença de Carvalho, says litigation and ADR activity is still "typical of what you would expect during economic crisis, with plenty of activity in insolvencies, restructuring and debt recovery related cases, as well as in white collar crime and regulatory related matters". He adds there has also been a surge in commercial litigation, namely disputes among shareholders, as well as banking sector litigation, with disputes related to "swap agreements and other financial instruments".

Linklaters counsel Ricardo Guimarães says a recovery in the economy is likely to lead to more arbitrations. "Recent years have seen an increase in cross-border transactions and there is usually a lag until related disputes arise – in that context, international law firms have an extraordinary opportunity to advise clients on multijurisdictional transactions and in relevant markets for foreign investment, inbound and outbound, such as Asia and Africa." Guimarães adds that clients expect arbitration to be a "skilled and specialised forum where decisions are rendered in the shortest period of time possible, lowering their exposure to dispute resolution as investment is taking place".

Clients now prefer ADR

Clients increasingly prefer using ADR rather than the courts, according to SRS Advogados partner José Carlos Soares Machado. "Thus, there are growing opportunities for law firms that offer alternative dispute resolution services." He adds that clients also increasingly seek a more "ongoing service" focused on pre-litigation, in order to prevent litigation proceedings.

Litigation and ADR are areas where there is plenty of opportunity for growth, according to João Caiado Guerreiro, partner at Caiado Guerreiro & Associados. "People and companies are more conscious of their rights and disputes are increasing," he says. "There are plenty of disputes – actual or to come – related to the BES resolution and some sales of assets by both BES and GES."

José Jácome, partner at AAA Advogados, says one of the biggest challenges facing law firms is providing "sensible and strongly grounded legal advice" in an environment where the outcome of cases is particularly hard to anticipate given the novelty of the applicable laws, the lack of judicial precedents and "the limited experience of Portuguese courts in similar matters". Mark Kirkby, partner at Sérvulo & Associados, says the "traditional slowness and uncertainty" of Portuguese-speaking jurisdictions, particularly in administrative courts, has moved many disputes between public authorities and international investors to jurisdictions where arbitration exists.

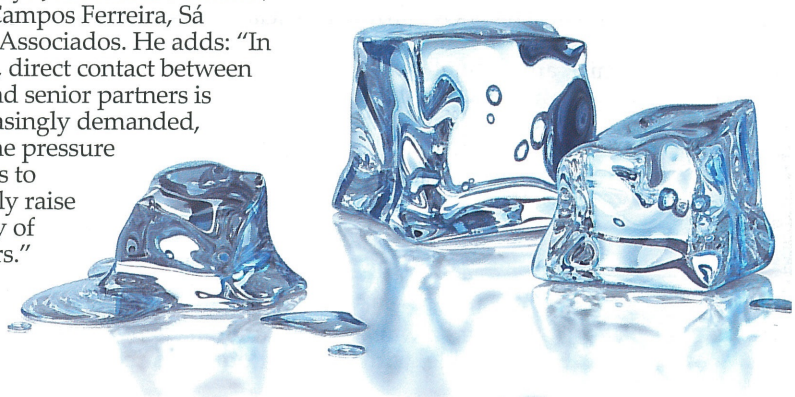
He adds: "This is an excellent opportunity for Portuguese firms with strong teams in this area."

Clients increasingly take more "carefully considered" decisions in order to prevent disputes in the long term, says João Maria Pimentel, partner at Campos Ferreira, Sá Carneiro & Associados. He adds: "In this context, direct contact between the client and senior partners is being increasingly demanded, putting some pressure on law firms to progressively raise the seniority of their lawyers." Sandra Teixeira da Silva, partner at AVM Advogados, says that, despite the positive outlook for the Portuguese economy during 2015, the number of businesses facing financial distress in recent years will "still bring insolvency and enforcement work, alongside disputes arising from employment matters, essentially involving lay-offs and collective dismissals".

> "People and companies are more conscious of their rights and disputes are increasing."
> João Caiado Guerreiro
> Caiado Guerreiro & Associados

Ana Cláudia Rangel, head of the litigation and ADR department at Raposo Bernardo, point out that, in the last year, there was a large judicial restructuring in Portugal as well as major changes to the civil procedure code, though she adds: "It is too early to draw conclusions about the practical effects of these changes."

Cortez argues that new lawyers are expected to develop business skills, languages, engineering and science skills, for example, in other words, "behaviours that set them apart from their peers", which entails a whole re-thinking of organisational structures, pricing, and service models that have been used the market for years. Gonçalves Pereira says clients now consider litigation much more carefully in light of restraints such as the judicial costs in Portugal, which he says are "very high for disputes in which the claims



have a high value". Gonçalves Pereira adds: "Once the decision to litigate is taken, the clients are very focused and informed and require very specialised representation focusing on the relevant areas of the law, such as M&A, securities, and banking."

Júdice says that that current client demands will now favour larger law firms or ADR and litigation boutiques that are able to specialise with lawyers "skilled in quantum issues and fluent in different languages". Aguilar de Carvalho says that for a law firm to thrive in the current climate, its lawyers need to be "passionate and enthusiastic about their work, keep up to date on constant changes in legislation and on legal trends, and commit to providing their clients with the support and answers they need, in a timely and cost effective manner".

Arbitration centres evolving

Kirkby believes that now is the moment for law firms to create specialised arbitration teams. He adds: "Because of the specific nature and sophistication of arbitration law, and also because the regulation of Portuguese arbitration centres is evolving and moving closer to the regulations of the large international arbitration centres, the ability to capture the really interesting cases depends on the confidence that firms are able to project in the market in terms of the specialised excellence of their teams." Rangel argues that one of the biggest challenges relating to litigation is making it a speedier process. "For most clients, waiting two or three years to obtain a court decision is always too long."

Fernando Ferreira Pinto, partner at Ferreira Pinto, says significant opportunities have been created by reform in the Portuguese legal system relating to disputes concerning patents within the pharma industry. He adds: "This offers mandatory arbitration, which requires experienced arbitrators in the market and lawyers capable of managing the arbitration process with strong industry expertise."

> "Direct contact between the client and senior partners is demanded, putting pressure on law firms to raise the seniority of lawyers."
> João Maria Pimentel
> Campos Ferreira, Sá Carneiro & Associados

The potential for the wider use of ADR in Iberia is considerable. However, the challenge for law firms is to educate clients about its benefits. The firms that manage to do this successfully and quickly could make some significant gains in what is an increasingly competitive market.

More compliance disputes going to arbitration despite cost

Though arbitration is often more costly than court proceedings, this type of alternative dispute resolution is being used more widely in Portugal, according to Dário Moura Vicente, a counsel and arbitration specialist at Serra Lopes, Cortes Martins in Lisbon.

The increase is partly due to the financial crisis – it is often used to adapt contracts, for example, in cases such as compliance disputes between companies and banks regarding financial investments, Moura Vicente explains. Meanwhile, arbitration is also used in disputes between the Portuguese government and private consortiums regarding large infrastructure projects.

As well as large commercial disputes, arbitration is also used for smaller cases, including consumer disputes, Moura Vicente says. Many cases go to arbitration in Portugal to avoid the long wait going through state tribunals implies, and this is a key factor in the increase.

The Portuguese arbitration law was reformed in 2011 using the United Nations' Commission for International Trade Rights Model Law on International Commercial Arbitration as a blueprint. The new law widens the criteria for the possible scope of arbitration and makes the regulations more detailed, Moura Vicente said.

While arbitration is used in all areas of law, Moura Vicente cites intellectual property (IP) as one in which there has been a significant increase in cases, especially involving generic pharmaceuticals manufacturers of patented medicines. Portugal has a low penetration rate of generic medicines – which must be sold at half the price of patented ones by law – due to the number of generic brands sued for IP violation before state courts. The government decided such disputes are best solved through arbitration and this has eliminated one major bottleneck in the marketing of generic medicines.

Dário Moura Vicente

Clients remain sceptical about arbitration in Spain

Some international companies still have concerns that arbitrators in Spain are not impartial and that there are problems with corruption

Francisco Málaga

Despite the fact alternative dispute resolution (ADR) remains attractive to clients seeking to avoid long and costly legal battles, a slight mistrust of local arbitration persists in Spain with many foreign companies seeking to use international arbitrators, according to Francisco Málaga, head of litigation at Linklaters in Madrid.

Málaga expects the use of ADR will increase in future as Spain's economy recovers. However, as yet, there has not been widespread use of domestic arbitration in Spain. Meanwhile, international companies and banks are sometimes mistrustful of the Spanish arbitration system, according to Málaga.

He believes certain international entities have a perception that arbitrators in Spain are not impartial and that cronyism and corruption exists. "We find clients that do not want to carry out arbitration in Spain, and would rather seek it abroad, or prefer to seek resolution in a tribunal," Málaga says.

But he adds this perception is unfounded as the situation has improved significantly, with the Madrid arbitration court, for example, having done important work to clean up the image of arbitration and "show the world that arbitration in Spain is thoroughly trustworthy and effective", according to Málaga.

Banks want arbitration clauses

Arbitration has often been applied to disputes arising in the financial sector, partly because banks are keen to include arbitration clauses in their products. However, arbitration, as well as other forms of ADR, is also frequently employed in the construction, real estate engineering and aeronautics sectors.

The financial crisis led to an increase in the use of arbitration, and while demand for ADR, in general, has fallen somewhat, there is still much demand for arbitration in the financial sector. Clients are also increasingly keen for arbitration to take place in Spain, particularly as they are eyeing costs and are keen on finding a law firm that has local expertise, in addition to being trustworthy, impartial and efficient.

Courts need system of ´binding decisions´

Joaquín García Bernaldo de Quirós

If judges are given a lot of discretion then the concept of "legal certainty" – which is what clients want – is difficult to achieve, Joaquín García Bernaldo de Quirós, partner at Ramón y Cajal Abogados, says. He adds that, while the judicial system does include measures aimed at increasing the likelihood of legal certainty, it is time to change the system because it is now outdated.

Bernaldo de Quirós acknowledges that this problem has already been identified and there have been attempts to provide a solution by making some judgments of the higher courts binding. However, there is still a great deal of diversity in judicial decisions and there is a strong need to standardise decisions and it is crucial that interpretations of the law are unified.

Making decisions binding saves time and money and also reduces the amount of resources spent on litigation. Currently, when clients present their case to their legal advisers they want to be given an idea of whether their case will be successful or not, explains Bernaldo de Quirós. He adds that clients want to be given an indication of the probability of their case being successful and what would be a court´s interpretation of their argument.

A system of "binding decisions", would be more suited to the needs of commercial clients, Bernaldo de Quirós argues. "Many times, the case is not worth the effort or the economic investment and what the client would really like is the judicial system to provide them with guarantees," he adds. "The economic analysis of law and the litigation is more important than we sometimes think. If the loser in a court case is required to pay the costs of the process, the system should give parties involved in disputes a clear indication of whether their case will be successful."

New laws favour debtors

Courts are doing more to alleviate the troubles of debtors, the result of which has been that, with the real estate market in decline, banks own a lot of property with little value

A number of legislative changes have been brought into effect in Spain that favour debtors, according to Araoz & Rueda partner Eduardo de León. However, while recent changes in the law are aimed at helping to alleviate the ongoing economic crisis – as well as the plight of Spanish debtors – it remains to be seen how effective they will be, he adds. "The issue of residential property foreclosure is a very real and human concern in Spain," says de León.

One of the main implications of the changes to the law, is the possibility of challenging the existence of "an abusive clause in a former mortgage agreement". Other possible minor consequences of the changes could be a cap on the late payment interest rate, as well as measures to reduce reducing the "outstanding debtor's liability after the enforcement of the mortgage".

The decline of the real estate market has meant that banks have ended up with a considerable amount of real estate in their possession, with much of it of little value to them. De León references voluntary codes of practice introduced in 2012 to encourage Spanish banks to restructure the debt, write off part of the debt, and even accept payment in kind in cases of foreclosure.

Court victory for debtors AAA

Subsequent to this in 2013, debtors scored a victory over Spanish banks following a ruling by the European Court of Justice of 14 March, 2013 (C-415/11). In the Aziz case, which has allowed the domestic courts to delay the eviction of those who have fallen behind with mortgage payments, according to de León. The decision allows the courts a lot of leeway in cases where harsh restrictions are found to exist in a mortgage agreement. Spanish legislation was subsequently amended in order to incorporate this ruling.

In May 2013, Law 1/2013 added a number of provisions that increase the powers of the Spanish courts, and aim to alleviate the burden put on debtors. So, for example, the late payment interest rate has been capped at three times the statutory rate.

In addition, the prior legal position, which established unlimited liability on the debtor in the case of foreclosure proceedings has been amended so that if the creditor has secured 75 per cent of the debt within five years from enforcement, the borrower is free of any obligations.

Eduardo de León

Mortgage foreclosures increase

De León notes that the net effect of all these changes has been that the courts have been playing an increasingly important role in the protection of debtors.

In the first three months of 2014 the overall number of mortgage foreclosures in Spain had actually increased (rising by almost 20 per cent on the same period in the previous year) but the enforcement on residential homes has decreased by 24.4 per cent. Spanish banks have as a consequence had a large amount of unwanted real estate on their hands. From banks' perspective the situation is "less than ideal", comments de León. Not least due to the costs associated with foreclosure, as well as the pressure to shift foreclosed properties from their balance sheets.

Challenging enforcement

Meanwhile, company insolvency procedures are now more "debtor-friendly", following Law 17/2014, which modifies parts of the Spanish insolvency law, Araoz & Rueda associate, Andrés Mochales, adds. "In pre-insolvency scenarios, enforcement proceedings can now be challenged if the company can prove that the assets in question are 'necessary' to the running of the company," he says.

A recent study by Axesor found that there was a decrease of more than 30 per cent in the number of companies filing for bankruptcy in 2015, compared to the previous year.

However, de León notes that the long-term practical implications of these legislative changes remain uncertain. "These new laws are very recent, and as yet untested. There has not been any practical application of them by the courts."

New rules on enforcing judgments in other jurisdictions

EU regulations on recognising member state judgments in other countries represent progress, but there is still uncertainty

Julio Garrido

Santiago Gastón de Iriarte

New regulations introduced by the European Union that impact on the enforcement of member state court judgments in other jurisdictions are a "positive step" for international litigation, according to Santiago Gastón de Iriarte and Julio Garrido, partners at AC&G Asesores Legales in Madrid.

The recast Brussels Regulation (EU) No 1215/2012, which impacts on the recognition of judgments in civil and commercial matters, came into force on 10 January, 2015. "With the regulation now containing, among other matters, revised provisions both on jurisdiction and on the recognition and enforcement of judgments in the domicile of the defendant, it will facilitate a positive view of judgements in member states," says Garrido. "This is very important for international litigation in the EU, but also applies to other state judgments."

However, there are specific matters that are causing uncertainty. For example, one issue is the effect the resolution will have on provisional and protective measures [formally known as 'interim measures'] in litigation. Gastón de Iriarte says that while such measures "must be adopted in principle and served on the defendant prior to enforcement, regardless of whether the defendant has time to appear", they cannot actually be enforced in certain circumstances.

Another issue that needs clarification is how the regulation will apply within the context of copyright, following the 2014 Spanish intellectual property law reform. "In Spain, our legal system has always been protective of the defendant," explains Garrido. "Now, we'll be able to ask for data to prepare a case against the defendant, making us closer to the prosecutor."

But while the regulation is seen as important for demonstrating the different laws within the European Union, lawyers also see it as a positive step for international litigation within Spain. "By establishing specific regulations from a domestic point of view that can then be enforced in other countries, a whole new concept is being introduced to our country," says Gastón de Iriarte.

Arbitration now seen as faster way to resolve disputes

Paulo de Moura Marques

Despite the fact that clients may prefer arbitration over litigation for the flexibility, independence and specialism it offers, it has traditionally been considered the more expensive option, according to Paulo de Moura Marques, founding partner at Lisbon-based AAMM.

However, Moura Marques adds that with arbitration costs now more balanced, parties are viewing it as a faster way to resolve a dispute and avoid a prolonged judicial fight.

"One of the major trends I've seen in Portugal over the last two to three years is an increasing number of parties asking for alternative dispute resolution [ADR]," says Moura Marques. "The fact that arbitration in particular, is now considered just as viable an option as going to court, is a real game changer within the legal community."

Moura Marques adds that another trend observed by lawyers is that, the higher the value the case, the more likely that arbitration will be used "whether by contract or by clause, or where both parties believe it is the best way to solve the issue", according to Moura Marques. He adds: "Arbitration clauses are also becoming increasingly relevant for lawyers disputing certain elements within ongoing contracts, due to the fact that confidentially can be maintained over a period of time."

Meanwhile, arbitration is mandatory in some specialist areas of the law, such as sport and pharmaceuticals. In such circumstances, Moura Marques says lawyers are "no longer able to suggest arbitration as a good option for resolution, instead they're legally obliged to start one".

Consequently, Moura Marques believes that these trends are now beginning to be followed by those that have traditionally been averse to arbitration. He says: "The rules have changed – I've seen a number of state contracts proposing ADR clauses for conflict resolution and this is a major departure from what we had in the past."

New investment could lead to greater use of arbitration

Arbitration could increase as new companies and joint ventures – involving local businesses and international partners – are established in Spain

Alternative dispute resolution is not used frequently in Spain, at least in the commercial field, where firms are much more likely to enter into litigation, according to Javier Mendieta, a partner at CMS Albiñana & Suárez de Lezo in Madrid.

Among clients' reservations about alternative dispute resolution, are – with regard to arbitration, for example – the extent of the independence and impartiality of the arbitrator, as well as the likelihood of being able to predict what the outcome of an arbitration will be. However, on the positive side, arbitrators are often extremely knowledgeable about the matters subject to the arbitration, which is not necessarily the case with judges in courts.

With regard to arbitration, despite the fact the Spanish arbitration law – enacted in 2003, amended in 2009 and 2011 and aimed at allowing Spain to become a centre for dispute resolution between Latin America and Europe – is technically good and provides for flexibility, Mendieta says he has noticed a decrease in its use, particularly in the case of domestic disputes.

This is because clients do not perceive arbitration as being faster or cheaper than litigation in Spain, even though the judicial process has become more expensive in recent years, according to Mendieta. The legal right to provisionally enforce a first instance judgment, subject to appeal, without the need for posting a bond, has in most cases reduced the attractiveness of an award rendered in an arbitration procedure due to the impossibility to file an appeal against it.

More arbitration?

However, Mendietta adds that the increase in investment in Spain, as the country begins its economic recovery, may lead to a rise in the number of arbitration cases, particularly international ones, due to the incorporation of new companies and joint ventures in Spain involving local businesses and international partners.

That said, in some sectors, such as construction, it is much more likely that firms will use the courts for conflict resolution, rather than seeking arbitration. In this regard, there could be opportunities for more legal work in instances of arbitration involving a private company and a foreign public company or government as arbitration clauses may be inserted into contracts regarding investment.

Mendieta – who specialises in litigation, pre-litigation and arbitration in civil, commercial and bankruptcy law – says this is because when a case involves two companies from different countries, there is always a "certain mistrust toward the legal system of the counterpart and that frequently determines the inclusion of an arbitration clause in the relevant agreement".

Javier Mendieta

Client concerns

Clients are always concerned about two main issues when considering the inclusion of an arbitration clause in an agreement. First, they want to know about the independence and impartiality of the future arbitrators, and second, the predictability of the decision in a potential controversy.

The first concern justifies and explains the common assignment of the administration of the arbitration procedure to a reputed international or domestic arbitration institution, as well as the agreement of the parties to submit themselves to the rules and regulations of that relevant institution, especially for the purposes of the appointment of the arbitrators.

"The arbitration institutions have made an effort to establish the relevant proceedings to ensure, as far as possible, the independence and impartiality of arbitrators," says Mendieta.

Judgment of Solomon

Regarding the second issue, some of the main concerns of clients are uncertainty about the procedures of the arbitration and the possibility of facing a "judgment of Solomon" award. This has led to a substantial reduction in the arbitration clauses which order the disputes to be settled or ruled in equity.

But those concerns are balanced with the usually greater and more extensive experience of the arbitrators on the relevant issues raised in the case subject to arbitration compared to that of the judges in the ordinary courts.