The Banking Litigation Law Review

Third Edition

Editor
Deborah Finkler

The LawReviews

THE BANKING LITIGATION LAW REVIEW

THIRD EDITION

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Deborah Finkler

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that the increase in litigation involving banks shows little sign of slowing.

Although disputes arising from the 2008 financial crises are reaching their end, what might be termed 'normal' banking litigation has resumed, and is in no short supply. This crosses the full spectrum from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. In all these cases, cross-border issues frequently arise, and banking litigation remains an important source of developments in the conflicts of laws in international commercial litigation.

The context for much of the consumer litigation is the growing – and increasingly complex – range of consumer protection regulation in the various jurisdictions under review. However, while the courts appear content to apply that legislation in order to hold banks to account, its existence – together with the more extensive rights it affords to consumers – has meant that in many parts of the world the courts are less willing to expand consumer rights beyond the context of that regulation, instead preferring to enforce the contractual rights between banks and customers strictly.

In those circumstances, we have seen a growth in the use of class actions and representative claims, often where consumers can take advantage of friendly regulation. These mechanisms are being adopted in countries where they did not previously exist, in some cases by changes in legislation, and in others by changes to court procedure. At the same time, courts in different jurisdictions are reacting very differently to this new or growing type of litigation. In some cases this is by seeking to restrict the circumstances in which such claims can be made but in others by promoting their use. It therefore remains to be seen whether the growth of class actions and representative claims against banks is really a worldwide phenomenon.

These novel forms of litigation, and other more conventional claims, are also subject to a global trend towards making both the courts and, importantly, alternative forms of dispute resolution more available to litigants. We continue to see parties encouraged to settle their claims out of court, by way of general mechanisms such as mediation or by way of specialised banking ombudsmen. Further, some jurisdictions are promoting the use of class or group settlements, which can resolve major disputes with limited court involvement.

At the same time, the impact of data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, has opened a further means by which claimants can bring claims against banks, which are inevitably major holders of personal data. The use of the GDPR both as a tool in litigation and as a source of complaint or damages in itself is, therefore, a concern for banks, both in a regulatory and in a litigation context. This concern is only likely to grow.

One bright spot for banks is a general trend in favour of upholding assertions of secrecy, confidentiality and privilege on the part of banks and their advisers against claimants. This is especially important in the context of investigations against banks. In common law jurisdictions in particular, courts now tend to treat such investigations as akin to adversarial litigation and after the concerns raised over the past year or two, now largely accept that many documents created during investigations should be protected by privilege.

Finally, the general political and economic uncertainty around the world remains a probable source of banking litigation, especially where that uncertainty negatively affects investors. Nobody is any closer to being able to say what the political or economic impact of Brexit will be either to the United Kingdom's banking sector or to that of the European Union. It would be dangerous to predict when clarity in this regard will be available.

Deborah Finkler
Slaughter and May
London
November 2019

Chapter 12

SPAIN

Javier Izquierdo and Marta Robles[1]

I OVERVIEW

Banking litigation in Spain has been governed in recent years by several judicial resolutions that, by interpreting the existing consumer protection laws in favour of the consumer, have increased the number of claims brought against financial entities. A significant number of Spanish courts have positioned themselves as pro-consumer, and judicial proceedings against financial entities have overwhelmed Spanish courts in the past decade, in particular over the past five years. This even led to the constitution of specialised courts for certain banking litigation proceedings, their aim being to reduce the workload of other courts that were accumulating significant delays.

Spanish courts have therefore shaped the current landscape of banking litigation, determining how to apply the corresponding regulation that, in truth, has not changed significantly in recent years. European Directive 93/13/EEC of 5 April 1993, on Unfair Terms in Consumer Contracts, constituted the basis on which Member States have adapted, since then, their own national regulations. Its implementation in Spain has been carried out through the introduction of fundamental laws such as Law 7/1998 of 13 April, on General Conditions of Contracts, Royal Decree-Law 1/2007 of 16 November, approving the consolidated text of the General Defence of Users and Consumers Act and other complementary laws.

These laws constitute the basic fundamental framework of banking litigation in Spain. In fact, most legal proceedings against banks are initiated in our local jurisdiction on the basis of their provisions and, principally, on the provisions regulating unfair clauses.

In fact, in order to reduce the number of proceedings affecting financial entities, several laws have been enacted recently in Spain. Their ultimate aim is to keep consumers duly protected against any abuse to be committed by banks and, at the same time, ensure that financial entities remain protected from allegations regarding the unfairness or invalidity of their contracts. In particular, and among others, we refer to the recent Law 5/2019 of 15 March, on Real Estate Credit Agreements (Real Estate Credit Agreements Act), and the different regulations that the Markets in Financial Instruments European Directive (the MiFId Directive) implemented in Spain in the most recent version enacted in 2014.[2]

The main changes introduced by those rules will be analysed in this chapter, after reviewing the most relevant judicial cases that have decisively influenced the current banking litigation situation in Spain.

1 Javier Izquierdo is a litigation and arbitration partner and Marta Robles is a litigation and arbitration associate at Pérez-Llorca.

2 European Directive 2014/65/EU of the European Parliament and of the Council, of 15 May 2014, on Markets in Financial Instruments, and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II).

II RECENT BANKING JUDICIAL PROCEEDINGS OF RELEVANCE

Most judicial proceedings initiated against financial entities in recent years have as their subject matter the declaration of invalidity, due to their alleged unfair nature, of clauses included in mortgage loan agreements. This has led to several judgments declaring, depending on the case, the validity or invalidity of clauses challenged by consumers.

In this chapter, we will focus on the most common type of judicial proceedings of recent years, with reference to certain judicial decisions of considerable relevance rendered during the last months of 2018 and throughout 2019.

i Judicial proceedings concerning the invalidity of '*cláusulas suelo*'

The '*cláusula suelo*' is the clause that establishes a minimum interest rate below which the floating interest rate may not fall, known as the 'floor clause'. This clause, which is no longer used in banking practice following judgments on the matter, sets a minimum interest rate to be paid by the mortgage borrower, despite the parties having agreed on a floating interest rate normally based on Euribor. Thus, as consumers say, this clause establishes, in practice, a fixed interest rate despite the fact that, in the mortgage loan contract, the interest rate is set forth as floating. On this basis, consumers request that it is declared null due to its unfair nature.

It should be noted that invalidity due to the unfair nature of this clause entails the repayment, to the consumer, of significant amounts. The fall of Euribor in 2009 led to the minimum interest rate (floor clause) being applied. Therefore, those consumers who had agreed to a floating interest rate on their mortgage loans could not benefit from the widespread fall in interest rates. Thus, the declaration of this clause as null and void implies the repayment to the consumer of those amounts paid in excess due to the application of the minimum interest rate.

On the basis of the above, the Supreme Court, in its judgment of 9 May 2013, after carrying out an abstract and general analysis of these clauses, considered them unfair and, hence, null and void. This judgment became essential, establishing itself as the judicial decision of reference on this matter.

However, notwithstanding the importance of the above-mentioned judgment of the Supreme Court, there are still pending judicial proceedings dealing with the validity of these clauses. We refer to proceedings initiated in 2010 by a well-known banking consumer organisation against the majority of financial entities operating in Spain. Commercial Court No. 11 of Madrid, in its judgment of 7 April 2016 (and based on the prior judgment of the Supreme Court of 2013) confirmed that, in general terms, this kind of clause is null and void as it is unfair. On 12 November 2018, the Court of Appeal of Madrid confirmed such judgment, although making a number of relevant considerations on this matter.

In particular, the Court of Appeal set forth that the abstract and general analysis of 'floor clauses' does not prevent consumers from initiating individual proceedings challenging their validity. In those individual proceedings, the specific clause must be analysed on the basis of the information provided to the consumer, also taking into account how it was included in the mortgage loan contract by the bank. It is, therefore, possible for the court to conclude that the latter acted with the necessary diligence and, thus, to agree that the clause, in that particular case, is valid, as the consumer was well aware of its content and consequences.

Currently, the judgment rendered by the Court of Appeal of Madrid is being appealed before the Supreme Court by many of the financial entities against which charges were originally brought (however, most decided not to appeal, given the time elapsed since the claim was filed and the fact that most of them have reached agreements with their clients in respect of this clause). The Supreme Court is expected to render a judgment that shall determine, as the case may be, the validity of these clauses in general, several years from now.

ii Judicial proceedings concerning the invalidity of clauses that foresee that the mortgage borrower must pay all fees and expenses arising from the granting of the mortgage loan

Currently, some of the most common judicial proceedings in banking litigation are those initiated to request that clauses that compel the mortgage borrower to pay all the expenses related to the granting of the mortgage loan (essentially, Property Register and Notary Public fees, taxes, expenses of the agency in charge of processing the granting of the loan, and expenses resulting from the appraisal of the mortgaged property) are declared null.

One judgment that triggered claims challenging these clauses was the Supreme Court judgment of 23 December 2015, which analysed several typical clauses included in mortgage loan contracts, including the clause in question. This resolution declared it unfair, and therefore, null and void. However, subsequent Supreme Court rulings have qualified this judgment, particularly in relation to the consequences of the invalidity of this clause. We refer to Supreme Court Judgments no. 44, 46, 47, 48 and 49, rendered on 23 January 2019.

The Supreme Court understands that it is unfair to compel the consumer to pay all the expenses arising from the granting of the mortgage loan, when many of them result from the benefit that it implies for the financial entity to establish a guarantee over the property. However, it is the consequences of this invalidity that are relevant, that is, whether the bank should return to the consumer expenses paid by the latter.

In relation to this, the Supreme Court agrees that the invalidity of this clause does not imply that the bank should repay the fees and expenses that have already been paid by the borrower. It shall depend on which party benefited from the services that accrued the fee or expense, as well as on what is regulated in the specific rules for each expense. For example, it is understood that, as the mortgage loan is registered with the Property Register in favour of the financial entity, it is the latter that should pay the corresponding fee. However, it is understood that the bank and the borrower should each pay half of the Notary Public fees, as this service benefits them both when the loan is granted.

The issue has been particularly controversial with respect to stamp duty, since this is the highest amount that borrowers usually pay when securing a mortgage loan, and the rules that govern who must pay it are not very clear. In this regard, the Supreme Court, when interpreting said controversial rules[3] in the judgments mentioned in this section, has clarified that the mortgage borrower should pay the stamp duty.[4]

3 Article 29 of Royal Decree-Law 1/1993, of 24 September, approving the Revised Text of the Property Transfer Tax and Stamp Duty Act, and Royal Decree 828/1995, of 29 May, approving the Regulation of Property Transfer Tax and Stamp Duty.

4 These judgments differentiate between the variable and fixed tax rate, indicating that the borrower must pay the fixed rate. The previous judgment of the Civil Chamber of the Supreme Court of 15 March 2018 already agreed in this sense; however, the Public Administration Chamber of the Supreme Court, *ex post*, contradicted said resolution. The Supreme Court, in plenary session and by means of said judgments, settled such contradiction by confirming that the borrower must pay this tax.

In any case, and as we will see later, the recent Real Estate Credit Agreements Act has definitively regulated which expenses arising from the granting of a mortgage loan must be paid by the bank and which must be paid by the borrower, in order to avoid further judicial proceedings on this matter.

iii Judicial proceedings concerning the invalidity of clauses that compel mortgage borrowers to pay certain banking fees or service fees (emphasis on the arrangement fee)

The payment of banking fees has also given rise to a significant number of judicial proceedings against banks, in which the unfair nature of some of these fees is considered. In general, Spanish courts understand the payment of banking fees by consumers to be justified if the bank has provided an effective service to the latter from which an expense has resulted, being proportionate to the service provided and the fees to be paid. For example, in relation to the debt claim fee, if the bank proves that it has had to incur expenses in order to claim the non-payment from the debtor on several occasions, without the latter having complied with the request, the fee to be paid by the debtor will be valid.

Among others, the validity of the arrangement fee in particular, which is accrued as a result of granting a new mortgage loan, has been questioned. Judgments of the Supreme Court of 23 January 2019, to which we referred in subsection ii, understand this fee to be part of the price of the loan. In particular, the Supreme Court states that interest and the arrangement fee are the main remunerations received by the financial entity for granting the loan. Thus, it is a fee duly received by the bank.

Moreover, and as stated by the Supreme Court, when preparing and granting the loan, the bank carries out a range of activities other than the mere disposition of money (examination of the application form, collection and analysis of solvency information, evaluation of the guarantees provided, preparation of the contract, etc.). All these actions, which are obviously necessary for granting any loan, would justify the lender charging an arrangement fee as part of the loan's price.

Notwithstanding the foregoing, as we will see, the aforementioned Real Estate Credit Agreements Act has also regulated which banking fees are valid and should be paid by borrowers (specifically, banking fees to be paid by the borrowers have been restricted to those corresponding to the appraisal of the property for which the mortgage is granted).

iv Judicial proceedings concerning the invalidity of clauses that apply the Mortgage Loan Reference Index to mortgage loans

The Mortgage Loan Reference Index (IRPH) is one of the indexes used by Spanish financial institutions instead of Euribor (the usual reference rate for mortgage loans) to calculate mortgage interest. This index has been defined, in recent years, as being higher than Euribor (normally between 1.5 and 3 per cent) and more stable (it dropped less severely than the latter). Thus, holders of mortgage loans that incorporate this reference index have gone to the Spanish courts to request that it be declared invalid due to its unfair nature, and that it be substituted by Euribor, demanding that the amounts paid in excess be returned.

To date, Spanish courts have faced, to varying degrees, these requests for invalidity. The Supreme Court, in its judgment of 14 December 2017, agreed that this index is valid and, therefore, so are the clauses that apply it to mortgage loans. This judgment, which could have led Spanish courts to adopt a consistent stance, has not, however, been followed by all.

Within this context, the Court of First Instance No. 38 of Barcelona, by means of its Court Order of 16 February 2018, requested that the European Court of Justice (ECJ) render a preliminary ruling on the validity of the clauses applying this reference rate to mortgage loans. The final decision of the ECJ on the unfair nature of the clauses incorporating this reference index is expected to be rendered by the end of 2019 or the beginning of 2020.

The Advocate General of the ECJ has recently published his conclusions on this matter, which the ECJ may or may not follow. According to said conclusions, it can be understood that clauses incorporating this index will be ultimately subject to the control of the courts and therefore, those courts will have to determine whether such incorporation was unfair.

v Judgment rendered by the ECJ in relation to the consequences of nullifying an early maturity clause in mortgage loans

Although the case law of the ECJ and, consequently, of the Supreme Court have already ruled on the unfairness of clauses allowing the early maturity of a mortgage loan in the event of non-payment of a single monthly instalment, yet to be clarified was:

a whether the clause could be partially retained in the contract by eliminating those elements that make it unfair (i.e., the possibility of repaying the loan for non-payment of a single instalment); and

b whether, if it is not possible to partially retain the clause in the contract, mortgage enforcement proceedings initiated on the basis of this clause may continue, therefore not applying that foreseen in Article 695 of the Spanish Civil Procedure Act (SCPA).

In particular, Article 695 of the SCPA foresees that the court should waive enforcement proceedings if the early maturity clause that determined the institution of said proceedings is declared unfair and, hence, null and void. However, this measure, which apparently benefits the debtor, could lead the bank to initiate ordinary enforcement proceedings. These would be more harmful to the debtor, since it enables the creditor to claim all of the debtor's property, not only the mortgaged property.

In its judgment of 26 March 2019, the ECJ ruled out a number of preliminary questions raised in this regard by the Spanish courts, concluding that:

a it is not possible to partially retain the early maturity clause in the contract; and

b taking into account the damages that would be caused to the debtor if the clause were to be eliminated from the contract and enforcement proceedings were to be terminated, it is possible to replace, exceptionally, the clause declared unfair by the alternative rule established in Article 693.2 of the SCPA. This would mean including an early maturity clause that enables early maturity when three or more instalments have not been paid.

The Real Estate Credit Agreements Act has also regulated this issue, setting forth the requirements that an early maturity clause should meet in order to be considered fair and therefore valid.

III RECENT REGULATIONS

i Law 5/2019 of 15 March, on Real Estate Credit Agreements

Law 5/2019 of 15 March, on Real Estate Credit Agreements, is aimed at implementing in Spain Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property.[5]

In general, the purpose of this rule is to strengthen the protection of the consumer and, at the same time, of the bank, by protecting it against possible allegations of unfair clauses and lack of information provided to consumers on the conditions of their mortgage loan. Indeed, the Real Estate Credit Agreements Act regulates the content of many of the clauses referred to above that have traditionally been challenged before the courts. The main changes introduced by this Real Estate Credit Agreements Act are as follows.

Pre-contractual information and transparency

Pre-contractual information must be provided to the consumer at least 10 days before the contract is executed before a notary public. Documents to be provided should consist of (1) the Standard European Consumer Credit Information Sheet (SECCI); (2) the Standard Warning Consumer Credit Information Sheet (FIAE); and (3) the draft contract to be signed by the borrower.[6] The information to be provided under this new Real Estate Credit Agreements Act must be more detailed and should ensure that the borrower is fully aware of all the implications of their loan.

The notary public figure takes a leading role in ensuring that the consumer is duly aware of all conditions and clauses of their loan. For this purpose, the Real Estate Credit Agreements Act foresees that, before the signing of the loan contract, the notary public must grant a notarial certificate to certify that the advice they have given to the borrower has been sufficient, and that the latter understands and accepts the content of the contract and its risks. In addition, the notary public must submit the borrower, who must receive all the relevant information in writing, to a test before signing.

Early repayment fee

The Real Estate Credit Agreements Act restricts early repayment fees. In particular, with regard to floating interest rate mortgage loans, the early repayment fee may only consist of a maximum of 0.25 per cent over the capital amount redeemed in the first three years, and for the remaining term of the loan, a maximum fee of 0.15 per cent must be applied. For fixed interest rate mortgage loans, the maximum fee to be applied during the first 10 years of the loan's term shall be 2 per cent, and 1.5 per cent for the remaining term of the loan.

The possibility that the bank will enforce early maturity

Before the Real Estate Credit Agreements Act came into force, the early maturity of mortgage loans was considered valid after the third instalment defaulted by the borrower. However, under said Act, it shall depend on the number of instalments due and not satisfied as well as on the phase of the loan's term in which the defaults occur. Specifically, early maturity would

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5 Its scope is thus restricted to this type of contract. In particular, loans secured by mortgage or other security rights over real estate for residential use, provided that the borrower or guarantor is a natural person, and the lender is a natural or legal person who carries out that activity in a professional manner.

6 The content of these documents is regulated in the same Real Estate Credit Agreements Act.

be valid during the first phase of the loan's term when the unpaid instalments correspond to 3 per cent of the capital granted or to 12 monthly instalments; during the second phase of the loan's term, the unpaid instalments must correspond to 7 per cent of the capital granted or to 15 monthly instalments.

The default interest rate and incentives to convert the loan to fixed interest rate

The Real Estate Credit Agreements Act sets forth that the default interest rate should be three times the legal interest. Likewise, it foresees that the borrower must be given incentives for switching their loan from a floating interest rate to a fixed rate.

Fees and expenses arising from the granting of the loan

This constitutes one of the most important measures introduced by this rule, given its impact on banking litigation. In particular, we refer to the fact that, by virtue of the Real Estate Credit Agreements Act, it is finally established that lender must pay all notary public, property register and administrative fees and expenses, including the payment of stamp duty,[7] arising from the granting of the mortgage loan. The borrower, for their part, must only pay expenses resulting from the appraisal of the mortgaged property.

The entry into force of the Real Estate Credit Agreements Act in June 2019 entailed major practical problems, such as what would happen to mortgage loans negotiated under the previous regulation but which had to be signed once the new act came into force, or what would happen if financial institutions had not had time to update their files in time in order to adapt to the new requirements introduced by the act. This situation obliged the General Directorate of Registers and Notaries to intervene, so as to provide a balanced solution for all parties involved pursuant to the law and in the spirit of the Real Estate Credit Agreements Act.

ii Markets in Financial Instruments European Directive (MiFId II)

The initial deadline for the Member States of the European Union to implement Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, on Markets in Financial Instruments (MiFId II), was 3 January 2017. As the European Commission ultimately delayed this deadline, the Spanish government arranged an implementation process consisting of three phases, by means of the following three laws:

a Royal Decree-Law 21/2017, of 29 December, on urgent measures for the adaptation of Spanish law to European Union regulations on securities markets.

b Royal Decree-Law 14/2018, of 28 September, amending the Securities Market Act.

c Royal Decree 1464/2018, of 21 December, implementing the Securities Market Act and Royal Decree-Law 21/2017, of 29 December referred to above. As this Royal Decree entered into force at the end of December 2018, it was implemented in 2019.

The main changes introduced by these regulations, in terms of investments and investor client protection, are:

7 Specifically, it is foreseen in Article 14 that the corresponding Property Transfer Tax and Stamp Duty Act shall be paid in accordance with the applicable regulation.

a Suitability and convenience test: investor clients must undergo a test to determine their risk profile, so that investment institutions can offer them suitable products. Depending on the results of the suitability test, customers must be classified as retailers, professionals or an eligible counterparty, ranging between those with less to more experience and knowledge, respectively. In addition, investment institutions are obliged to review the products that their clients have contracted annually, and to confirm that they are the most suitable for them.

b Advice and incentives: depending on whether the financial advisers are dependent or independent (they are obliged to report this to the client), they may or may not collect incentives and retrocessions.[8] In general, independent advisors may not collect incentives corresponding to the sale of funds.[9] Non-independent advisors may continue to obtain incentives, if they can provide evidence that they have improved the quality of the service provided (for example, if they give the client access to a wide range of third-party products), and it is ensured that no benefit is being generated for the investment services firm without there also being a benefit to the client.

c Contracts: the provision of investment services, with the exception of advisory services, must be duly set out in a contract signed by both parties, indicating the rights and obligations of both. For advisory services, it will be necessary to record the recommendation made in writing or by other reliable means.

d Training: MiFId II requires a more personalised service to be provided to each investor. Financial institutions that provide advisory services must ensure and certify that their investment employees are sufficiently trained. Thus, new training and knowledge requirements are established for those who provide advisory services. If an employee does not have sufficient certification, he or she may continue to carry out this activity for two years, although always under the supervision of another professional with the required qualification.

e Transparency and necessary information: there is an increasing obligation to inform investors of the costs involved in acquiring financial products, as well as to provide pre-contractual information and include more details in periodic reports. In relation to this, and depending on the case, there will be a periodic evaluation of the suitability of the financial instruments that are recommended to clients. In essence, the new information requirements set out in MiFID II focus on three main aspects:
- information on the advisory service to be provided, namely, independent or non-independent, as well as the range of financial instruments analysed and their selection process;
- information on costs and associated expenses, both for financial instruments and for investment and ancillary services; and
- information regarding financial instruments and associated investment strategies, including associated risks and how the financial instrument in question may operate in different scenarios (both favourable and unfavourable).

8 We refer to incentives as rewards provided by the owners of the funds, corresponding to the achievement of sales targets; retrocessions are part of the service charge that the marketer of an investment product, usually a fund, retains, including them within the final price.

9 In other words, they can only charge a service charge to their clients, not to the managers of the investment funds that they market.

The obligation to record all telephone conversations and communications related to transactions carried out when negotiations are performed independently, and to the provision of services related to the reception, transmission and execution of client orders, was also introduced. All this compulsory information must be collected on a durable medium (which, for the purposes of this new legislation, is considered to be hard copy or online), for a minimum period of five years.

IV CONCLUSION

Banking litigation in Spain has been governed in the past few years not so much by the applicable regulation, but by the interpretation that courts have made of it, often seeking help from the ECJ to reach their conclusions.

The current trend is to encourage greater protection for the consumer and, in turn, for the bank, by protecting the former in order to avoid the litigation against the latter, as the significant number of judicial proceedings initiated against financial entities had begun to overwhelm some courts, leading to substantial delays.

A good example of this trend are the two laws we have mentioned: MiFId II and the Real Estate Credit Agreements Act; the latter decisively influenced by certain judicial resolutions that have decided upon the unfair nature of certain clauses commonly used in banking practice. In fact, the Real Estate Credit Agreements Act shows the impact that banking litigation and, in particular, judicial resolutions such as those mentioned in this article, have had on banking practice.

Nonetheless, it is expected that banking litigation will continue in the coming years, in terms of consumer protection proceedings and proceedings related to the validity of clauses included in banking contracts, including investment transactions. It should be noted that more information is continuously being provided with the aim of nullifying any allegation of defective consent of the client, and that conditions offered by financial entities are now designed to ensure a balance of benefits that may avoid any allegation of unfairness.

In short, legislators' response to the deluge of banking litigation has been to exercise extreme caution and ensure the protection of the consumer and the investor client, thus reducing the chances of questioning, *ex post*, the transactions they have entered into. This is as a result of significant judgments rendered in relation to the unfair nature of certain clauses traditionally included in banking contracts, and some questionable attitudes of financial institutions.

However, there are still many banking transactions that fall within the scope of the previous legislation, which was less protective of consumers. This situation, together with the fact that, to date and to a large extent, judgments have mainly favoured the position of consumers against financial entities, leads us to believe that, in the immediate future, there will continue to be a significant number of legal proceedings initiated against banking entities, questioning their transparency and behaviour towards their clients.

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Javier Izquierdo joined Pérez-Llorca as a partner in 2018 after working for almost 15 years at various national and international firms.

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