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BRIEFING

Legal bites on consumer protection in Spain (III)

What can residential lettings learn from banking litigation on unfair terms?

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Several recent developments point to the same trend. In April, a fine of more than 3 million euros was imposed against a major residential letting operator for using unfair terms in its standard contracts. Around the same time, at least one further disciplinary investigation, still confidential, has been reported in the press, targeting a major real estate company active in residential lettings. There is also a May report on unfair terms and practices in the residential sector, more activity conducted by regional consumer protection bodies, and louder campaigning by consumer associations and tenants' unions. The message is clear: the residential lettings sector is now firmly on consumer regulators' radar.

The real question is whether this is the start of something like the wave of mass litigation that hit the banking sector in the early 2010s. In our view, that is the key issue: neither consumers nor businesses are in the same position they were in then, and that difference could decide how this plays out.

Key issues

1. Recent signs point to rising litigation pressure over the short to medium term.
2. The DESCA report has no regulatory force. It maps out focal points – it is not a list of terms definitively found unfair.
3. Five areas account for most of the risk: ancillary services, passing costs on to the tenant, tenancy-related insurance, remedies for breach, and waiver clauses.
4. The aggravating factors in the first fine give a roadmap of what will increase exposure in future cases.

5 The banking litigation wave offers key lessons: pre-contractual documentation is the strongest defence; the sales network can decide the outcome of disputes; and there is a world of difference between having a protocol and being able to prove it is followed.

6 Administrative proceedings feed civil litigation. The Collective Actions Bill, if passed, could extend exposure across the entire portfolio.

Where have we come from, and where are we going?

We do not expect a wave on the scale of the banking crisis. But we do see signs of rising litigation pressure over the short to medium term.

The key difference is that the residential sector reaches this point with an advantage the financial sector never had: it can look back at the last cycle, spot the early warning signs, and plan ahead.

A word of caution up front: the DESCA report on unfair terms has no regulatory force

The DESCA report, published in May, identifies terms and practices in the lettings and sales markets that it considers problematic, pointing to specific clauses in standard contracts used by market operators.

That said, there is an important caveat: the terms listed in the report cannot be treated as a list of terms that are definitely unfair.

There are three reasons for this. First, none of the terms the report calls unfair have actually been confirmed as such by case law, meaning two consistent judgments from the Supreme Court's First Chamber (or one from its plenary session). Second, the courts have not yet ruled on many of the terms discussed. Third, for many others, lower courts have issued conflicting decisions.

In short, the report highlights areas to watch and previews the scrutiny that may be coming; it is not a piece of regulation. It does not bind regulators or the courts, which leaves real room for analysis and defence.

Five areas at the centre of the debate

Comparing the first enforcement decision with the DESCA report, we have identified five areas where litigation is likely to increase.

1. Unsolicited ancillary services that come at a cost

Think of so-called "*tenant support services*" and similar arrangements. The risk is higher where the service is, in substance, really the agency fees that the Housing Act does not allow to be charged to the tenant - which is exactly the issue in the case in question.

2. Passing on costs that may not, *a priori*, be the consumer's responsibility

Here, the first question is not whether the term is unfair, but whether it complies with the mandatory rule in article 20 of Urban Lease Act 29/1994 of 24 November (the "**ULA**"), which governs how general expenses, taxes and non-itemisable charges are passed on to the tenant. This rule requires the maximum annual amount to be stated in the agreement and limits any increases – if this is not done correctly, the term is automatically void.

That said, not all costs are treated the same way. Most Courts of Appeal take the view that the **property tax (*IBI*)** and the **waste collection charge (*tasa de basuras*)** are not general expenses necessary for maintaining the asset or non-itemisable charges, but itemised taxes tied to the property, so the requirement to state their annual amount in the agreement does not apply to them.

Owners' association charges (*cuotas de comunidad de propietarios*), on the other hand, cannot be itemised, and the clause covering their payment must meet the two requirements in article 20.1 ULA: it must be in writing, and the annual amount must be specified when the agreement is signed.

Recent rulings also require cost pass-through clauses to meet a **substantive transparency test**: clear, legible wording is not enough; the consumer must genuinely be able to understand the clause's scope and financial consequences. Courts have found this test unmet where the tenant is not told which specific items are being passed on, the term is not backed by real data on the property, costs are deferred and settled annually, or the landlord can unilaterally change the services and charges being passed on.

Terms that breach mandatory rules are **automatically void**, and courts can apply this on their own initiative, even if no party raises it.

3. Tenancy-related insurance

Two products need to be looked at separately. On **rent guarantee insurance**, the position is not settled, and landlords have some room for manoeuvre if the term is drafted carefully. Lower court case law is divided: some rulings uphold the validity of such insurance within the legal framework, though the prevailing view requires meeting certain conditions. Courts have looked at the issue from two angles which are to be considered when planning ahead.

The first is the **quantitative approach**: rent guarantee insurance can be accepted as additional security under article 36.5 ULA, but is capped at two months' rent for tenancy agreements of up to five years.

The second is the **qualitative approach**: a challenge based on imbalance or unfairness. Some rulings have found that requiring the tenant to pay the full premium for a policy that only benefits the landlord can upset the fair balance between the parties, making the term void for unfairness under the General Consumer Protection Act (the "**GCPA**"). That risk can be managed, though: sharing the cost, or choosing a coverage that also protects the tenant's interests, helps rebalance the term and reduce exposure.

On **home insurance**, the first fine in this area found that requiring the tenant to take out home insurance – while placing them by default with a broker from the same business group – amounted to an unfair term, since it restricted the tenant's right to skip insurance not required by the ULA, or to choose the product they want Whether the civil courts will follow this approach remains to be seen.

4. Remedies for breach

This is the area with the greatest potential for wide-reaching risk going forward: penalty clauses for late vacation of the premises, termination for minor breaches, legal costs payable regardless of outcome of a litigation, one-sided default interest. The possible scenarios are endless, and each term needs to be examined on its own facts.

On penalty clauses, the debate ultimately comes down to whether the amount is proportionate. There are already substantive rulings on the point, though they do not settle the issue.

What has been settled is the floor: the landlord is always entitled to claim the equivalent of ordinary rent until possession is actually handed back. What remains open is whether a penalty above that floor can validly be agreed.

Existing rulings are contradictory, which suggests the courts' position is still forming.

5. Two cross-cutting issues that keep coming up

Here we mean two types of terms that come up again and again across standard contracts in the sector.

The first: any term that waives or limits consumer rights.

The second, and particularly exposed: terms stating that the agreement was individually negotiated. Terms like this try to shift a burden of proof that the law places on the business. Article 82.2 GCPA is clear: it is for the business to prove the terms were negotiated, and that burden cannot be passed to the consumer by contract. The risk is not limited to that term being struck down; its presence can also affect how the court views every other term in the agreement.

Administrative proceedings as a catalyst for litigation

Administrative proceedings have picked up pace and become an increasingly important front in recent months.

As noted, a fine of 3.6 million euros was imposed in April on a major nationwide real estate agency for seven very serious breaches of article

47.j) GCPA (including unfair terms in consumer agreements), together with additional penalties: publication of the decision and an order to remove the six terms found unfair.

The aggravating factors applied in this first enforcement decision in the sector give an idea of what to expect next.

The administrative decision placed particular weight on two issues:

First, a record of unaddressed complaints, in particular any earlier fines or proceedings for the same practice. In this case, an earlier regional penalty relating to the home insurance clause proved decisive: the fact that the business had been warned and carried on regardless is what settled the question of intent. Repeat offending is by far the aggravating factor given the greatest weight.

Second, classification as a very serious offence, which increases the fine, based on article 48.3 GCPA: taking advantage of people's need for housing – expressly taking the housing crisis into account – and exploiting the particular vulnerability of certain groups. One point stands out here: the profile of the portfolio itself (a significant share of young or foreign tenants) was treated as supporting the aggravating circumstance.

The financial consequences are direct: classifying an offence as very serious sharply widens the range of fines – up to one million euros, or six to eight times the unlawful profit – and triggers further penalties such as public disclosure, with the reputational damage that brings.

The risk is shifting towards collective litigation

Administrative action tends to encourage civil litigation. Once a public body imposes a fine, its decision is final and gives both consumer organisations and individuals a ready basis to go to court. To assess future exposure, we need to look at three linked questions: the litigation model to date, what is changing it, and what comes next.

To date, consumer litigation over tenancies has been individual and largely reactive, driven by two things: dissatisfaction with the service provided, and the need to defend against landlords' actions in response to breaches of contract.

That is starting to change. Lessons from the banking wave – in particular the growing activism of consumer organisations and Supreme Court case law on injunctive relief (*acciones de cesación*) – are shifting consumer litigation away from individual claims and towards a more organised, collective form of pressure.

The tools for collective litigation already exist. The Civil Procedure Act (the "**CPA**") and the GCPA allow consumer associations and groups of claimants to bring collective actions, and a number of injunction claims have already been filed seeking to ban specific terms in tenancy agreements.

However, the current system has a real structural limit: unless the mechanism in article 15 CPA is triggered – which requires the court to formally summon affected parties to the proceedings – compensation claims remain limited to individual proceedings. That has, so far, kept the practical impact of collective litigation in the sector fairly limited.

That is set to change with the Collective Actions Bill, accepted for fast-track processing in March 2025 to implement the Representative Actions Directive. Its key feature is the introduction of collective redress actions: actions that go beyond banning specific conduct to secure compensation for everyone affected, all at once.

Under the bill, the general rule is *opt-out*: the action and its outcome bind all affected consumers unless they expressly opt out. Opting in is reserved for exceptional cases, and only where two conditions are both met: the individual claim exceeds 3,000 euros, and the court considers opting in justified. If either condition is not met, opting in is not available.

In the claims typical of this sector – cost charges, passed-on insurance premiums – the individual amount rarely reaches that threshold. If the bill passes in its current form, opt-out will, in practice, be the rule for the residential lettings sector.

The consequences are significant. An unfair term stops being one tenant's isolated problem and becomes a portfolio-wide litigation risk. Exposure is no longer about how likely any tenant is to sue – it is about how much of the portfolio the practice affects.

That, in turn, shifts the focus of analysis from individual conduct to standardised practices, both contractual and pre-contractual.

From a contractual perspective, the focus falls on the standard contract: identical terms used across thousands of tenancies which, once found unfair, put the validity of the entire portfolio at risk in one go.

At the pre-contractual stage, the focus shifts to the sales process: what information tenants were given, how their questions were answered, and what record exists of all of it. Proving the case is harder for both sides here, which is exactly why this is the area of greatest risk, but also where the strongest defence can be built.

Lessons from the banking wave: why documentation matters

Three lessons from the banking wave apply directly to the lettings sector, and they all point the same way: document everything.

First, **pre-contractual documentation was the strongest defence for many financial products**. For certain complex products, the rules in force at the time did not actually require specific documentation, but some institutions produced it anyway, having read the signs. Those institutions came through the banking wave in the best position, because they could show, case by case, that the customer had received clear information before signing. That documentation turned out to be the only evidence that really counted: courts tend to give less weight to the testimony of the employee who made the sale, precisely because of their stake in the outcome.

The implications for residential lettings are clear: review pre-contractual information for consistency with housing rights legislation, the ULA and the GCPA, and check that the actual letting process matches what that documentation says.

Second, **undercover inspections are changing the role of the sales network**. In the disciplinary proceedings discussed above, the investigation relied on a body of evidence - most notably, given the weight the decision gave to it, a phone call in which a sales agent, not realising he was speaking as part of an investigation, described requiring the tenant support service as a condition for accessing properties managed by the agency.

What that call shows is that the conduct of a single sales representative can be strong evidence of a systematic practice across the organisation, particularly where other evidence points the same way.

Training and oversight of the sales network are no longer just an operational matter – they are now central to managing legal risk. The same was true during the banking wave, when staff training and conduct became the focus of the debate.

Third, having a protocol **is not enough** – **you need to be able to prove it is actually followed**. A clear sales protocol shared with all agents, in-house and external, is the starting point. What really sets a strong position apart, though, is the ability to show that compliance is monitored and can be checked. That difference – whether the process is actually audited – will be decisive once a case is brought.

A note on the shift to sales

The shift by many operators towards sales –driven by regulatory pressure on the lettings market, especially where demand outstrips supply, and by the greater potential to make money – does not remove the consumer protection risk. It carries the risk forward and, in some respects, widens it: consumer protection law applies in full where a property is sold directly to an individual consumer, and the DESCA report itself already points in this direction.

Contractual and pre-contractual documentation for direct sales therefore deserves the same scrutiny as for lettings, bearing in mind the list of prohibited terms in article 89.3 GCPA (passing on documentation costs, compulsory subrogation to existing financing, passing on taxes for which the business is liable, and utility connection costs), and avoiding any clause that waives or limits consumer rights.

Ultimately, changing the business model does not take you out of the risk – it just moves you sideways within it.

A final word

What we are seeing is not yet a wave, but it is a set of signs worth paying attention to, having already watched one unfold.

The residential sector has an advantage the financial sector never had: the ability to plan ahead intelligently.

The real question is not whether this escalates, but how far ahead each operator chooses to prepare. The time to act is before the courts settle the standard. Once that happens, the window for a pre-emptive defence closes, and all that is left is a reactive one.

Three areas carry most of the value: reviewing contractual terms and pre-contractual documentation; auditable training and oversight of the sales network; and getting ahead of repeat offences as an aggravating factor.

Operators who address these now do so from a position of strength.

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