Financial Services Litigation

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2017

GETTING THE DEAL THROUGH

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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
Second edition
ISSN 2398-5844

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

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Portugal

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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 customers petitioning for losses caused because of the wrongful payment of checks (eg, forged ones) or in connection with the refusal to refund the customer in case of undue use of credit cards by third parties.

As for claims against insurers, customers 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 customers 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 customers (or with customers purchasing property for habitation purposes) are also subject to pre-contractual and contractual information duties, duties to clarify any doubts of the customer 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 those described above.

As a final comment, in all relevant fields, the aforementioned duties are mainly owed to the customers. Accordingly, the breach thereof shall raise liability to the relevant financial institution, if the customer 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 customers.

Also, these types of institutions are liable for losses caused to customers as a result of breach of duties concerning their organisation and exercise of their business, which are indirectly aimed at safeguarding the customers' interests (ie, losses caused to customers because of breach of duties to separate the assets of the customers from those 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' criterion. 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 criterion 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. The Securities Code (article 304) also provides a general rule of good faith applicable to the financial intermediaries (eg, they have a duty to act in a diligent, loyal and transparent manner). Since financial services are heavily regulated in Portugal, customers 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 customers against financial institutions, essentially based on the breach of the bona fide duty, for example, with a view to:

- preventing a credit institution from accelerating a loan, on grounds that the event of default was not material;
- terminating or modifying 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
- prohibiting 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 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 customers, 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 customer; 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.

Typical claims submitted by clients seek 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 customer.

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 customer. 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 customer. 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 customers 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 customers, 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 customer'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 customer, pre-contractual and contractual information duties, restrictions on termination of credit agreements upon a customer's default, cooling-off periods, etc.

In the credit-granting and investment services businesses in particular, when a customer 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 customer and regardless of the customer 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 customer;
- 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 customers' 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, customers often submit a complaint to the regulator of the relevant financial services sector. This may have a positive impact on the customer, 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.

10 Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

Customers face some procedural limitation defences in mis-selling claims brought against financial institutions, in particular banks, based on the alleged breach of duties to provide complete and accurate information and advice on financial instruments, as well as concerning claims brought against the banks' directors based on the breach of their fiduciary duties.

In such proceedings banks often invoke article 324 of the Securities Code, which is applicable to contractual liability of the financial intermediaries. That article sets forth a two-year statute of limitation for claims arising from financial intermediaries' liability except in case of wilful misconduct or gross negligence. Banks claim that this period starts on the date of subscription or purchase of the product by the customer; customers, on the other hand, argue that the relevant date is when they became aware of the loss allegedly caused by the bank's negligence (eg, when the issuer of the subscribed security is in default or when the customers asked for the reimbursement and were informed that the issuer was in default). This topic has been discussed in courts. In particular in cases where the customers claim that they were not aware of a risk of non-reimbursement of the principal, higher courts have been following the second interpretation (ie, the one followed by the customers).

As regards to directors' liability, article 498 of the Civil Code sets forth a three-year statute of limitation as of the date when the plaintiff becomes aware of the damage and thus its right to compensation, even if not yet aware of the perpetrator's identity or the extent of the loss.

In the wake of Banco Espírito Santo's bankruptcy in August 2014, various customers filed lawsuits against the directors of this institution and other institutions of the Espírito Santo group, petitioning the payment of compensation for losses. In order to interrupt such statutes of limitation, judicial claims and judicial notices filed by the customers against the banks and their directors have been increasing as we approach the third anniversary of such bankruptcy. In fact, most customers allege that the statute of limitation period commenced when Banco Espírito Santo was declared bankrupt and subject to recovery measures, and should thus end in August 2017 or later. These matters are currently being discussed in the courts.

Procedure

11 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), 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.

12 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 procedure 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.

13 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 customers (corporate bodies or individuals) the opportunity to submit certain disputes to arbitration before any of those authorities. Such disagreements are those 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 customer 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.

14 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 (see question 27).

15 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.

16 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 the Portuguese jurisdiction.

17 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 pretrial 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's interest, or if that transfer is required on important public interest grounds, or for the commencement or defence of legal claims (article 20).

18 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 customers in connection with the rendering of their services (articles 78 and 79 of the General Banking Law, article 304/4 of the Securities Code and article 119 of the Insurance Contract Law). Names of customers, 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 disclosure 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).

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

Private parties may request disclosure of their own personal data. As regards to disclosure of other parties' data, and as a general rule, it is not allowed since personal data regarding bank customers will be protected by banking secrecy.

Outside of a court action, 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.

20 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

21 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, anyone who 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.

22 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.

23 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.

Update and trends

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

In particular, owing to the collapse of Banco Espírito Santo and other companies of the group, Portuguese courts are dealing with hundreds of lawsuits filed by investors against financial services providers, their directors and national regulators mainly based on mis-selling of financial products. The proceedings of judicial liquidation of Banco Espírito Santo are also pending and the court must deal with hundreds of credit claims.

Loan enforcement and debt collection proceedings brought by credit institutions have been consistently increasing over the past few years and they still represent a significant share of the existing litigation regarding financial services. From the customers' standpoint, the number of urgent interim measures in reaction to those proceedings, as well as class actions in the banking sector, have increased in recent years and it is likely that they will keep increasing.

In addition, banks have been assuming a relevant role in insolvency or recovery procedures of Portuguese companies owing to the significant amount of bad debt claimed in those proceedings, including by participating on recovery measures decided by the creditors of such companies.

Lastly, the decrease of Euribor has also led to a substantial increase in litigation commenced by customers against their financial counterparties under derivatives (mostly relating to interest rate swaps). Portuguese courts were caught off guard by this new type of litigation since until now court proceedings relating to derivatives have been very rare in Portugal.

24 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 no 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.

25 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.

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

First, the introduction of legislation limiting the rights of banks to collect debt from customers 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). Customers 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.

27 Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

Law No. 144/2015 (see question 14) provides specific rules on alternative dispute resolution (ADR) procedures (eg, arbitration, mediation and conciliation procedures) applicable to consumers who wish to complain about contractual obligations stemming from sales contracts or service contracts between a trader established and a consumer resident in Portugal or in the European Union. There is no limit on the number or on the amount involved for the use of such ADR procedures.

Financial services providers shall inform their customers about the generally available ADR entities or regarding the ADR entities that they have hired, in particular indicating the website of such entities. This information shall be included in the contracts entered into with the customers and on the website of the services provider, if any.

The ADR entity shall be independent and impartial. That entity shall propose a solution or bring the parties together with the aim of facilitating an amicable solution.

Participation in ADR procedures is not mandatory. The parties are not bound to file such a procedure as a condition precedent to start a lawsuit in the competent courts.

As regards to conciliation procedure, the parties are entitled to withdraw from that procedure at any stage, as well as to bring a court action regarding the same dispute. In such case, the procedure shall have no relevance on the court proceedings. In addition, the solution obtained in conciliation may be different from the one that would be granted by a court – it does not have to be strictly based on the applicable laws. In any case, the parties are not bound by the solution proposed by the ADR entity in such conciliation.

Each of the ADR entities shall approve and apply their own procedural rules.

Customers of financial services firms may complain to one of the three Portuguese regulators of financial services: to the Bank of Portugal in matters related to retail banking products or services; to the CMVM in matters related to investment funds or securities; or to the Portuguese insurances and pension funds regulator (the ASF) in matters related to insurances or pension funds. The regulators shall review the complaint and present to the complainant the conclusion reached about the financial services firms' acts. When any irregular situation is found, the regulators are entitled demand the remedy of the breach of the relevant legislation or regulation and sanction the serious misconducts. Regulators will not, however, allocate damages to compensate the customers nor issue an enforceable decision regarding the dispute. A redress can only be claimed in courts, by arbitration or by the special regime on alternative dispute resolution described above.

The Bank of Portugal and the CMVM also promote conflict mediation through their independent and impartial mediators, with a view to reaching memoranda of understanding or collaboration agreements between financial services firms and their customers.

Only the Portuguese securities market has a maximum size test for companies to use the complaints procedure and the conflict mediation system. Under Decree Law 5/2015, these mechanisms are only available to non-qualified investors.

28 Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

There is no specific extrajudicial process for private individuals to recover lost assets from insolvent services firms.

Though it does not ensure an actual recovery 'from' the insolvent bank, the Deposit Guarantee Fund guarantees the repayment in full of cash credit balances of each deposit holder up to a limit of €100,000 per credit institution. In general terms, repayment shall take place within seven working days of the date on which the deposits became unavailable and shall not depend on a request from the depositors to the fund for that purpose.

There is also an Investors Compensation Scheme managed by the Portuguese securities market regulator, which enables non-qualified investors to claim up to a maximum of €25,000, in case of an insolvency (or breach of payment duties due to lack of funds) of an investment companies, in relation to whom they hold credits, which may arise in connection with the duty to reimburse funds aimed to be used in investment transactions, or resulting of such transactions (including in case of reimbursement guarantees assumed by the investment companies).

Both the Deposit Guarantee Fund and the Investors Compensation Scheme, to the extent they pay the compensation to the depositors or investors, become subrogated in relation to the claims held by those depositors or investors as regards the banks or investment companies that were settled with such payment.

The collapse of Banco Espírito Santo has also led to the discussion of extrajudicial ad hoc agreements in order to partially reimburse some investors in respect of losses suffered in connection with the subscription of financial instruments issued by Espírito Santo group entities. An agreement to partially reimburse non-qualified investors who invested in commercial paper and who have claimed their credits within the insolvency proceedings of the Espírito Santo group issuer companies is under discussion between the state, the Bank of Portugal, the CMVM, Banco Espírito Santo and an association representing the investors.

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