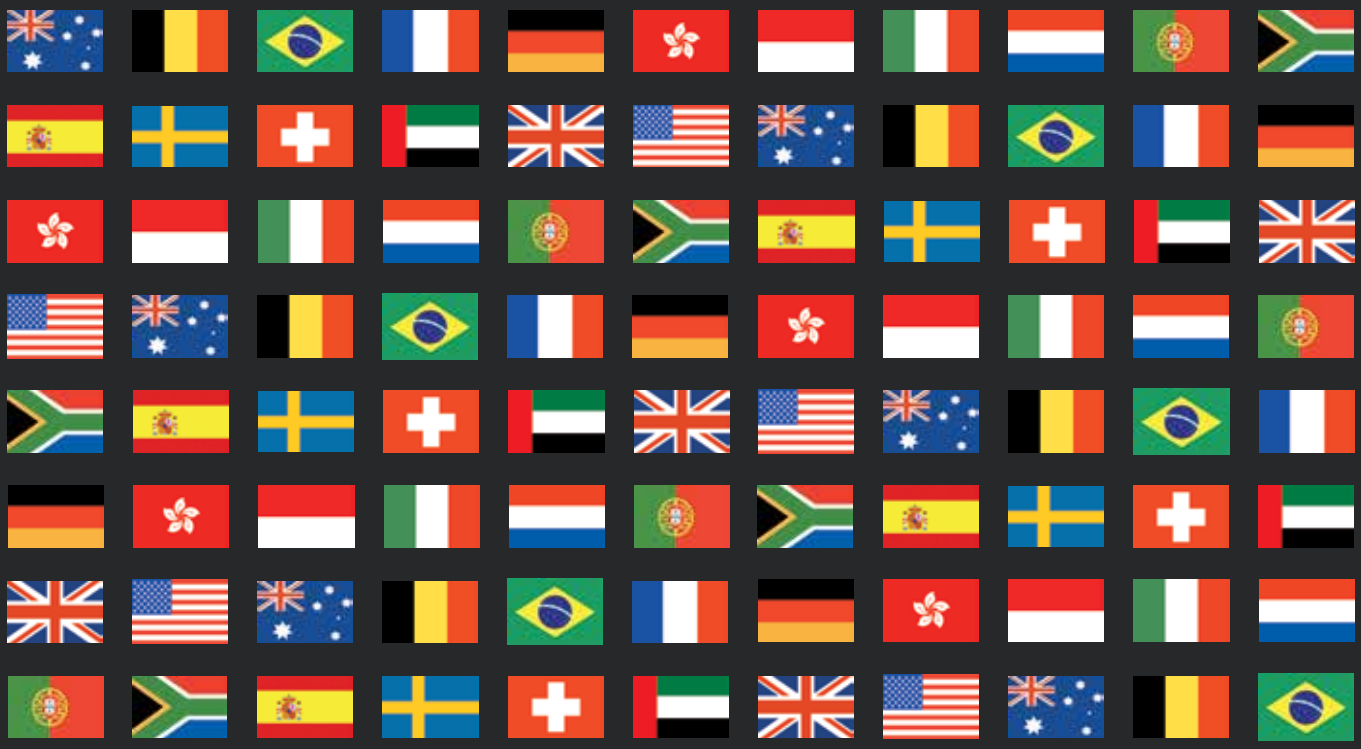
# Financial Services Litigation

*Contributing editor*
**Damien Byrne Hill**



2016

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

# Financial Services Litigation 2016

*Contributing editor*

**Damien Byrne Hill**

**Herbert Smith Freehills**

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910


First published 2016
ISSN 2398-5844



Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

# Portugal

**João Maria Pimentel, André Fernandes Bento and Pedro Duro**

**CS Associados**

## Nature of claims

**1 What are the most common causes of action brought against banks and other financial services providers by their customers?**

The types of claims vary depending on the relevant financial sector. Within the investment services field, the most common causes of action are connected with mis-selling of financial products (including prospectus liability) or breach of duties of diligence in the advice rendered in connection with the purchase or subscription of financial products. In relation to this type of claim, since 2014, the number of class actions and collective actions filed by small investors and organisations representing them has been increasing, in the context of the bankruptcy of certain financial institutions that issued or mis-sold financial products.

Within the past few years, litigation regarding the termination of contracts with swaps based on subsequent substantial changes has also increased, notably on the grounds that the parties have not predicted, upon execution of the contract, the relevant decreases in Euribor of the past years.

Within the credit-granting field, banks normally assume the claimant position in the proceedings. Yet there are often cases of clients petitioning for losses caused because of the wrongful payment of checks (eg, forged ones) or in connection with the refusal to refund the client in case of undue use of credit cards by third parties.

As for claims against insurers, clients typically submit claims when those financial institutions refuse to pay the indemnification owed for losses upon verification of the occurrences covered under the insurance policies.

Injunctions aimed at prohibiting the use of abusive clauses included in standard contracts, such as funding and leasing contracts, opening bank account contracts and contracts for the use of credit cards, as well as insurance contracts, among others, are also common in the area of financial services (see question 6).

**2 In claims for the mis-selling of financial products, what types of non-contractual duties have been recognised by the court? In particular is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?**

Claims on mis-selling of financial products have been particularly common in the investment services field. The legal framework regarding this subject is rather stringent in relation to clients that are categorised as non-professional, in relation to which the investment service provider is normally subject to requirements on evaluation of suitability of the product, best execution, pre-contractual and contractual information, pursuant to the provisions of the Markets in Financial Instruments Directive MiFID, as implemented in Portugal by Decree-Law No. 486/99 (the Securities Code).

In the credit-granting field, credit institutions that deal with consumer clients (or with clients purchasing property for habitation purposes) are also subject to pre-contractual and contractual information duties, duties to clarify any doubts of the client as well as limitations on the type of information and methods used in the marketing of their products, as a result of Decree-Law No. 133/2009, which has implemented the EU Consumer Credit Directive (the Consumer Credit Act) in Portugal and national legislation on housing loans.

In the insurance field, Decree-Law No. 72/2008 (the Insurance Contract Law) establishes duties similar to the ones described above.

As a final comment, in all relevant fields, the aforementioned duties are mainly owed to the clients. Accordingly, the breach thereof shall raise liability to the relevant financial institution, if the client suffers losses as a result of such breach, regardless of whether or not the relevant provisions are stated in the contracts entered into with the clients.

Also, these types of institutions are liable for losses caused to clients as a result of breach of duties concerning their organisation and exercise of their business, which are indirectly aimed at safeguarding the clients' interests (ie, losses caused to clients because of breach of duties to separate the assets of the clients from the ones of the financial institution).

**3 In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?**

Yes. In relation to the prospectus, articles 149 to 154 of the Securities Code provide that liability may arise in relation to misrepresentations in the information stated in the prospectus to:

- the issuer;
- the offeror;
- the members of the issuer's management body;
- the sponsors in case of an initial public offering;
- the members of the auditing body and any auditors that have audited or in any way analysed the financial statements based on which the prospectus was prepared;
- the financial intermediaries providing assistance services in relation to the offer; and
- any other persons named in the prospect as being responsible for the information, forecasts and studies stated therein.

Among these persons, the most likely defendants are the issuer, the offeror and the arranger, on the basis that they are strictly liable for losses because of breaches by some of the persons listed above.

The law is not clear but the majority of scholars understand that the claimant does not need to show reliance on the prospectus in order to claim damages, it only being necessary to claim the representation stated in the prospectus and the resulting loss suffered in connection therewith by the investor. However, the defendant may exclude liability if he or she demonstrates that the investor was aware of the misrepresented facts.

As for periodic financial disclosures, pursuant to articles 245 and 246 of the Portuguese Securities Code, liability may also arise in relation to misrepresentations, not only to the listed company but also to its management and auditors.

As for the applicable law, the Securities Code provides that Portuguese mandatory laws shall apply when the order has been submitted to a regulated market or multilateral negotiation scheme registered with the Portuguese securities market regulator (the CMVM), a rule that may be consistent with the criteria stated in article 4, No. 3 of the Rome II Regulation, on the 'manifestly more close connection' criteria. This view also has the upside of subjecting one issuance to the same prospectus liability laws. Still, there may be a basis to claim that the criteria of the 'place where the harmful event occurred' provided in article 4, No. 1 of such Regulation should prevail, such as where each investor could submit the claim according to the legislation of the country where it has suffered the loss.

In relation to the specification of jurisdiction, the matter is not regulated using Portuguese legislation and it is unclear how it should be treated pursuant to the Brussels Ia Regulation. In this respect, following the *Kolassa* (Case C-375/13) decision of the Court of Justice of the European Union in relation to liability prospectus, the competent court should be the one of the 'place where the harmful event occurred'. There have been no decisions from Portuguese higher courts applying this ruling yet.

In the event of any of these breaches, the liable parties may also be subject to penalties applied by the CMVM.

**4 Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?**

Yes. The duty to act in good faith results from the Portuguese Civil Code (articles 227 and 762/2), and applies to financial institutions in connection with negotiation, execution and performance under financial services agreements. Since financial services are heavily regulated in Portugal, clients only allege breach of the bona fide principle as an ancillary argument, in addition to the claim that the financial institution has breached a specific statutory or contractual provision.

Still, judicial proceedings have been brought by clients against financial institutions, essentially based on the breach of the bona fide duty, for example, with a view to:

- prevent a credit institution from accelerating a loan, on grounds that the event of default was not material;
- terminate or modify derivatives agreements, on the basis of a substantial change in the financial markets that has not been predicted by the parties, resulting in alleged unfair benefits to the financial counterparty; or
- to prohibit a financial institution from benefiting from a clause included in non-negotiated standard terms and conditions, owing to the fact that it is abusive.

**5 In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?**

The fiduciary duties are set forth in the civil law applicable to the agency relationship and typically apply when financial institutions act in their capacity as agents acting on behalf of the customer, in particular in connection with the rendering of investment services such as management of asset portfolios or investment funds. The core of the duties arising from a fiduciary relationship cannot be excluded by contract.

Even with the lack of an agency relationship, financial institutions such as banks or insurers are automatically subject to stringent conduct of business rules when dealing with clients, which are deemed as equivalent to fiduciary duties. Indeed, in the statutory rules applicable to each field of financial services, there are rules requiring these players to provide accurate and complete information to the client; act with diligence, loyalty and fairness; prevent and address conflict-of-interest issues; comply with confidentiality duties, etc. In the investment services field, the level of some of these duties depends on the categorisation of the client concerned, according to the legislation that implemented MiFID in Portugal.

The typical claims are submitted by clients seeking the condemnation of investment services providers for breach of their duties to provide complete and accurate information and advice on financial instruments subscribed or purchased by the client. Under the Securities Code, the client must allege and provide evidence of the breach of this duty, and the effective losses caused by such breach, but the burden regarding the negligence or intentional behaviour of the financial intermediary lies with the latter.

**6 How are standard form master agreements for particular financial transactions treated?**

There are standard agreements that are commonly used in Portugal, such as the ISDA Master Agreement and the credit facility agreements following the models approved by the Loan Market Association. However, we are not aware of any model standard agreements approved by a similar Portuguese association, though it should be noted that the insurance regulator enacts legislation imposing the use of standard insurance policy for certain mandatory insurance.

Standard-form master agreements are recognised as valid and enforceable contracts, provided that they are signed by the parties and are coupled with special conditions applying to the relationship established between the financial institution and the client.

Decree-Law No. 446/85 of 25 October 1985 prohibits financial institutions from inserting unfair terms in master agreements containing standard clauses that are not subject to negotiation by the client. There are two lists of clauses contained in this legislation that are deemed as unfair per se – one applicable to relationships with professionals (more flexible) and the other with consumers (less flexible). Even when the relevant clauses do not fall within the scope of this list, courts do not shy away from qualifying them as abusive, when they conclude that they breach the bona fide principle.

Breach of the aforementioned legislation results in the clause being declared null and void by the court, at the initiative of the court or upon petition submitted by the affected client. The public prosecutor is also entitled to start a special proceeding against the financial intermediary, aimed at condemning it to remove any abusive terms and conditions from its standard agreements in the future.

A significant volume of litigation has focused on the breach of Decree-Law No. 446/85 by financial institutions, either as a result of clients challenging petitions submitted by financial institutions by way of sustaining that the relevant clauses are unfair because of breach of this regime, or by the public prosecutors under the special proceeding described in the preceding paragraph.

**7 Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?**

Financial institutions are prevented from excluding liability towards clients.

In relation to liability limitations (eg, limiting it to cases of gross negligence or setting forth thresholds), the law is not entirely clear, in particular the Securities Code, which regulates the activities of investment services providers, where as a matter of practice there are higher risks of liability being originated towards the client.

Notwithstanding, the Portuguese scholars who addressed this topic understood that, owing to the higher standards of conduct required of financial institutions, they will be prevented from inserting any clauses in their contracts with a view to limiting their liability towards clients, and will thus be subject to the general civil liability principles enshrined in Portuguese law and in the provisions that govern their field of business.

**8 What other restrictions apply to the freedom of financial institutions to contract?**

In the relevant financial services fields, there is a set of mandatory rules that safeguard the client's position, and that limit the freedom of financial institutions to contract, for example, the duty to assess adequacy of the financial product to the client, pre-contractual and contractual information duties, restrictions on termination of credit agreements upon a client's default, cooling-off periods, etc.

In the credit-granting and investment services businesses in particular, when a client is not qualified as a consumer or non-professional, the financial institutions benefit from a less stringent legal framework, and thus have more freedom to contract, though there are still some mandatory applicable rules by which they should abide.

In relation to the granting of credit, in case of default of the client and regardless of the client being consumer or professional, credit institutions:

- are prevented from charging default interest at a rate higher than a yearly 3 per cent, regardless of the category of the client;
- shall only compound ordinary interest for minimum periods of one month;
- are prevented from compounding default interest, unless expressly agreed in connection with a consolidation or restructuring of the credit; and
- are subject to limitations applicable to the charging of debt collection fees and expenses.

**9 What remedies are available in financial services litigation?**

There are no special provisions applicable to remedies available in financial services litigation. Both the financial services providers and the customers are allowed to claim for damages, rescission and injunction relief under the legislation generally governing civil proceedings.

From the clients' standpoint, damages is the most common remedy in financial services litigation brought against financial institutions. Portuguese law does not entitle parties to punitive damages, meaning that the creditor is only able to seek compensatory damages.

In minor cases, clients often submit a complaint to the regulator of the relevant financial services sector. This may have a positive impact on the client, in cases where it is clear that the financial institution has breached its duties, and the infraction is susceptible to being punished at the initiative of the regulator under an administrative offence proceeding.

## Procedure

### 10 Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

Save for the exception detailed below, there are no specialist courts, judges or arrangements in relation to financial litigation.

In relation to administrative offence proceedings started by the regulators (including but not limited to the financial sector field), there is a specialist court empowered to address appeals and revisions, as well as to enforce decisions issued by those regulators. Still, there are no specific arrangements for the hearing of the cases in such court.

### 11 Do any specific procedural rules apply to financial services litigation?

Financial services litigation is generally subject to the standard procedural rules set forth in civil proceedings litigation.

Law No. 83/95 of 31 August 1995 provides the general regime applicable to class actions. Class actions regarding consumer rights are ruled by that regime and the Consumer Protection Act (Law No. 24/96, last amended by Law No. 47/2014).

Still, there are specific provisions laid down in the Securities Code regarding the class action regime, which entitles not only investors protection associations and foundations, but also groups of investors, to bring class actions in relation to damages suffered in connection with the subscription or purchase of financial instruments. This legislation provides, in particular, that an entity should be designated for the receipt and management of any compensation payable to the investors that are not individually identified. Such entity should either be a guarantee fund (if created by the entity managing the relevant regulated market or settlement or clearing system), the plaintiff association or one or more of the investors that started the class action.

The compensation owed to investors that end up not being identified shall either revert to the aforementioned guarantee fund, or in the absence of it, to the investors compensation scheme managed by the CMVM.

### 12 May parties agree to submit financial services disputes to arbitration?

Yes. Law No. 63/2011 provides that parties have the right to submit any disputes to arbitration, insofar as they concern economic interests (the default for disputes arising in the financial services sector).

Under article 92 of Decree-Law 317/2009, the providers of payment services and the issuers of electronic money are required to enter into a protocol with at least two arbitral institutions and give their clients (corporate bodies or individuals) the opportunity to submit certain disputes to arbitration before any of those authorities. Such disagreements are the ones where the amount in dispute is up to €5,000 and that concern the breach of information duties and other rights concerning bank accounts, payment accounts, funds transfer, credit cards, direct debit and electronic money services. The client is free to submit the dispute to arbitration or not.

Law No. 144/2015 provides a special regime on alternative dispute resolution brought by consumers against services providers, including but not limited to financial institutions.

### 13 Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

No, unless they have committed to submit those disputes to alternative dispute resolution.

When the parties have previously undertaken to submit a dispute to mediation, and one of the parties starts legal proceedings before a judicial court in breach of such agreement, the court may, upon request of the counterparty, suspend the proceedings and refer the dispute to such mediation (article 12/4 of Law No. 29/2013).

Should the parties choose to submit the dispute to arbitration, and if the agreement is breached because of a party starting legal proceedings before a state court, the claim shall be dismissed on the grounds of lack of jurisdiction.

As an exception to the aforementioned rules, article 13 of Law No. 144/2015 provides that, in respect of arbitration or mediation agreements concluded pursuant to such statute, the consumer cannot be prevented from immediately starting legal proceedings in a state court against the financial institution.

### 14 Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

The pre-action considerations are particularly relevant in the banking sector.

When a client fails to discharge his or her payment liabilities under a financing agreement, or any event of default occurs, the relevant credit institution shall send an event of default notice, granting the client a reasonable remedy period, before accelerating the loan and starting legal actions against the client.

If the financing agreement has been entered into with a consumer, or with an individual for the purposes of the purchase, works on or construction of a residence for habitation purposes, the credit institution shall adopt an out-of-court proceeding subject to the rules of Decree-Law No. 227/2012.

This legislation provides that under such proceedings, the credit institution shall:

- contact the client within a maximum 15-day period from the default;
- integrate the client in the proceedings between the 31st and 60th day from the default, informing the client of such integration within a maximum of five days;
- within a maximum 30-day period from the client's integration, disclose to him or her the outcome of an evaluation conducted, or, when it is concluded that the client has financial capacity to perform under the loan agreement, submit to the client a renegotiation proposal adjusted to the client's financial situation; and
- be available to negotiate any counterproposals submitted by the client.

The proceedings shall only be deemed complete if the client settles his or her liabilities, becomes insolvent, does not cooperate with the credit institution, or if a 90-day period elapses since the commencement thereof. While the out-of-court proceeding is pending, the credit institution is prevented from terminating or accelerating the loan, or starting any court proceedings against the client.

### 15 Does your jurisdiction recognise unilateral jurisdiction clauses?

Under Portuguese Procedural Law, there is no general prohibition of unilateral jurisdiction clauses.

Article 94 of the Civil Procedural Code simply provides that the parties may agree in writing to refer the dispute to a jurisdiction when the dispute is connected with more than one jurisdiction, provided that the jurisdiction is chosen based on a serious interest of one of the parties or both of them, and the choice of that jurisdiction does not cause serious inconvenience to the other party.

The treatment of unilateral jurisdiction clauses is reviewed under Portuguese law and domestic case law. Therefore, the treatment of such clauses by the courts of other jurisdictions does not have effect within Portuguese jurisdiction.

### 16 What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

In civil proceedings, parties having the burden of proof are required to disclose documents and information that support their claims or defence.

Parties have the right to ask the court for the submission of documents in the possession of the counterparty or of a third entity in order to prove facts alleged in the proceedings. The court orders the party or the third party to submit those documents if it deems them relevant to the decision of the dispute.

Should the parties fail to provide non-confidential documents or information without due cause, the court may apply a fine and apprehend the document in question. Also, the court will take such refusal into consideration when examining the remaining evidence. The reversal of the burden of proof against the party who unlawfully refused to provide information or documentation can be applicable, too.

The refusal to provide witness testimony with no due cause is a criminal offence.

Confidentiality duties of Portuguese financial institutions affect the disclosure of documents and the witness evidence, as they and their members are allowed to refuse to provide documents and testimony on confidential documents and facts. See question 17 for more detail.

Council Regulation (EC) No. 1206/2001, on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters, is also applicable. It provides that a request for the hearing of a person from a member state to another is admissible whether intended for use in judicial proceedings, commenced or contemplated, and is pursuant to the provisions stated in that Regulation. Under the same regime (article 14), if certain criteria are met, persons are allowed to refuse to give evidence based on the law of the member state of the requested court or on the law of the member state of the requesting court.

Portugal is also a signatory of the Hague Convention of 1970 on the taking of evidence abroad in civil or commercial matters. The Portuguese state declared that it will 'not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common-law countries'.

Law No. 67/98 on the protection of personal data, provides that in general the transfer of personal data to a state that is not a member of the European Union is only allowed if an adequate level of protection is ensured (article 19). The evaluation of such requisite is made by the Portuguese Data Protection Authority. However, the same authority may allow the transfer under certain circumstances, for instance if the holder of the data has given his or her consent to the transfer, if that transfer is necessary for the performance of a contract between the holder and the controller or a third party, in the data holder interest, or if that transfer is required on important public interest grounds, or for the commencement or defence of legal claims (article 20).

**17 Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?**

Credit institutions, investment service providers and insurance companies are subject to confidentiality duties, which cover the information received from their clients in connection with the rendering of their services (article 79 of the General Banking Law, article 304/4 of the Securities Code and article 119 of the Insurance Contract Law). Names of clients, deposit accounts and their movements as well as other financial services operations, are subject to professional privilege.

As a general rule, under court proceedings, financial institutions must refuse the disclosure of information protected by banking secrecy (article 417/3 of Decree-Law No. 41/2013 (the Civil Procedure Code) and article 135 of the Criminal Procedure Code).

The counterparty is allowed to reply to such refusal.

If the court decides that the matter is not subject to professional secrecy, the financial institution is ordered to disclose the information requested. The party that claimed that the matter was subject to secrecy may lodge an appeal from that order before a higher court.

If the court believes that the matter is subject to secrecy, it may, at its discretion or upon request of a party, submit the question before a higher court. That higher court may order the revelation if, in a grounded decision and in view of the particulars of the case, it concludes that the interest in the information being disclosed is more valuable than the interests underlying the preservation of the professional secrecy.

By way of exception, credit institutions and investment service providers have the duty to disclose confidential information to public prosecutors and the court, provided that the same is requested in connection with a criminal proceeding brought against the client.

It is also worth noting that within enforcement or attachment proceedings, and as per request of an enforcement agent, the Bank of Portugal shall provide the list of banks where the debtor may receive deposits or has bank accounts. The attachment of the deposits existing in the bank accounts is made by the enforcement agent by means of an electronic system (article 780 of the Civil Procedure Code and article 17 of Portaria No. 282/2013).

**18 May private parties request disclosure of personal data held by financial services institutions?**

In general, personal data regarding bank clients will be protected by banking secrecy.

Outside of a court proceedings, financial institutions shall not provide personal data (other than the one of the individual requesting it) without the prior consent of the data holder.

In the context of court proceedings, the disclosure of personal data shall be subject to the procedure as described in question 17. There are no additional requirements or limitations applicable, in view of the fact that the data is qualified as 'personal data' pursuant to the Portuguese legislation that has implemented the Personal Data Protection Directive.

**19 What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?**

Financial disputes do impose the analysis of a growing amount of electronic information. However, in civil claims each party follows its own method – mostly human review with classic electronic discovery (term matches).

In criminal cases, the investigation is conducted by a prosecutor and under court supervision. Selection of electronic documents by investigators relies on term matches as a first step, but the list of terms tends to be large enough to impose a thorough human review. Predictive coding is not under discussion, and there are no relevant prior decisions of higher courts on the issue.

## Interaction with regulatory regime

**20 What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?**

Regulatory authorities do not have powers to bring court proceedings directly related to their regulatory mission, except to enforce the collection of contributions, fees, charges and fines applied by them.

Regulatory authorities may apply financial penalties in case of breach of the legislation and regulation in force in the financial sector field supervised by them. Also, whoever does not comply with valid orders of the regulators can be charged with the crime of disobedience. The procedure is conducted by those authorities and is not monitored by a court. The financial institutions, or another condemned entity or person, can challenge the regulators' decisions in court.

**21 Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?**

Communications between financial institutions and regulators are under the general limits of disclosure to third parties, including banking secrecy, professional secrecy and judicial secrecy (including criminal infractions and administrative infractions).

Notwithstanding the above, information under banking or professional secrecy can be exchanged with national regulators; public prosecutors; the authority for money laundering and financing of terrorism prevention; management entities of regulated markets and multilateral trading facilities and of settlement systems; clearing houses; central securities depositories and central counterparties; listed authorities intervening in insolvency or revitalisation proceedings; managing entities of sinking funds and investor compensation schemes; auditors and authorities with supervisory capacity; the European Securities and Markets Authority; the European Banking Authority; the European Insurance and Occupational Pensions Authority; the European Systemic Risk Board; the European Central Bank; the European System of Central Banks; the supervisory authorities of the member states of the European Union or entities therein, carrying out functions equivalent to those referred to above as Portuguese entities; and entities of non-EU member states if and insofar as is necessary for the supervision of the markets in financial instruments and for the individual and consolidated supervision of the financial intermediaries and entities related to resolution measures, including the Ministry of Finance.

Cooperation with other EU member state authorities can be denied to protect sovereignty, security and Portuguese public order, or if a domestic judicial decision concerning the same subject and the same persons already exists.

**Update and trends**

Particularly because of the collapse of the Espírito Santo Group, Portuguese courts are currently dealing with hundreds of lawsuits filed by investors against banks, their directors and national regulatory authorities. The winding down of Banif will also be under discussion in and out of courts in 2016.

Also, the financial crisis in itself has led to increased litigation, as a result of loan acceleration and debt collection. From the clients' standpoint, the number of urgent interim measures in reaction to those proceedings, as well as class actions in the banking sector, has increased in the last two years and will keep increasing.

At the consumer protection level, it is possible that during the next year additional legislation will be enacted aiming at strengthening the client's rights towards financial institutions, and aiming to protect clients in the context of financial services litigation.

Finally, the decrease of Euribor has also lead to a substantial increase of litigation started by clients against their financial counterparties under derivates (mostly interest rate swaps). The courts were caught by surprise with this new type of litigation, since until recently there have been few court proceedings started in Portugal in relation to derivatives.

The Portuguese judiciary system is now dealing with the challenge of managing a large amount of new, complex and sophisticated cases.

**22 May private parties bring court proceedings against financial institutions directly for breaches of regulations?**

Yes. Private parties (either individuals or companies) may, without distinction, bring court proceedings against financial institutions for breaches of regulations when such parties are directly affected by those breaches.

As mentioned in question 2, financial institutions are liable for damages caused to any persons because of breach of the duties concerning the organisation and exercise of its activity, whether there is a contract between them or not.

**23 In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?**

No, there is no such obligation to disclose complaints filed by other private parties.

Other complaints are less relevant, as it is not possible to establish collateral facts based on such complaints. Moreover, in Portugal there is not any judicial precedent rule.

In any case, as a general rule court proceedings are not confidential, meaning that any party, any lawyer or anyone who has a reasonable interest may have access to the court file. Criminal proceedings and administrative proceedings may be confidential by virtue of law or decision of the administrative authority in charge of the proceedings.

Arbitrations are, in general, subject to confidentiality; nevertheless, parties are allowed to disclose information involved in the proceedings if necessary to protect their rights or if ordered to do so by any authority.

**24 Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?**

No. A private party shall not directly enforce the terms of a business review or redress exercise.

**25 Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?**

Firstly, the introduction of legislation limiting the rights of banks to collect debt from clients under housing and consumer loans has led to adaptations in the financial services litigation, as the credit institutions must now follow a mandatory out-of-court procedure, as a condition precedent to accelerating those loans and enforcing security (see question 14). Clients are entitled to challenge the judicial proceeding if this prior formality is not settled.

Second, the implementation of EU Directive 2014/59 on recovery and resolution of credit institutions has influenced the way in which the Bank of Portugal has adopted recovery proceedings in relation to Banco Espírito Santo and Banif. In particular, the resolution measures in respect of Banco Espírito Santo, which were adopted in August 2014, are having a major impact on financial services litigation. Investors with losses have filed hundreds of complaints against companies of the affected financial groups, against the vehicles created by the resolution measures, against former directors and against the regulator (the Bank of Portugal) that applied the resolution measures. Regulators have also brought administrative offence proceedings against the former directors of those financial institutions and companies.

Campos Ferreira
Sá Carneiro
& Associados

**João Maria Pimentel** **joao.pimentel@csassociados.pt**
**André Fernandes Bento** **andre.fernandesbento@csassociados.pt**
**Pedro Duro** **pedro.duro@csassociados.pt**

Av da Liberdade 249, No.8
1250-143 Lisbon
Portugal

Tel: +351 211 926 800
Fax: +351 211 926 899
www.csassociados.pt

*Getting the Deal Through*

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

*Also available digitally*

**Online**

www.gettingthedealthrough.com

Law Business Research

*Financial Services Litigation*
*ISSN 2398-5844*

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

*Official Partner of the Latin American Corporate Counsel Association*

ABA Section of International Law
*Your Gateway to International Practice*

*Strategic Research Sponsor of the ABA Section of International Law*