Chapter VII

The Juridical Relation

Translation of “Capítulo VII – A Relação Jurídica” available at *Aquila* for students of *Introduction to Law*

Chapter VII – The Juridical Relation

Program topics covered in this chapter:

7. The general theory of the juridical relation:

7.1. The subjective and potestative rights. The fundamental rights. The rights of Personality.

7.2. Legal duties and states of subjection (*"estados de sujeição"*).

7.3. The subjects of the juridical relation. The individual and collective juridical personality. The juridical capacity of enjoyment of rights. The legal capacity of the exercise of rights.

7.4. Legal entities. Associations, foundations and societies. The bodies of legal entities.

Chapter VII – The Juridical Relation

7.5. Representation and Mandate.

7.6. The object of the juridical relation.

7.7. The juridical fact. The juridical act. The juridical business. The contract. The business declaration. The negotiating object. The nullity and annulment of the juridical business.

7.8. Time and its impact on the legal relation (term, statute of limitation, caducity).

7.9. The guarantee of the juridical relation. Broad concept and restricted concept of guarantee. The exercise and guardianship of rights. The proofs.

Chapter VII – The Juridical Relation

1. Concept of Juridical Relation

- ✓ Juridical relation in broad sense – all and any relation of social life, regulated and protected by Law, i.e., legally relevant and producing legal consequences.

- ✓ Juridical relation in strict sense - is the relation of social life that is disciplined by Law, by assigning a subjective right to an active subject, and the imposition, to another passive subject, of a juridical duty or a subjection.

Chapter VII – The Juridical Relation

2. Classification of Juridical Relations

a1) Abstract Juridical Relation - when it designates an archetype, a model or a schema contained in the law, of applicable relation with many cases (purchase and sale – *"compra e venda"*, donation – *"doação"*, lease – *"locação"*, contract – *"empreitada"*, loan – *"mútuo"*).

a2) Concrete Juridical Relation - when a given real relation is contemplated, between certain people, about a given object, proceeding from a certain juridical fact (the sale of a property that A made to B).

b1) Unilateral Juridical Relation - legal relation in which only one party holds a subjective right, while the other holds a juridical duty (A lends B a pen; A has the right to get back the pen from B and B is bound to give it).

Chapter VII – The Juridical Relation

b2) Bilateral Juridical Relation - juridical relation in which either party is holder, simultaneously, of one or more rights and duties (A sells a property to B; A is entitled to receive the sale price and the duty to deliver the house, while B has the right to the house and duty to pay its price).

3. Structure of the Juridical Relation

- ✓ The structure of the juridical relation is its content. It comprises a subjective right and a binding situation (juridical duty and/or subjection). These are the elements which constitute its content.

Chapter VII – The Juridical Relation

- ✓ There are two theories that attempt to explain the essence or nature of the subjective right:

- ➢ Theory of will (*"Teoria da Vontade"*)- *Savigny* - the essence of the subjective right lies on the willingness of the individual, i.e., it consists on a "power of will, given to the subject by the Juridical Order".

- Critiques – entities devoid of conscious will, such as newborns or demented people, may be considered subjects of subjective rights.

Chapter VII – The Juridical Relation

- Theory of interest (*"Teoria do Interesse"*) - *Ihering* – the interest is considered to be the content of the subjective right, which is "a legally protected interest".

- Critiques –*Ihering* wrongly associated Law with interest, when the interest is the purpose of the subjective right. The subjective right is a means or an instrument to achieve that purpose. While every subjective right matches with an interest, the opposite is not true.

Chapter VII – The Juridical Relation

- ✓ The juridical relation has two sides:

- ➢ An active side, corresponding to the holder of the subjective right (active subject).
- ➢ And a passive side, corresponding to the holder of the juridical duty or liability (passive subject).

4. Subjective Rights and Juridical Duties

- ✓ Subjective right - power granted to a person, by the Juridical Order, for freely requiring or wanting from another person, a certain positive behavior (action) or negative (omission), or by an act of free will, *per si*, or integrated by an act of a public authority, to produce certain legal effects on the juridical sphere of others.

Chapter VII – The Juridical Relation

a) Subjective Rights, *stricto sensu*, and Juridical Duty (*"Direitos Subjectivos"*)

- ✓ Subjective right *stricto sensu* - corresponds to the first part of the definition of subjective right - translates the power to require or to want from others to have a certain positive behavior (action) or negative (omission).

- ✓ Juridical duty - on the passive subject falls one juridical duty, i.e., the need to perform the behavior, to which the active holder of the juridical relation is entitled. The juridical duty may not be performed, because men have the freedom to act.

Chapter VII – The Juridical Relation

b) Potestative Right and Subjection (*"direito potestativo e sujeição"*)

- ✓ Potestative right (*"direito potestativo"*) - is the second part of the concept of subjective right - is the juridical power belonging to the active holder (*"titular activo"*) of the juridical relation, by an act of free will, *per si*, or integrated by a judicial decision, to produce certain inevitable legal effects on the juridical sphere of others.

- ✓ Subjection (*"sujeição"*) – the passive subject of the juridical relation has got a subjection, i.e., the situation in which he is involved, not being able to avoid certain consequences to be produced in its legal sphere, by reason of the exercise of the right by the active holder of the same juridical relation.

Chapter VII – The Juridical Relation

c) Modalities of Potestative rights (*"direitos potestativos"*)

- ✓ The potestative rights are usually divided into:
- ➢ Constituents *("constitutivos"*) - when they cause the formation of juridical relations (e.g.: recognition of the right of passage for the benefit of a jammed building - art.1550 of the Civil Code);
- ➢ Amending *("modificativos"*) - when they cause the modification of juridical relations (e.g.: change of servitude of passage to another place - art.1568, no.1, of the CC);
- ➢ Extinguishable (*"extintivos"*) - when they cause the extinction of juridical relations (e.g.: extinguishment of the right of passage because it turns out to be unnecessary - art.1569, no.1, of the CC).

Chapter VII – The Juridical Relation

d) Classification of subjective rights

- ✓ Public subjective rights – correspond to Public Law relations, i.e., those rights which pertain to the State or other public entities, armed with public authority (*ius imperii*), and to citizens facing the State, while holding that authority (right to pay taxes, to vote, to have diplomatic protection, to eligibility).

- ✓ Private subjective rights – represent relations of Private Law, i.e., those which are established between individuals, or between them and the State or other public entities, but as private individuals (e.g.: rights of spouses in the marital relationship).

Chapter VII – The Juridical Relation

- ✓ Absolute subjective rights - those that are imposed to everyone (*erga omnes*), which correspond to a general duty of respect. This means that no one can prevent or interfere with the exercise of these rights; all are obliged to respect them (*"in rem"* rights or rights about things; right of property; personality rights; right to life, honor, freedom).

- ✓ Relative subjective rights - those that are imposed only to a certain person or a group of persons, which corresponds to a duty to carry out the conduct that is due to the holder of the right (e.g.: credit rights, which give the holder the power to require from others the execution of a certain performance - *"prestação"*).

Chapter VII – The Juridical Relation

- ✓ Property subjective rights - are reducible to money (*"in rem"* rights - property rights on a property; credit rights; literary or artistic property rights).
- ✓ Non-property subjective rights - not capable of pecuniary expression (personality rights - right to life, honor, freedom; family rights - the right of children to education).
- ✓ Innate subjective rights – those that are born with the person, who, thus, does not require to acquire them (personality rights - right to life, to physical integrity, to freedom).
- ✓ Non-innate subjective rights - those which are not acquired at birth, but later (personality rights - right to have a name and copyright - *"direitos de autor"*).

Chapter VII – The Juridical Relation

e) Juridical Situations

- ✓ Burden (*"ónus"*) - juridical situation based on the need to adopt a certain behavior to perform a given self-interest (advantage or disadvantage). The holder of the right may have the burden of claiming it within a term, otherwise, failing to exercise it. If A proposes a legal action against B, demanding payment of the price of a contract of purchase & sale, plus delay interest (*"juros de mora"*), B has the burden to respond, otherwise he may be condemned of the claim, if he does not do it.
- ✓ Juridical Expectation (*"expectativa jurídica"*) - assigned faculty, according to a certain right that does not exist yet, but will most likely come into existence. E.g.: the heirs have the expectation to inherit, even though they have not yet the right to it.
- ✓ Exception (*"excepção"*) - juridical situation assigned to the holder of a duty which allows him to refuse, definitely (peremptory exception) or temporarily (dilatory exception), the performance of that duty.

Chapter VII – The Juridical Relation

5. Elements of the Juridical Relation

- ✓ Subjects/Individuals - people among whom legal relations are established. Holders of subjective rights and corresponding passive positions (juridical duties or subjections).

- ✓ Object/Purpose - everything on which the juridical relation will focus (persons, things, performance or rights).

- ✓ Juridical fact - any natural event or human action which can produce legal consequences. These effects may create, modify or extinguish juridical relations.

Chapter VII – The Juridical Relation

- ✓ Guarantee - susceptibility of coactive protection of the position of the active subject of the juridical relation.

- ✓ Which are the elements of the following juridical relation?: "Bernardo sells an apartment to Claudia“.

6. Juridical Subjects

- ✓ Subjects of Law - entities that are capable of being holders of juridical relations.
- ✓ The subjects can be:

A1) Active - subjects of the juridical relation that are holders of subjective rights or legal powers, creditors;

A2) Passive - subjects of the juridical relation that are holders of legal duties or are assigned to perform certain obligations, debtors.

Chapter VII – The Juridical Relation

B1) Natural persons or physical (*"Pessoas Singulares"*) - when it comes to a sole individual;

B2) Legal entities (*"Pessoas Colectivas"*) - when it comes to an organization of people or assets.

6.1. Natural persons

- ✓ Juridical personality – the susceptibility to be an holder of rights and being attached to legal relations.
- ➢ Legal personality is acquired at the time of complete birth and life (art.66, no.1, of the CC). Before birth and full life there is no natural person;

Chapter VII – The Juridical Relation

- The full birth occurs when the fetus is separated with life from the mother. A stillbirth has no legal personality.

- Law speaks about *"nascituros"* and *"concepturos"*, as human-beings yet unborn:

- *"Nascituros"* (*stricto sensu*) – human-beings already conceived (embryo or fetus in pregnancy period), but not yet born (arts.952 and 2033 of the CC).

- *"Concepturos"* - future human-beings, who have not yet even been conceived, but are expected to become conceived, by a certain person.

- In a broad sense, as sometimes is used by the legislator, *"nascituros"* can encompass both concepts.

Chapter VII – The Juridical Relation

- Legal personality ceases with death (art.68, no.1, of the CC), being this fact the only cause of its term, as regards to natural persons.

- ✓ Juridical capacity - laid down in art.67 of the CC. However, what the CC considers to be juridical capacity is the general ability of use (*"gozo"*), which is attributed to all persons and impossible to renounce (art.69, of the CC).

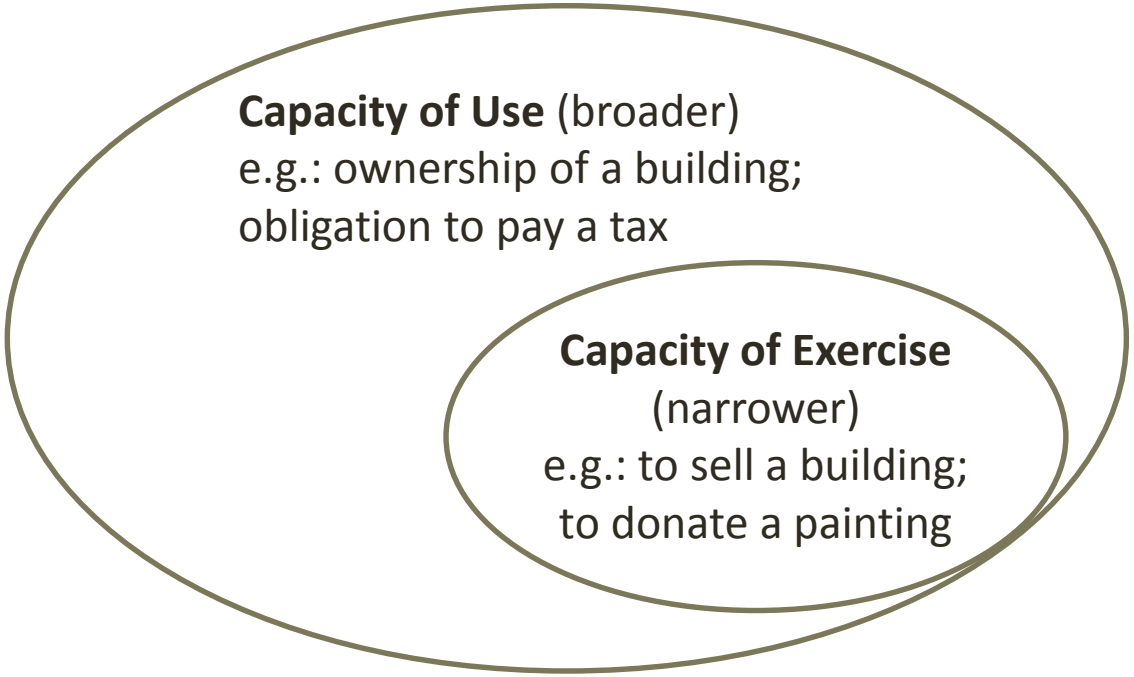
- The concept of juridical capacity may be considered from two distinct perspectives:

Chapter VII – The Juridical Relation

- Ownership (*"titularidade"*) - legal capacity for the use of rights - the ability to be the holder of a larger or smaller set of rights and bindings to which one can be attached (e.g.: property rights on a property). The capacity of use is what that a natural person can have (benefit).

- Exercise – capacity of exercising of rights, or capacity to act, means the measure of rights and bindings that a person can exercise or perform by himself, personally and freely (e.g.: possibility of selling a property). The capacity of exercise is what a person can do (perform, exercise).

Chapter VII – The Juridical Relation



- ✓ Personality rights – fundamental rights which are an attribute of oneself and relate to his physical, moral and legal personality. Personality rights are set forth in arts.24 and following of the CRP, and arts.70 and following of the CC. Its breach is a crime, stated and punished in the Penal Code, being, therefore, protected by Criminal Law.

Chapter VII – The Juridical Relation

- Rights of personality regarding goods of physical personality:

- The right to life (art.24, no.1, of the CRP) - its breach constitutes the crime of murder (arts.131 and following of the Penal Code);
- The right to physical integrity (art.25 of the CRP) – its breach constitutes a crime of offense to physical integrity (arts.143 and following of the Penal Code).

- Rights of personality regarding goods of moral personality:

- The right to honor (art.26, no.1, of the CRP) – its breach constitutes a crime of slander (*"calúnia"*) or injuries (arts.180 and following, of the Penal Code);

Chapter VII – The Juridical Relation

- The right to freedom (art.27, no.1, of the CRP) - freedom of expression and information (arts.37 and 38 of the CRP); freedom of conscience, religion and worship (art.41 of the CRP); freedom of assembly and demonstration (art.45 of the CRP);

- The right to the privacy of private and family life (art.26, no.1, of the CRP and art.80 of the Civil Code);

- The right to image (art.79 of the CC).

Chapter VII – The Juridical Relation

- Rights of personality regarding goods of juridical personality:

- Right to personal identity (art.26, no.1, of the CRP) – the right to have a name (arts.72 to 74, of the CC);
- The right to citizenship (art.26, no.1, of the CRP).

- Features of personality rights:

- Absolute rights - the holder can enforce them *erga omnes* (i.e., against all others);
- Non-property rights - incapable of pecuniary assessment;
- Unavailable rights - the holder can not freely dispose of them. He is unable to waiving or limiting them;

Chapter VII – The Juridical Relation

- Non-transferable rights - the holder can not transmit them to others, nor in life, nor by death.

✓ Status of natural persons – set of qualities of individuals with legal significance:

- Name (arts.72 and 74 of the CC – individual quality);
- Gender;
- Nationality;
- Place of birth;
- Residence - is a legal bond with a certain place. It is the usual place of residence - where one lives, sleeps, keeps personal items, receives correspondence (art.82, no.1, of the CC). The residence can be:

Chapter VII – The Juridical Relation

- Volunteer residence - when people choose, voluntarily, the place of their residence (which is not the case of minors and interdicts - art.85 of the CC - who have a legal residence);

- Legal residence - when the domicile is determined by law. Public employees, civil or military, and diplomatic Portuguese agents, have a volunteer residence and a legal one (arts.87 and 88, of the CC). The same applies to other jobs that have an established professional residence - typically the office - (art.83 of the CC). There is also the possibility of an elective residence, stipulated by the parties in a given business (art.84 of the CC).

Chapter VII – The Juridical Relation

- Age;
- Filiation, kinship (*"parentesco"*) and affinity (arts.1578, 1579 and 1584 of the CC);
- Marital status;
- Profession;
- Qualifications.

✓ Impairments of individual persons

- Individuals acquire the capacity of exercise:

- By majority (18 years old) - art.130 of the CC;
- By emancipation, through marriage (between 16 and 18 years old) - art.133 of the CC.

Chapter VII – The Juridical Relation

- Age majority: one reaches majority at midnight of the day of the 18th birthday, having, as main effect, the end of his/her minority condition and his/her generic inability of exercise.

- Emancipation: only possible by marriage. Knowing that the minimum age for marriage is 16 years old (art.1601, §a, of the CC), this is also the minimum age for emancipation. The effects of emancipation depend on the approval, or not, of the parents:

- ✓ If marriage is allowed, it is said that emancipation is full (*"plena"*), so the emancipated minors acquire the same legal capacity of adult persons;

Chapter VII – The Juridical Relation

- If marriage is not allowed, it is said that emancipation is restricted (marriage is valid, but irregular), so minors are emancipated, but are subject to the sanction of art.1649 of the CC (the administration of property continues to belong to the paternal power - the parents).

- Age is only relevant, in terms of civil capacity, in distinction between adults and minors, and there is no limitation (depending on age) for older people, yet their natural ability (of wanting and understanding) can, in some cases, be found diminished.

- The juridical relevance of age exceeds the issues of civil legal capacity. Thus, in Labour Law, at the minimum age to enter into an employment contract (16 years - art.55, no.2, of the Labour Code), or, at the minimum age, as defined in Penal Law, as for criminal liability (16 years - art.19 of the Penal Code).

Chapter VII – The Juridical Relation

- Restrictions on the capacity of exercise:

a) Minority

- One is minor when has not yet attained 18 years old (art.122 of the CC).

- The condition of minority does not limit the ability of use (*"capacidade de gozo"*), except: marrying (art.1601, §a, CC); affiliate (*"perfilhar"*) (art.1850, no.1, CC); testing - if not emancipated - art.2189, §a, of the CC. However, minors need to acquire capacity in order to promote their exercise of rights (art.123 of the CC).

- The inability of minors is a general inability; they are not able to govern their person and to promote the use of their property.

Chapter VII – The Juridical Relation

- There are exceptions to the general inability, under art.123 of the CC (there are several exceptions provided by law). Some of these exceptions are dispersed throughout the Civil Code. For example, as follows:

- One can act as an attorney, when business is within the reach of his/her ability to understand it and want it (art.263 of the CC);

- One may exercise parental responsibility in those matters that do not involve representation and property management (art.1913 of the CC).

Chapter VII – The Juridical Relation

- But, the most important exceptions (because they are the most common) to the inability of the generic exercise of minors, are stated in art.127 of the CC.

- Acts of management or disposition of property that has been acquired by his/her work, if older than 16 years (art.127, no.1, §a, of the CC) - The minimum age of 16 years to conclude a contract of employment and the recognition that work generates some maturity, imply that the minor can manage and dispose of his/her salary and assets that he/she has bought with that money;

Chapter VII – The Juridical Relation

- Legal business of one's own everyday life, which, standing at reach of his/her natural ability, only involve costs, or dispositions of assets, of minor importance (art.127, no.1, §b, of the CC) - the purchase of a metro ticket, a cake, a magazine;

- Business relating to the job, art or craft that one has been authorized to practice, or the one practiced in the exercise of that profession, art or craft (art.127, no.1, §c, of the CC). E.g.: if a minor, aged 16, starts working as an woodworker, will need to acquire and sell certain goods. The exercise of professional activities always involve the celebration of legal businesses, either through the acquisition of raw materials, either by contracting /rendering of services, contract, sale, …;

Chapter VII – The Juridical Relation

- If a person aged 16 is free to start working, it would make no sense to prevent him/her for practicing the acts of this profession, because, in practical terms, it would condition the very exercise of the activity itself.

- The legal businesses in question are legal issues not fitting into the natural capacity of a minor. These businesses, practiced in the exercise of the profession, need no withdrawal (*"retirada"*) of the incapacity, by the custodial parent of the minor.

- To contract marriage, validly, since one is older than 16 years (art.1601, §a, of the CC), and being certain that the opposition of the parent or guardian is an impedient impediment (*"impedimento impediente"*), does not imply the invalidity of the act, but gives rise to special penalties (arts.1604, §a, 1627 and 1649, of the CC).

Chapter VII – The Juridical Relation

- The inability of the minor ends when he/she reaches 18 years of age or is emancipated, unless if it is pending against the minor, upon reaching adulthood, an action to ban (*"interdição"*) or to disqualify (*"inabilitação"*) him/her (arts.129 and 131 of the CC, respectively).

- Legal business practiced by the minor can be canceled (art.125, CC), according to the rule established in arts.287 and following, of the CC. Persons legally entitled to invoke the nullity (and the relevant deadlines) are stated in art.125, no.1, of the CC:

- Representative (parent, guardian or administrator of assets) of the minor, within a year, counting from the awareness of the contested act;
- The minor himself, within a year, counting from the termination his/her incapacity;

Chapter VII – The Juridical Relation

- Any given heir, within a year after the death, if the deceased (*"hereditando"*) has died before the expiration of the term in which he/she could have requested the annulment.

- The right of annulment on the grounds of incapacity of a minor is never the responsibility of the counterparty, i.e., the person with whom the minor celebrated the business/contract can not rely on that fact as a reason for invalidate it (art.125, no.2, of the CC):

- Because the juridical interest protected by this legal rule is the one from the minor, himself.

- By consistency with the regime of confirmation that law admits.

Chapter VII – The Juridical Relation

- The right to invoke the annulability is barred (*"precludido"*) by the malicious behavior of the minor, in those cases in which he/she uses intention (*"dolo"*), or bad faith, in order to pass as an adult or emancipated (art.126 of the CC).

- For this preclusion (*"preclusão"*), it is not enough that the minor states his/her majority or emancipation, being necessary the use of suitable devices that show it – e.g.: fake citizen id card, use of fake beards, fake birth registration. Here, the following are inhibited to invoke the nullity: parents, guardians, administrator (representatives), the minor himself and heirs.

Chapter VII – The Juridical Relation

- The inability of the minor is suppressed through the institute of legal representation (acting in place of the incapable, as if it were himself acting).

- Representation may take one of three forms:

- Parental custody - is, par excellence, the way of suppressing the incapacity of minors, leaving the remaining (protection and wealth management) a subsidiary or limited role to circumstances in which the parents can not play that role. Parental custody is a functional power (a power-duty). Holders of parental custody (parents) must exercise the faculties comprised in that power, observing the interests of the minor child.

Chapter VII – The Juridical Relation

- Parental custody comprises several faculties, either of personal and property nature:

  - Duty to respect, support and care (art.1874, CC);
  - Right to choose the name of the children (art.1875, CC);
  - Duty to ensure for safety and health (art.1878, CC);
  - Right/Duty to direct their education (arts.1878 and 1885, CC);
  - Power to administer the assets of the child (arts.1878 and 1888, CC);
  - Right to demand obedience from children (art.1878, no.2, CC);

Chapter VII – The Juridical Relation

- Duty to support the children and ensure their expenses (arts.1879 and 1880, CC);
- General power of representation (art.1881, CC);
- Decide on their religious formation (up to 16 years of age, art.1886, CC);
- Right to choose the residence of children (art.1887, of CC);
- Right to property on certain goods produced by the children (art.1895, CC);
- Right to use part of the income of the children to the satisfaction of family needs (art.1896, CC).

Chapter VII – The Juridical Relation

- Remarks:

  - The administration of the assets of minor children does not fit the holder of parental custody in cases stated in art.1888 of the CC.

  - If the minor child uses, in his/her work, means which belong to the parents, the produced goods also belong to the parents (art.1895, CC).

  - Art.1889 of the CC establishes the acts that can only be practiced with authorization of the Court, under penalty of nullity (art.1893, CC).

- The exercise of parental custody, when parents are married to each other, belongs to both, under a presupposition of equality and equal dignity (arts.1901 and 1902, CC).

Chapter VII – The Juridical Relation

- For most of the acts taken in the exercise of parental custody, the consent of both parents is not required. Thus, when one acts, the law presumes the agreement of the other parent (art.1901, no.2, of the CC).

- During the duration of parental authority, various setbacks can affect its exercise:

  - The death of one of the parent - parental custody focuses on the living parent, being exercised, from that day forward, only by that one (art.1904, CC);

Chapter VII – The Juridical Relation

- Divorce or Separation of Fact - parental custody continues to belong to both parents; however, its exercise will be adjusted (adjustment of the exercise of parental custody). If parents agree on how to exercise parental custody, they celebrate an agreement, which becomes effective after approval by the Court. Failing an agreement, the Court will decide by sentence, thinking, naturally, about what is best for the minor (arts.1905 to 1909, of the CC);

- The impediment of one or both of the parents, by condemnation for crime, incapacity (interdiction or disability, by mental disorder) or absence (art.1913, no.1, of the CC).

Chapter VII – The Juridical Relation

- The inhibition of the exercise of parental custody withdraws from parent the opportunity to exercise it. The inhibition may result directly from law, or depending on a Court judgment (art.1913, of the CC):

  - If both parents are fully inhibited of the exercise of parental custody, as in case of death, the incapacity of minors will be suppressed by tutelage (*"tutela"*);

  - If only one parent is completely inhibited, the parental custody concentrates on the other parent.

- Parental custody ceases when one of the following facts is verified:

Chapter VII – The Juridical Relation

- Death of the child;
- Majority of the child (art.130, CC);
- Emancipation of the child (art.132, CC, notwithstanding the regime of art.1649);
- Death of both parents (applying, in this case, the tutelage, under art.1921, no.1, §a, of the CC).

- Tutelage/Guardianship - guardianship is the means of suppressing the incapacity of exercise of those that are interdicted, although it also applies to minors, as a means of suppressing parental responsibility. Tutelage shall be established whenever any of the circumstances described in art.1921, no.1, of the CC is verified:

Chapter VII – The Juridical Relation

- Death of both parents;
- Inhibition of the parental custody, as regarding the regency of the son;
- Impediment of the parents of the exercise of parental custody, for more than 6 months;
- If the parents are unknown.

- The tutor has powers of representation covering the generality of the juridical sphere of the minor. The tutelary power is less extensive than the custodial power. Its limitations are stated in arts.1937 and 1938 of the CC.

- The choice of the tutor relapses on the person designated in will by the parents, or on the person appointed by Court (arts.1927 and 1928, of the CC).

Chapter VII – The Juridical Relation

- The institution of guardianship is always dependent on a court decision (art.1923, CC), being made in the very sentence of interdiction, if that is the case.
- The incapable (minor or interdicted) subject to guardianship is called “pupil”.
- By rule, tutelage comprises three organs (art.1924 of the CC):
  - Tutor - the executive organ of guardianship;
  - Family Council - art.1954, CC - advisory and oversight organ of guardianship, consisting of 3 members (Public Ministry, between 2 relatives of the minor, as a rule, one from the maternal side and one from the paternal side);

Chapter VII – The Juridical Relation

- Pro-guardian (*"Proturor"*) – permanent surveillance organ of the activity of the tutor, being one of three elements of the family council (art.1955, CC).

- Asset management - way of suppressing the inability of the minor, which will take place, coexisting with parental custody, under art.1922 of the CC:
  - When parents, keeping the regency of the children, have been excluded, disqualified or suspended from the administration of all the property of minors, or of some parts;
  - When the competent authority to appoint the guardian, trust another, in whole or in part, the administration of the property of the minor. The appointment of the administrator of the goods is regulated under arts.1967 and 1968 of the CC.

Chapter VII – The Juridical Relation

b) Interdiction (*"Interdição"*)

- The following situations are reasons of interdiction: mental disorder, deafness, dumbness or blindness, when, by their gravity, the interdict becomes unable to govern his/her person and his/her property (art.138, no.1, of the CC).

- The interdiction is applicable only to adults, because the minor, though insane, deaf, dumb or blind are protected by the Institute of minority (art.138, no.2, of the CC).

- The action of interdiction (against adults) can be initiated at any time. However, if the person concerned is still a minor, the action may only be brought within one year from the date on which reaches majority (i.e., from the age of 17).

Chapter VII – The Juridical Relation

- For the existence of an interdiction the occurrence of natural handicaps (as mentioned in art.138, no.1, of the CC) is not enough; a court sentence declaring such incapacity is needed (art.140 of the CC).

- The jurisdiction conferred to the Court of Minors, regarding the functioning of the legal representation of minors, competes to the common Court, as refers to the interdicted (art.140 of the CC).

- The person upon whom an interdiction process is set, is called *"interditando"*. If the interdiction is to be legally declared, then he/she becomes interdicted (*"interdito"*).

Chapter VII – The Juridical Relation

- Interdicted persons can not be tutors/guardians (art.1933, no.1, §a of the CC) or administrators of goods (art.1970 of the CC). In addition, those interdicted by mental illness can not marry (art.1601, §b, of the CC), affiliate (art.1850, no.1, of the CC) or make a will (art.2189, § b, of the CC).

- Spouses, guardians or administrator (*"curador"*), any relative successor or the Public Ministry are entitled to request the interdiction (art.141, no.1, of the CC). However, if the *"interditando"* is under parental authority, only parents or the Public Ministry are entitled to apply for the interdiction (art.141, no.2, of the CC).

Chapter VII – The Juridical Relation

- The inability of the interdiction is suppressed by the institute of legal representation. Legal representation will take the form of guardianship (*"tutela"*), this being governed by the same rules which govern the guardianship of minors (arts.1927 and following of the CC). The persons named in art.143 of the CC can be tutors:

- The spouse of the interdicted, unless the former is judicially separated of persons and property or separated in fact, by his/her fault, or if he/she is incapable by any other legal cause.

- The person designated by the parent or parents who exercise the parental authority, in a will or in an authentic or authenticated document;

Chapter VII – The Juridical Relation

- Any one of the parents of the interdicted, appointed by Court, accordingly to the interests of the interdicted;

- To adult children (*"filhos maiores"*), preferably the oldest, unless the Court, after hearing the advice of family, establish that some of the other children gives more guarantees of good performance of the task;

- Whomever the Court appoints, after hearing the advice of the family, when there are reasons that discourage the granting of custody to anyone of the above mentioned nominees.

Chapter VII – The Juridical Relation

- The sentence of interdiction shall be registered, under penalty of not being able to be invoked against third parties acting in good faith (art.147 of the CC).

- The regime of the inability by interdiction is identical to the minority one, regarding the value of practiced acts and the means to its suppression (art.139 of the CC). The interdicted persons are equated to minors, on the generic inability of exercise. Therefore, the general principle of art.123 of the CC must be applied to interdicted persons, as well as the exceptions of art.127, no.1, CC. As for these, one needs to consider the cause and the severity of the interdiction

- Value of the acts practiced by the interdicted persons:

Chapter VII – The Juridical Relation

- After the registration of the sentence of final interdiction – juridical businesses practiced in this period are capable of annulability (art.148 of the CC). Regarding the deadline for invoking the annulability and the persons entitled to argue it, art.125 of the CC is applicable, *mutatis mutandis*, *"ex vi"* art.139 of the CC;

- Pending the interdiction process - if the act is practiced after the published ads of the filing of the action, and the interdiction is to be enacted, there will be place to annulability, once proved that the business has caused injury to the interdicted (art.149 of the CC);

Chapter VII – The Juridical Relation

- Prior to advertising the action – according to art.150 of the CC, reference is made to the provisions concerning the accidental disability (art.257, CC). The negotiable declaration made by who was accidentally incapable to understand its sense, or did not have the free exercise of his will, is annulled (*"anulável"*), if:

- The fact is notorious (anyone of normal diligence could have noticed it), and/or

- The fact is known to the one that declares it (the other party knew that the other person was unable to understand it and wanting what was being declared – drunkenness, drugs consumption, febrile delirium, dementia).

Chapter VII – The Juridical Relation

- The interdiction does not end with the cessation of natural inability; it is necessary to lift the interdiction by Court order. The following have legitimacy to request the lifting of the interdiction (art.151 of the CC, with reference to art.141):

- ❑ The interdicted himself/herself;
- ❑ Any of the persons entitled to require interdiction.

- Also by Court order, the interdiction can become a disability (*"inabilitação"*), by means of the relief of the disabling causes.

Chapter VII – The Juridical Relation

c) Disability (*"Inabilitação"*)

- Under art.152 of the CC, the following are subject to disqualification:

- Individuals whose mental disorder, deafness, muteness or blindness, although permanent, is not so serious as to justify the interdiction;

- Individuals who are unable to govern their property by regular profligacy (*"habitual prodigalidade"*) – (asset misappropriation) – costs disproportionate to income;

- Individuals who are unable to govern their property because of alcohol abuse or narcotics.

Chapter VII – The Juridical Relation

- The disability is similar to the interdiction, but is based on a minor severity reason. Disability to exist need only the existence of a present danger to be proven, of harmful acts, regarding property.

- The disqualification only covers acts of disposal of property amongst living persons, and those specified in the sentence, given the circumstances of the case (art.153 of the CC).

- The incapacity of the disqualified persons does not exist, by the simple fact of the existence of the circumstances referred to in art.152 of the CC; a sentence of disability at the end of a lawsuit, as it happens with interdictions, becomes necessary (art.156 of the CC, with reference to art.140).

Chapter VII – The Juridical Relation

- The person in relation to whom a disability process pends is called *"inabilitando"*. If the disability is to be legally declared, it is called, then, as disqualified (*"inabilitado"*).

- The same persons who may require interdiction, are the ones who may require the disqualification, under art.141 of the CC, by remission of art.156 of the CC.

- Disqualified persons can neither be tutors (art.1933, no.1, § a, CC), nor members of the family council (art.1953, no.1, CC), nor administrators of goods (art.1970, CC). The disqualified by mental disorder can not marry (art.1601, § b, CC) and are completely inhibited to exercise the parental authority (art.1913, no.1, § b, of the CC).

Chapter VII – The Juridical Relation

- The effects of disability are determined by the judge, in the concrete measure of the inability to exercise. The administration of the property of the disqualified person can be removed from him/her, and delivered to a administrator (*"curador"*) – trusteeship (*"curatela"*) (art.154, CC).
- The inability of the disqualified persons is suppressed, in principle, by the institute of assistance (the incapable one may act on its own, but to conduct its businesses, he/she requires the consent of the assistant), as they are subject to authorization by the curator, or to the specificities of the sentence, in order to dispose of property (art.153, CC).
- It may be determined, however, that the administration of property of the disqualified is to be delivered by the Court to the trustee (art.154, no.1, CC). In this case, the disability is suppressed by the institute of legal representation in the figure of the Curator.

Chapter VII – The Juridical Relation

- The value of the acts practiced by the disqualified person - the law does not regulate this issue directly; one applies the provisions that are in force, concerning the value of the acts of interdicted persons, under art.156 of the CC, which refers to arts.148, 149 or 150, depending on the case. So:

- A business concluded after the registration of the sentence: the regime of art.148 of the CC applies (by remission of art.156).

- A business celebrated during the pendency of the action (after advertising but before the registration of the sentence): the regime of art.149 of the CC (by remission of art.156) applies; it is necessary, in each case, to verify if the business is comprised in the scope of incapacity, as declared in the sentence.

Chapter VII – The Juridical Relation

- Business concluded before the advertising of the action: the regime of accidental inability applies (by remission of art.156 of the CC to art.150, and from this to art.257).

- The characteristics of annulability are, *mutatis mutandis*, those of art.125 of the CC, applicable by remission of arts.139 and 156 of the CC.

- The disability ceases to exist only if it is terminated. Art.155 of the CC contains special rules on wavering the disability in cases of prodigality or abuse of alcohol or drugs, in order to avoid deception about a possible regeneration; the following is required:

- Proof of termination of the causes that led to the disability;

Chapter VII – The Juridical Relation

- Over a period of 5 years on *res judicata* of the disability or sentence that denied a request for waiver.

d) Accidental Incapacity

- It is said that is vitiated by accidental incapacity, the declaration issued by a person unable to understand the meaning of it or one that does not have the free exercise of his/her will (art.257, no.1, CC).

- The scheme of invalidity is the one of annulability, and must meet at least one of the following assumptions:

- That fact is well known (when a person of regular diligence would have noticed it), and/or

Chapter VII – The Juridical Relation

- When the fact is known to whom it is declared (when the other part in the business knew that the person was unable to understand and want what was being declared). Examples: Delirium fever, drunkenness, insanity.

6.2. Legal Entities (*"Pessoas Colectivas"*)

✓ Classification:

➢ Public Legal Entities (*"Pessoas Colectivas Públicas"*) - those that can only be created by acts of Public Law (State, Local Municipalities, Public Institutions, Political Parties, Public Companies).

➢ Private Legal Entities (*"Pessoas Colectivas Privadas"*) - those that can only be created by acts of Private Law:

- Institutional Structure - legal entities whose purpose is intended to the satisfaction of the interest of a single person.
- Corporate Structure - private legal entities whose purpose is intended to satisfy the interest of a number of people:

Chapter VII – The Juridical Relation

- Corporate Private Legal Entity with profit in a broad sense – the profit has an impact on the property of the Legal Entity, but not on the members that compose it (associations, private foundations and cooperative institutions).

- Corporate Private Legal Entity with profit in a strict sense – the profit has an impact on the property of the members of the legal entity: civil and commercial companies - general companies (*"sociedades em nome colectivo"*), quota companies (*"sociedades por quotas"*), share companies (*"sociedades anónimas"*) and companies in partnership (*"sociedades em comandita"*).

Chapter VII – The Juridical Relation

i) Associations and Foundations

✓ <u>Creation of Associations and Foundations</u>

- Associations - are created by contract (agreement between a plurality of persons) by public deed (*"escritura pública"*) - art.168, no.1, of the CC.

- Foundations - are created by unilateral legal acts (where only one singular person intervenes). Foundations can be created by a still living founder (*"acto inter-vivos"*) or a founder after his/her death, by testamentary way (*"acto mortis-causa"*). The establishment of a foundation by *"acto inter-vivos"* shall be made by public deed - art.185, no.1, 2 and 3, of the CC.

Chapter VII – The Juridical Relation

- ✓ Acquisition of juridical personality by a Legal Entity is not automatic (as in the case of natural persons), depending on a number of formal and material constitution assumptions. The attribution of juridical personality to Legal Entities is called of "Legal Recognition". This may be:

- ➢ Normative legal recognition – Associations - the acquisition of legal personality comes simply from the adequacy of the act of creation with the existing rules (art.158, no.1 of the CC).

Chapter VII – The Juridical Relation

- Individual legal recognition - Foundations - the acquisition of legal personality, beyond what is provided by law, requires the recognition of the specific case, an individual assessment (art.158, no.2, of the CC). For individual recognition to be effective, Foundations have to respect two requirements:

- Requirement concerning the scope – must have a scope of social and/or community interest (art.188, no.1, of the CC);

- Requirement concerning assets (*"património"*) – must have assets that are sufficient to achieve the purposes for which it is constituted (art.188, no.2, of the CC).

Chapter VII – The Juridical Relation

- The capacity of use (*"capacidade de gozo"*) of Legal Entities is limited by the principle of specialty (*"princípio da especialidade"*), instead of what happens with natural persons: limited to rights and necessary or appropriate relations, in order to achieve its purposes (art.160, no.1, of the CC), except for rights and obligations prohibited by law, or those that are inseparable from singular personality (art.160, no.2, of the CC). Legal Entities enjoy the rights and are subject to duties compatible with their nature (art.12, no.2, of the CRP).

Chapter VII – The Juridical Relation

- ✓ The capacity of exercise of Legal Entities is not natural, but instead legally organized. The law endows Legal Entities with organs, through which the entity will exercise its rights and its bindings.

- ✓ Under art.163 of the CC, Legal Entities are organically represented to whom the by-laws determine, or, in the absence of a statutory provision (*"disposição estatutária"*), to the administration or to whom is assigned by the former.

- ✓ Obligations and the responsibility of the holders of organs of Legal Entities are defined in its statutes (art.164, no.1, of the CC). Legal Entities respond civilly for acts or omissions of its representatives, in the same way that the *"comitentes"* respond for the acts or omissions of its *"comissários"* (arts.165 and 500 of the CC).

Chapter VII – The Juridical Relation

- ✓ Social Denomination of Legal Entities - is the name of the Legal Entity. The first step in the process of constitution of a Legal Entity is to obtain a certificate of eligibility regarding the desired corporate name, issued by RNPC (*"Registo Nacional de Pessoas Colectivas"*). The CC does not set any regulation concerning the corporate name of Legal Collective Persons; however, three principles must be respected:

- ➢ Truth - the corporate name must be true, so as not to mislead about its identification or activity. There must be a link between the name of the Legal Entity and its activity;

Chapter VII – The Juridical Relation

- Novelty - each social denomination must be unique and different from previous ones. The name should not be confused with other existing names, trademarks or other distinguishing marks;

- Exclusivity - registering the name in RNPC confers an exclusive right of use by the holder, on the territorial scope of activity in which it is developed.

- ✓ Headquarters - Address of the Legal Entity. It is the place that the by-laws set forth for the operation of its business or, in the absence of statutory designation, the place where the core administration normally functions (art.159 of the CC).

Chapter VII – The Juridical Relation

- ✓ By-laws of Associations
- ➢ By-laws - set of qualities relevant to the performance of juridical situations (art.167, CC). The by-laws are composed by two elements:

- A set of qualities;
- A text where these qualities are present.

- ➢ Qualities - set of elements that must be included on the content of the by-laws; however, not all of these elements are mandatory (art.167, no.1, of the CC). These elements are:

- Name;
- Headquarters;

Chapter VII – The Juridical Relation

- Duration – Associations are constituted, as a rule, for an indefinite period of time. There are few Associations that are extinct over time. If the statutes do not say anything, the duration of the constitution of the Association is indefinite (art.167, no.1, CC).

- Goal/purpose - the aims, the mediate goals, that the Association intends to fulfill through its activity (art.160 of the CC).

- Organization - the various organs that ensure the functioning of the legal entity and the exercise of its activity: a college of management (*"Orgão Colegial de Administração"*) and a supervisory board (*"Conselho Fiscal"*), which, almost in all statutes, are called as, respectively, *"Direcção"* and *"Conselho Fiscal"* (art.162 of the CC).

Chapter VII – The Juridical Relation

- Property/assets - this is not a mandatory element in Associations. However, when there are assets, these consist on the members contributions (*"jóia"* or *"quota"*). In contrast, in Foundations, the property is an essential element, being formed by the set of goods belonging to the founder.

✓ <u>Organs of Legal Entities</u>

➢ Organs are intended to exercise competences. These competences are: taking decisions and practicing acts (which are attributable to the Legal Entity, but are practiced, however, by the holders of those organs).

Chapter VII – The Juridical Relation

- Organs of Associations (arts.162 and 171 of the CC):

- Board of management (*"Orgão da Administração"*) - who manages the Legal Entity, consisting of an odd number of members, one of whom shall be president/chairman. The president has, at least, two important functions: it is he/she who shall convene the meetings of the organ, and it is his/her casting vote in case of tie (art.171, no.2, of the CC). The administration organ is responsible for the management, the representation of the Association (art.163, CC) and the notice for convening the General Assembly (*"Assembleia Geral"*) (art.173, no.1, CC);

- Supervisory Board (*"Conselho Fiscal"*) – the one that inspects activities undertaken by the management, composed of an odd number of holders, of whom one shall be the chairman.

Chapter VII – The Juridical Relation

- ✓ General Assembly - formed by the community of people who are the Association (associates/members).

- ✓ In Associations, the board of management and the supervisory board are appointed by the associates in the General Assembly (art.170, no.1, of the CC).

- ✓ General Assembly
- ➢ Competence:
- Anything that is not within the competence of other organs, is a matter of the General Assembly (art.172, no.1, of the CC);

Chapter VII – The Juridical Relation

- There are certain decisions that are of compulsory competence of the General Assembly (art.172, no.2, of the CC):

- Removal of the members of the organs of the Association;
- Approval of the balance sheet;
- Amendment of the by-laws;
- Extinction of the Association;
- Authorization to demand acts practiced by the board members in office.

- ✓ Associates/Members
- The law gives little information about the juridical position of the associates. Art.167, no.2, of the CC only says that members have rights and obligations.

Chapter VII – The Juridical Relation

- Rights of associates/members:

- Right to participate in the organs of the Association - the right to elect and to be elected to the organs of the Association;

- Right to vote - this has got an important limitation, provided by law: deprivation of voting rights in case of conflict of interests between the member and the Association (art.176, CC). Voting rights may also be limited by the by-laws, if the associate does not fulfill his/her obligations towards the Association;

- Right to convene General Assemblies - the associate has the right to convene a General Assembly when the organ, with the obligation to convene it, does not do it,; he/she also has the right, along with other members, to request the call, provided with a legitimate purpose;

Chapter VII – The Juridical Relation

- Right to participate in the General Assembly - includes the right to vote on resolutions subject to vote of the General Assembly, but also to present protests, petitions, motions, proposals and complaints about matters comprised in the agenda or are not subject to deliberation. This right comprises also the right to speak at the sessions of the General Assembly;

- Right of appeal (*"impugnação"*) - the right to request the annulment of the decisions of the organs of the Association that damage him/her;

Chapter VII – The Juridical Relation

- Right to participate in the activities of the Association – the way members may participate in the Association is set in the by-laws or by the General Assembly. The associate can enjoy the facilities of the Association, collaborate on activities, integrate the commissions and have certain economic benefits, such as discounts.
- Right over the property of the Association - specific right, that is extracted in *contrario sensu* from art.181 of the CC because, once dissolved the Association, the member becomes entitled to a share of the assets of the Association.

Chapter VII – The Juridical Relation

- Duties of members

- Duty to compete for the property of the Association – members may do so by paying monetary contributions, or in goods or services provided to the Association. Monetary contributions can be made in the form of entry-fee (money that is paid to entry) or quota/share (money that is paid regularly);

- Duty of care (*"diligência"*) - duty that applies to members that are elected or appointed to hold office in the Association's organs. In exercising its positions, associates must act in the interest of the Association, pursuing it with zeal (*"zelo"*)and probity.

Chapter VII – The Juridical Relation

- Duty to obey law, statutes and the deliberations of the General Assembly - the associates shall keep, before the Association, a behavior in accordance with the rules that regulate the life of the Association: laws, by-laws and resolutions of the General Assembly.

- Duty to accept offered positions – often the by-laws of Associations say that the associate is required to accept a job that is proposed to him/her; however, this is not compatible with the freedom of each individual, so the member always has the possibility to renounce the position that is being proposed.

Chapter VII – The Juridical Relation

- Violation of the duties of the associate

- The violation of the duties of the associates can make them incur in disciplinary liability; the by-laws or a special regulation may establish penalties for faults committed by associates: fine, temporary suspension of the exercise of associational rights or exclusion.

- Nature of the associate

- The personal nature of an associate is not transferable (contrary to what happens in corporations). Nobody can sell his/her position of associate (art.180 of the CC).

- Liability of associates (*"responsabilidade civil"*)

- Members do not have any responsibility in the debts of the Association. The property of the Association respond exclusively for the debts of the Association. Nor even the holders of the organs of the Association are liable for the debts of the Association.

Chapter VII – The Juridical Relation

- ✓ Reasons of extinction of Associations and Foundations:

- ➢ Associations - causes of extinction are present in art.182 of the CC.

- Once the Association extinguishes, organs only have the power to carry out the liquidation of the assets or the finalization of outstanding business (art.184, CC). After the extinction and liquidation, the destiny of the assets of the association will be that that is present in art.166 of the CC.

- ➢ Foundations - causes for extinction are present in art.192 of the CC. When a Foundation is extinguished, there has to be a liquidation of its property (art.193, CC).

Chapter VII – The Juridical Relation

II. Cooperatives – Autonomous Legal Entities, of free constitution, with variable composition and capital, which, through cooperation and mutual assistance of its members, in compliance with the cooperative principles, aim, in a nonprofit way, to meet the needs and the economic, social and cultural aspirations of the members (art.2, no.1, of the Cooperative Code - CCoop).

- ✓ Cooperative principles (art.3 of CCoop):
- ➢ Voluntary and free entrance/membership;
- ➢ Democratic management by its members (one member, one vote);

Chapter VII – The Juridical Relation

- Economic participation of members;
- Autonomy and independence (controlled only by its members);
- Education, training and information (of its members, but not exclusively);
- Inter-cooperation (of Cooperatives among each other);
- Concern for the community.

✓ Cooperatives are allowed to associate with other Legal Entities of cooperative or non-cooperative nature, since it does not lead to any loss of autonomy (art.8, no.1, CCoop).

Chapter VII – The Juridical Relation

- ✓ Legal Entities that result from the association of Cooperatives with for-profit Legal Entities can nor adopt the form of a Cooperative (art.8, no.3, CCoop).

- ✓ Association of Cooperatives:

  - ➢ Unions of Cooperatives – a group of, at least, two cooperatives (art.82, CCoop);

  - ➢ Federations of Cooperatives – a group of cooperatives, or, simultaneously, of cooperatives and unions that belong to the same cooperative sector (art.85, CCoop);

Chapter VII – The Juridical Relation

- Confederations of Cooperatives - grouping, of national level, of Cooperatives (art.86, CCoop).

- ✓ Organs of the Cooperatives:

- General Assembly (*"Assembleia Geral"*);

- Board of Management (*"Direcção"*);

- Supervisory Board (*"Conselho Fiscal"*).

- ✓ All organs of the Cooperatives are exclusively composed by cooperators – *"cooperadores"* (arts.39 and following of the CCoop).

Chapter VII – The Juridical Relation

III) Civil companies and Commercial companies

- ✓ Societies/Companies unfold into two kinds:

III.I) Civil Society:

- ✓ Civil societies are those with a civil or non-trade purpose, i.e., companies that do not have the practice of acts of trade (agricultural societies of artisans engaged in crafting activities and societies of professionals engaged to carry out their activities).

- ✓ To be considered civil, societies must have a purpose that is, exclusively, not commercial.

Chapter VII – The Juridical Relation

- ✓ Civil companies can be of two kinds:

- ➢ Simple Civil Companies (*"Sociedades Civis Simples"*) – governed by the CC (arts.980 and following);

- ➢ Civil companies of business type (*"Sociedades Civis de tipo ou forma Comercial"*) – those Civil Societies which adopt one of the types of a Trading/Commercial Society (corporation) – therefore, the CSC (*"Código das Sociedades Comerciais"*) is applicable (art.1, no.4, of the CSC).

<u>III.II) Commercial Companies:</u>

- ✓ Under CSC, a Commercial company is the one that meets two requirements:
- ➢ Has, as purpose, the practice of acts of trade - commercial object – art.1, no.3, of the CSC;

Chapter VII – The Juridical Relation

- Adopt one of the types of companies set forth in art.1, no.2 of the CSC, i.e., General Companies (*"sociedades em nome colectivo"*), Quota Companies (*"sociedades por quotas"*), Share Companies (*"sociedades anónimas"*) and Companies in Partnership (*"sociedades em comandita"*).
- ✓ Principle of typicality (*"Princípio da tipicidade"*) – it means that only the organizations which correspond, expressly, to the types of companies referred to in art.1, no.2, of the CSC, can be created as Commercial Companies.
- ✓ Art.3 of the CSC defines the personal law of Commercial Companies depending on the location of the place of their effective management – nationality (political character bond between a person and a State).
- ✓ A Commercial Company acquires legal personality with the final registration of the contract, which has, thus, constitutive effects (art.5, CSC).

Chapter VII – The Juridical Relation

- ✓ The capacity of Commercial Companies comprises rights and necessary or convenient ties for attaining their end, excluding those which are prohibited by law or are inseparable from their singular personality (art.6, CSC) – Principle of Specialty (*"Princípio da Especialidade"*):

- ➢ Capacity of use (*"capacidade de gozo"*) – set of rights and bindings that a given Commercial Company is likely to hold, among all possible rights and bindings.

- ➢ Capacity of exercise (*"capacidade de exercício"*) – the ability to legally act, exercising rights and fulfilling obligations, directly and permanently (through organs), or punctually and indirectly (through volunteer representatives) - corporate civil liability for acts or omissions of the holders of its organs.

Chapter VII – The Juridical Relation

- ✓ Analysis of the types of Companies referred to in art.1, no.2, of the CSC:

a) General Companies (*"Sociedades em Nome Colectivo"*)

- ✓ First form of regulation of Commercial Companies, in an organized manner. A Society in which two or more partners, joining efforts and financial capabilities, decide to undertake a profitable economic activity, as if they were one person only.

- ✓ Regulated in arts.175 to 196 of the CSC, being applied to them, in certain circumstances, by direct remission of the law, the provisions of Quota Companies ("Sociedades por Quotas") – art.189, no.1, of the CSC.

Chapter VII – The Juridical Relation

- ✓ There are two types of partners/shareholders (*"sócios"*) in these Societies:

  - ➢ Capital Partners - those who take part in the Society with an entry in cash or in kind;
  - ➢ Industry Partners - those who will participate in the exercise of the economic activity through their labor.

- ✓ This kind of Company can be formed with a minimum number of two partners/shareholders (art. 7, no.2, CSC).

- ✓ If not all the partners are identified, the firm should, at least, contain the name of one of them with the addition, abbreviated or in full, of an expression that will help in identifying the plurality of its members (*& Companhia; & Cia; & Filhos; & Irmãos*) – art.177, no.1, CSC.

Chapter VII – The Juridical Relation

- ✓ Each partner/shareholder is responsible before the Society for providing his/her entry (cask, in kind or labor); and responds, severally and without limit, with the other partners, before the creditors of the company, and for its debts, even when these are previous to his/her entry (art.175, no.1 and 3, CSC).

- ✓ Unlimited Joint Liability (*"responsabilidade solidária ilimitada"*) is subsidiary, i.e., it only takes place when the social property is not enough to meet the debts of the company.

- ✓ Partners respond for social obligations, alternatively (*"subsidiariamente"*) in relation to the Society and jointly *("solidariamente"*) among them (art.175, no.1, of the CSC).

- ✓ Industry Partners are responsible in external relations, with an alternative liability (art.178 of the CSC).

Chapter VII – The Juridical Relation

- ✓ Social shares (*"participações sociais"*) are called as social parts and are not represented by certificates (*"títulos"*) (art.176, CSC).
- ✓ The transfer of shares *inter-vivos* requires the express consent of the other partners (art.182, no.1, CSC). In case of refusal, the partner can only get exonerated from the Society (art.185, no.1, §a, CSC).
- ✓ The transfer of shares *mortis causa* can only occur if the Society Agreement does not rule out that possibility (art.184, no.1 and 2, CSC).
- ✓ *Sociedades em Nome Colectivo* do not have a minimum capital value and can exist even without capital (art.9, no.1, § f and art.178, no.1, of the CSC).

Chapter VII – The Juridical Relation

- The *Sociedades em Nome Colectivo* have a General Assembly (art.189, CSC) and a management board (arts.191 to 193, CSC). They do not have a supervisory organ. As a rule, all members are managers, not happening this only when the social contract provides otherwise (art.191, no.1, CSC). Non members can be managers only when the partners designate them by unanimous decision (art.191, no.2, CSC).

- No partner may exercise, on its own or on behalf of others, a competing business, nor be a member of unlimited liability in any other company, unless he/she has the express consent of all the other partners (art.180, no.1, CSC).

Chapter VII – The Juridical Relation

b) Quota Companies (*"Sociedades por Quotas"*)

- ✓ Inspired by the model of German Limited Liability Companies (1892).
- ✓ Regulated in arts.197 to 270-G of the CSC (*"Código das Sociedades Comerciais"*), being directly applicable, by express reference, certain provisions of the Share Companies (*"Sociedades Anónimas"*).
- ✓ The firm must be composed of the names of all or some of the partners or it must allude to the activity that the company intends to pursue, and should conclude by the word *"Limitada"* or the abbreviation *"Lda"* (art.200, no.1, CSC).
- ✓ Responsibility of partners towards the Quota Company – each partner is responsible for his/her entry, but jointly with other partners, for the execution of all entries (art.197, no.1, CSC).

Chapter VII – The Juridical Relation

- ✓ Liability of partners towards social creditors - only the Quota Company responds for the debts towards creditors (art.197, no.3, CSC), unless the partners expressly stipulate in the contract that they will be liable to a certain amount (art.198, no.1, CSC).

- ✓ The liability of the partners towards the creditors covers only the social obligations assumed by the Society, as long as the partner belongs to it, and is not transferred by death, notwithstanding the transfer of obligations to which the partner was previously bound to (art.198., no. 2 by CSC).

Chapter VII – The Juridical Relation

- ✓ The minimum number of quotas in a Quota Company is two, except when the law requires a higher number or allows the company to be incorporated by a single person (art.7, no.2 and art.270, CSC).
- ✓ The capital is freely set forth in the contract of the Company, corresponding to the sum of shares subscribed by the partners (art.201, CSC).
- ✓ Equity in a Limited Liability Company is called *"quotas"*. These are not certified (art.197, no.1, and art.219, no.7, CSC). In the act of constitution, each partner can not support more than one quota and its minimum value can not be less than 1 euro (art.219, no.1 and 3, CSC).
- ✓ The entry of partners of industry is not allowed (art.202, no.1, CSC).

Chapter VII – The Juridical Relation

- ✓ Entries of partners may consist of assets other than money – an entry in kind (movable and immovable property, securities or common credits, industrial property rights: trademarks, patents, name of a trade establishment) - art.9, no.1, §h of the CSC).

- ✓ In Quota Companies, the transfer of quotas *inter-vivos* is free if made between certain categories of persons (spouses, ascendants, descendants and other partners); otherwise, it requires approval by the company (art.228, no.2, CSC). There may be exceptions, however (*"derrogações estatutárias"*): total inhibition of assignment (*"cessão"*) of quotas; restrictions on transfer of quotas; increase of the possibilities of assignment of *quotas* (art.229, no.1, 2, 3 and 5, CSC).

Chapter VII – The Juridical Relation

- In Quota Companies the transfer of quotas by death can be transmitted to the successors, depending on the statutory exemptions (*"derrogações estatutárias"*). There may not exist transmission to the successors (art.225, no.1, CSC); there may be a conditional transmission to the successors (art.225, no.1, CSC), or a transmission depending on the willingness of the successors (art.226, CSC).

- They have a General Assembly (art.248, CSC), a Management Board (consisting of one or more managers with legal capacity, who may be partners or not - art.252, CSC) and, in general, they can have a supervisory organ - Supervisory Board ("Conselho Fiscal") or an Auditor (*"ROC – Revisor Oficial de Contas"*) - (art.262, no.1, CSC); beginning from a certain size - when certain limits of turnover (*"volume de negócios"*) or employment of workers are reached – the Supervisory Board or the ROC are mandatory (art.262, no.2 and 3, CSC).

Chapter VII – The Juridical Relation

- ✓ Quota Companies generally consist of two or more partners (*"Sociedades Plurais por Quotas"*), but can be constituted by a single partner (*"Sociedades Unipessoais por Quotas"*) - art.270, no.1, CSC).

c) Share Companies (*"Sociedades Anónimas"*)

- ✓ Had their embryo in colonial companies, particularly in *"Companhias das Indias"* (seventeenth century). They require large amounts of capital, that would hardly be provided by a single person.
- ✓ Regulated in arts.271 to 464 of the CSC.
- ✓ The name of the corporation - whether *"firma-nome"*, *"firma-denominação"* or *"firma mista"* - must be completed by the term *"Sociedade Anónima"*, or simply, by its initials (*"S.A."*) - art.275, no.1, CSC.

Chapter VII – The Juridical Relation

- ✓ The liability of the shareholders (*"accionistas"*) towards the company – they are accountable for the value of their entry (art.271 of the CSC) and, possibly, by supplementary capital contribution ("prestações acessórias") – art.287, CSC.
- ✓ Liability of shareholders towards social creditors – only the Company is liable for its debts, being the liability of shareholders limited to the amount they have subscribed (art.271, CSC).
- ✓ Share Companies, apart from the possibility of being formed only by one other company (*"Por Quotas"*, "*Anónima*" ou *"Comandita Por Acções"*) – arts.481, no.1, and art.488, no.1, CSC), or by 2 shareholders (one of whom will be the State, a Public Corporation or other entity treated as such by law for this purpose, which will hold the majority of shares - art.273, no.2, CSC), must be formed by, at least, 5 members (art.273, no.1, CSC).

Chapter VII – The Juridical Relation

- ✓ Shareholders of industry are not allowed (art.277, no.1, CSC).
- ✓ The minimum social capital is of EUR 50.000 (art.276, no.3, CSC).
- ✓ Equity is called shares (*"acções"*), corresponding to fractions of capital with the same nominal value (minimum of 0,01 cent), represented by certificates (freely transferable) or in book-entry form (*"escriturais"*) - arts.271, 274, 276, no.2, and art.298 of the CSC. The shares are indivisible (art.276, no.4, CSC).
- ✓ In Share Companies, the transmission of shares *inter-vivos* is free (art.328, no.1, CSC), with the exception of any restrictions for nominative shares (*"acções nominativas"*) resulting from exemptions set forth in the by-laws (art.328, no.2, CSC).

Chapter VII – The Juridical Relation

- ✓ In Share Companies, the transfer of shares *mortis causa* is given to the successors (arts.2024 and following of the CC).

- ✓ The organization of Share Companies is set forth in art.278 of the CSC. These companies always have an internal deliberative organ (*"orgão deliberativo interno"*), called of General Meeting ("Assembleia Geral") – art.373, no.1, CSC). Moreover, depending on its organizational model, they may have:

- ➢ Classic model - a Board of Directors (*"Conselho de Administração"*) or a sole director, and an Auditor (who must be a ROC) or a Supervisory Board (including a non-member ROC) - arts278, no.1 and 2, art.413, no.1 and 4, and art.414, no.1 and 2, of the CSC; or a Supervisory Board (*"Conselho Fiscal"*) (which need not to include a ROC), and a ROC (art.413, no.1 and 4 and art.414, no.2, CSC).

Chapter VII – The Juridical Relation

- German Model - an Executive Board of Directors (*"Conselho de Administração Executivo"*) or a single director, a General and Supervisory Board and a ROC (arts.278, no.1, §c, arts.434 and 446, CSC);
- Anglo-Saxon model - a Board of Directors, comprising Executive Directors and an Audit Committee (*"Comissão de Auditoria"*) and a ROC (art.278, no.1, art.423-B and 446, CSC).

d) Companies in Partnership (*"Sociedades em Comandita"*)

- ✓ Original from the *Middle Ages* (*"Idade Média"*), associated with the contract of commendation (*"contrato de comenda"*). This is a social type that allows one or more partners (*"comanditários"*) to stay hidden (*"permanecer na sombra"*), limiting their liability to the amount of capital they provide. In turn, the partner who is the visible face of the business (*"comanditado"*) takes the direction of the Company and the unlimited liability for the results.

Chapter VII – The Juridical Relation

- Corporate type (*"tipo societário"*) - according to the Census conducted in 2000 there are, currently, nine Companies in partnership (systematized in arts.465 to 480 of the CSC).

- They may take one of two distinct models – *"comandita simples"* and *"comandita por acções"* – being applicable, as appropriate, the provisions of *Sociedades em Nome Colectivo* or of Share Companies (*"Sociedades Anónimas"*).

- The firm must derive from the name or from the firm of one of its partners, with the added words *"em comandita"* or *"em comandita por acções"*, as appropriate (art.467, CSC).

Chapter VII – The Juridical Relation

- This type of companies is comprised of 2 types of partners with different liability schemes (art.465, no.1, CSC): *"sócios comanditados"*, who assume the liability for the debts of the Society; and *"sócios comanditários"*, who do not respond for any debts of the Society beyond the capital they subscribe.

- Social participations (*"participações sociais"*) may be only comprised of social units (*"partes sociais"*) or also shares (*"acções"*) – art.465, no.3, CSC. In "Sociedades em Comandita Simples" all participations are not certificated (social units); In *"Sociedades em Comandita por Acções"* the participations of *"comanditados"* are social units and those of *"comanditados"* are certificated shares (*"acções tituladas"*).

Chapter VII – The Juridical Relation

- The transfer of shares *inter-vivos,* concerning *"sócios comanditados"* requires deliberation of authorization (unless contractual exemption) - art.469, no.1, of the CSC; regarding *"sócios comanditários"*, the regime of Quota Companies applies in *"Sociedades em Comandita Simples"* (art.475, CSC), and that of Share Companies, in *"Sociedades em Comandita por Acções"* (art.478, CSC).

- In what concerns the transfer of shares *mortis causa* between *"sócios comanditados"*, the regime of *Sociedades em Nome Colectivo* applies (art.469, no.2, CSC), while to "sócios comanditados", one must apply the regime of Quota Companies, in *"Sociedades em Comandita Simples"* (art.475, CSC), and of Share Companies, in *"Sociedades em Comandita por Acções"* (art.478, CSC).

Chapter VII – The Juridical Relation

- The *"Sociedades em Comandita Simples"* require at least, to be constituted, the participation of 2 members (art.7, no.2, CSC); while *"Sociedades em Comandita por Acções"* can not be constituted by less than 6 members (at least one general partner – *comanditado* – and 5 partners – *comanditários*) – art.465, no.1, and art.479 of the CSC.
- They do not have a minimum value of social capital, while *"Sociedades em Comandita por Acções"* require a capital of EUR 50.000 (art.478, CSC).
- At the level of organization, they have a General Assembly, a management Board (*"Gerência"*) – art.470, CSC – and a Supervisory Board or ROC in *"Sociedades em Comandita por Acções"* (arts.478, 413 and following, CSC).

Chapter VII – The Juridical Relation

7. Object

- ✓ Concept - is what the powers of the active subject focus at, i.e., is what subjective rights can fall upon.

- ✓ Types of Object:

- ➢ Immediate or direct – binomial right / linking (*"direito / vinculação"*): whenever there is a subjective right (active side - subjective right for itself or potestative right), there is a corresponding linking (passive side – legal duty or submission), and, therefore, a juridical relation.

- ➢ Mediate or indirect – the powers of the active holder affect the object indirectly, i.e., fall indirectly on the subjective right.

Chapter VII – The Juridical Relation

- ✓ The following can be object of the juridical relation:

- ➢ People – on the designated powers-duties (*"poderes-deveres"*) or functional powers (these are not the genuine subjective rights). Rights enshrined in custody (*"poder paternal"*) or guardianship (*"poder tutelar"*) can not ascribe any kind of dominance over the child or the pupil, in the interest of the parents or the guardian, but of safeguard the incapable.

- ➢ Performance (*"Prestações"*) - is the conduct to which the debtor is forced to accomplish. This is a behavior, an action or an omission (art.762, no.1, of the CC). These provisions may be of two types:

Chapter VII – The Juridical Relation

- Performance of thing (*"Prestação de coisa"*) (*"de dare"*) - it reflects the delivery of one or several things. This provision may be:
  - To provide (*"prestar"*) - delivering something to the lender, for his/her use and fruition, but which property remains with the debtor;
  - To repay (*"restituir"*) - delivering something to the lender that already belonged to him/her since the establishment of the obligation, or that belongs to the former in virtue of that delivery.

- Performance of fact (*"Prestação de facto"*) - can be of two types:
  - Performance *"de facere"* or of positive fact – the provision consists of an activity or action made by the debtor (e.g.: to pay, to perform a certain work);
  - Performance *"de non facere"* or of negative fact – the provision is a pure omission or not to do something (e.g.: not to build from a certain height).

Chapter VII – The Juridical Relation

- Rights – rights of personality (like life, honor, freedom, privacy, name, physical integrity).
- Things (*"coisas"*) - everything that can be object of a juridical relation (art.202 of the CC). Goods of static nature, devoid of personality, which can be object of a juridical relation. We can identify two kinds of things:

- Material things (*"coisas corpóreas ou materiais"*) - physical things that can be apprehended by the senses (can be touched - *"res quae tangi possunt"*), falling upon them the power of domain of the holder (e.g.: a book, a building, a motorcycle, money).
- Intangible things (*"coisas incorpóreas ou imateriais"*) – things not susceptible of apprehension by the senses (can not be touched - *"res quae tangi non possunt"*). They are designed by the spirit (e.g.: intellectual property rights - literary, scientific and artistic work - copyright, patent of an invention, a trademark, a firm, but also gas and electricity).

Chapter VII – The Juridical Relation

- ✓ Things in trade and off-trade - this distinction is based on art.202, no.2, of the CC, which considers:

- Thing in trade: all that can be object of private juridical relations;
- Thing off-trade: all that can only be object of non private juridical relations, i.e., public and international (e.g.: public domain).

- ✓ Classification of things - art.203 of the CC identifies all categories of things. They can be:

a) Movable or Immovable (arts.204 and 205, CC) – The CC does not define movable things, merely saying that movable things are everything that is not immovable. Immovable things are exhaustively defined in art.204 of the CC, which states:

Chapter VII – The Juridical Relation

- Rural and Urban buildings;
- The waters;
- The trees, shrubs and natural fruits, while connected to the ground;
- The rights that are inherent to the immovable assets, as mentioned above;
- The components (*"partes integrantes"*) of rural and urban buildings;

➢ With respect to the waters, mentioned in art.204, no.1, §b of the CC, it must be said that only the waters of private domain are considered immobile things, and not the public waters. Naturally, if the waters are removed from the building (i.e., from the source), they cease to be considered as immovable things.

Chapter VII – The Juridical Relation

- A similar regime applies to trees, shrubs and natural fruit which, harvested or separated from the soil, start to be regarded as movable things. Indeed, such trees, shrubs and fruits that are attached to the soil are considered an integral part of the building, and, as such, they lack autonomy.

- This autonomy can be physical (e.g.: cutting of trees), or purely legal (e.g.: establishment of surface right).

- § d of no.1 of art.204 of the CC intends to consider as immovable things the rights (*"in rem"*) upon immovable assets, meeting, in accordance, the legal requirements of deed (*"escritura"*) or registration on the transaction of property.

Chapter VII – The Juridical Relation

b) Simple or Composed (art.206 of the CC) - There are things constituted by a single element or part lacking aggregation (physical or juridical) of autonomous elements (e.g.: a cat; a gold bar), and other things composed of various elements or parts, i.e., which have aggregation elements (e.g.: an airplane; a car). There are also sets of things that are legally treated as being one (the universalities).

- Complex things can distinguish between:

- Composed - there is a physical aggregation of elements (e.g.: a watch; a laptop; a television);
- Collective - there is a legal aggregation of elements (e.g.: a deck of cards; an herd; an art collection; a library).

Chapter VII – The Juridical Relation

- Collective things are also subdivided in:

- Collective *stricto sensu* - can not be object of proper legal relations (e.g.: a pair of shoes; a man's suit);

- Universality of fact - may be object of proper legal relations (e.g.: an herd; a library; an art collection).

- Thus, the universality of fact is the complex of juridical things, belonging to the same person and tending to the same end, that the law recognizes and treats as forming one thing only. Therefore, universality of fact is not to be confused with universality of Law (e.g.: inheritance; commercial establishment).

Chapter VII – The Juridical Relation

c) Fungible or non-fungible (art.207, CC) – fungible things are determined by its type, quality and quantity, whenever they constitute an object of juridical relations.

- As it results from the letter of the legal provisions, the distinction between fungible and non-fungible thing has to be done while keeping in mind a specific legal relation. In abstract, one can not tell if something is fungible or non-fungible; it depends on the legal relation that is in question.
- Fungible things are characterized by a generic element, i.e., a kind (*"género"*) and a quantity. Non-fungible things are defined by a specific element, individualized from that thing (features that differentiate them from other things).

Chapter VII – The Juridical Relation

- Consider the following example:

- If **A** buys **B** 3 horses of a certain breed, not given attention to the specific features of each one, but only to the fact that they all belong to that breed (gender and quality), the thing is said fungible (3 horses), which is the object of this legal relation.

- If **A** buy **B** 3 horses who participated in and won a specific contest, considering their individuality (**A** does not want any 3 horses; **A** wants those 3 horses which have unique characteristics that differentiate them from others), the thing is said non-fungible (3 horses), which is the object of this legal relation.

Chapter VII – The Juridical Relation

- On the first legal relation, **A** and **B** took into consideration the elements gender (horses of a certain breed) and quantity (3 horses), in order to define the object of the juridical transaction. The moment that **B** fulfills his obligation of delivering the horses to **A**, if **B** has more than 3 horses of that breed, the latter is the one that will choose and deliver the 3 horses to **A**.

- On the second relation, **A** and **B** took into consideration the features that differentiate those three horses from all the others, individualizing the thing. When **B** has to fulfill his obligation to deliver the horses to **A**, even if **B** has other similar horses, he will have to deliver to **A** those 3 horses that were individualized.

Chapter VII – The Juridical Relation

- Fungible things are, generally, object of legal relations which content are generic obligations, falling the choice to the debtor. To that extent, one fungible thing can be associated with the idea of being replaceable.

- Money is, by nature, an example of a fungible thing. When, in a legal relationship, **A** agrees to donate EUR 10.000 to **B**, the thing (money) that is object of the relation, is fungible, because it is defined by its gender (euros) and quantity (10.000), and not individualized.

- However, there are particularities of the scheme of fungible things in various institutes of Civil Law, that are here listed:

- In the loan agreement *("contrato de mútuo")* of fungible things;

Chapter VII – The Juridical Relation

- In lending (*"comodato"*) of non fungible things;
- In general obligations (*"obrigações genéricas"*);
- In compensation (*"compensação"*).

d) Consumable or non-consumable (art.208 of the CC) – consumable things are those whose regular use implies their destruction or disposal (e.g.:, a book is something not consumable; however, books intended for sale in a bookshop are consumable things).

Chapter VII – The Juridical Relation

e) Divisible or non-divisible (art.209 of the CC) – divisible things are movable or immovable things that may be divided without changing its substance, or with no effect on its value, or without prejudice to the purpose for which they are intended. Missing one of these circumstances, the thing is said to be non-divisible.

- Thus, if the fractionation of one thing: (i) changes its substance; or (ii) downgrades it; or (iii) impairs its intended use; then, it is considered a non-divisible thing. If, conversely, none of these conditions apply, then the thing is divisible.
- The following are considered divisible: a package of flour; a packet of ten euros' notes; a ton of coal; on the opposite, things like an horse; a mobile phone; a deck of cards; or a car, are considered non-divisible.

Chapter VII – The Juridical Relation

- Obviously, in some cases, one can only tell if something is divisible or non-divisible after analyzing the value and the intended use of the thing, under the circumstances of each case. Just think of a plot for the construction of buildings (if split it may worth more or less), or a collection of paintings, books or stamps (whose value can also vary with the division; and even possibly impair the intended use, if the interest of the collection lies especially in the unity of the works that compose it).

Chapter VII – The Juridical Relation

f) Main or Accessory (*"Principais ou Acessórias"*) – art.210 of the CC: movable things which do not constitute an integral part, but are permanently affected to the use or ornamentation of another thing, are considered accessory (*"pertençaS"*). Businesses that have the main thing as object, do not cover, unless stated otherwise, the accessory things (while integral parts are covered by businesses concerning the main thing).

- Unlike integral parts, which are movable things linked to a non movable thing, accessory things are movable things that can be of service both to movable or non movable things (e.g.: furniture, ornaments and utensils belonging to an urban building should be considered accessory things).

Chapter VII – The Juridical Relation

g) Present or Future (art.211 of the CC) – present things are those that already exist and are available to the declarant; while future things are those that do not yet exist, which are not held by the disponent (*"disponente"*), or those that he has no right to, at the time of the negotiating declaration (e.g.: grapes from a vineyard that will be produced next year are considered future things; the shares of a Corporation not yet issued, interest not yet matured, goods not yet manufactured, are considered future things as well).

- ✓ The outcome (*"frutos"*) - everything that one thing – material (movable or non-movable) or intangible - produces itself, periodically, and, in addition, without prejudice of its substance (art.212, no.1, CC). The outcome may be:

Chapter VII – The Juridical Relation

- Natural - that that comes directly from the thing;
- Civil - rents or interest that the thing produces as a result of a legal relation.

✓ Improvements (*"benfeitorias"*) - all expenditures for maintain or improve anything (art.216. º CC). Improvements can be:

- Necessary (*"necessárias"*) - when aimed at preventing the loss, destruction or deterioration of the thing;
- Useful (*"úteis"*) - that that is not essential to the conservation of the thing, but increases, however, its value;

Chapter VII – The Juridical Relation

- *"Voluptuárias"* - that is not essential to the conservation of the thing nor increases its value, but serves only to the enjoyment of the one that produces the improvement (*"benfeitorizante"*).

- ✓ Patrimony - all rights and bindings, valued in money, belonging to an holder. The heritage can be classified as:

- Gross patrimony (*"património bruto"*) - corresponds to the notion of patrimony in its broadest sense, encompassing rights and bindings. Thus, when we refer to our patrimony, we consider all our rights and all our obligations, valued in money.

Chapter VII – The Juridical Relation

- Active patrimony (*"património activo"*) - all patrimonial rights of an holder. Thus, our active patrimony consists only of our patrimonial rights.

- Liable patrimony (*"património passivo"*) - a set of patrimonial bindings of a person. It just covers debts and subjections valued in money.

- Net patrimony (*"património líquido"*) - the difference between active and liable patrimony, which can be positive (when the active one is greater than the liable one) or negative, in the opposite situation.

Chapter VII – The Juridical Relation

8. Juridical Fact

- ✓ It is any event which produces effects on the juridical order.
- ✓ Types of juridical facts:
  - ➢ Voluntary Juridical Fact (*"facto jurídico voluntário"*) or Juridical Acts (*"actos jurídicos"*) - manifestations of the will of the subject or of whom he/she is represented by.
  - ➢ Involuntary Juridical Fact (*"facto jurídico involuntário"*) - natural facts, independent of the will of oneself (cataclysms - wind, rain, volcanic eruption, tornadoes, tsunamis).

Chapter VII – The Juridical Relation

- ✓ The voluntary juridical facts or juridical acts may be:
- ➢ Lawful Juridical Acts- those in accordance with the Legal Order (marriage, donation, loan).
- ➢ Unlawful Juridical Acts - those who are opposed to the Legal Order and involve a penalty for its author. There are several types of unlawful acts:
- Civil Illicit (*"ilícito civil"*) - is a breach of the rules of Private Law, referred to in the CC, affecting personal interests and which give rise to civil penalties. Illicit activities may trigger civil liability.

Chapter VII – The Juridical Relation

- Criminal Illicit (*"ilícito penal"*) - is a breach of Criminal Law rules, contained in the Criminal Code, which reaches general interests and basic values of the society and give rise to criminal sanctions. The practice of criminal illicit acts triggers criminal liability, because there is a crime (action or omission, typical, unlawful, culpable and punishable by law).

- Disciplinary Illicit (*"ilícito disciplinar"*) - when an employee or agent, integrated in some organization, operates a voluntary act that breaches some of the duties arising from the position he holds, breeching rules that govern the operation of that organization. The practice of disciplinary illicit acts triggers disciplinary liability and the application of disciplinary sanctions.

Chapter VII – The Juridical Relation

- Social Regulatory Ordinance Illicit (*"Ilícito de Mera Ordenação Civil"*) – covers counter-ordinances and it consists in the disrespect of rules which are intended to protect collective values of second relevance. The juridical goods which are protected by administrative offenses have less ethical resonance against those of crimes.

✓ Volunteer juridical facts or illicit juridical acts may be:

➢ Intentional/Willful (*"dolosos"*)- when there is, on behalf of the one that practices the act, the purpose of doing harm. He/she predicts the outcome (A steals B, being that his/her real intention).

➢ Negligent - when the person that practices the act does not foresee the result, but there was still negligence, which confers him/her guilt (road accident because of disrespecting a red light).

Chapter VII – The Juridical Relation

- ✓ Volunteer juridical facts or illicit juridical acts may be:
- ➢ Simple Juridical Acts – volunteer juridical acts whose effects are not determined by the contents of the will, but direct and mandatory by law (with the creation of a artwork, one acquires the copyright).
- ➢ Juridical Businesses – volunteer juridical facts consisting of one or more manifestations of will, intentionally designed to produce legal effects (wedding, buying and selling, donation, lease, loan).

Chapter VII – The Juridical Relation

8.1. Juridical Businesses (*"Negócios Jurídicos"*)

- ✓ Classifications of juridical businesses:

a)

- ➢ Unilateral Juridical Businesses (*"negócios jurídicos unilaterais"*) - there is only one declaration of intention, or there are more, but parallel, forming a single group. There is only a party (power of attorney, will, deed of constitution of a Foundation).

- ➢ Bilateral Juridical Businesses (*"negócios jurídicos bilaterais ou plurilaterais"*) – two or more declarations of will, with different content, which harmonize between themselves, with the production of a juridical result (contracts – *"Dos contratos em especial"* in the CC).

Chapter VII – The Juridical Relation

a1) Unilateral Legal Businesses can be:

- *"Receptícios"* - those in which the declaration of will must be addressed and communicated to the other party in order to produce its effects (termination of an employment contract).

- *"Não Receptícios"* - those wherein the issue of a declaration is enough to validate the businesses, not requiring, therefore, the knowledge of the other party (will).

Chapter VII – The Juridical Relation

b)

- Onerous Juridical Businesses (*"Onerosos"*) - assumes patrimonial duties. Each party gives and receives (sale, lease, employment, contract, loan).
- Non-onerous Juridical Businesses (*"Gratuitos"*) - One party makes a patrimonial assignment in favor of another without obtaining any consideration (donation, *comodatum*).

c)

- Juridical Businesses *inter-vivos* - intended to produce effects during life of the parties (purchase and sale).
- Juridical Businesses *mortis causa* - are intended to take effect only after the death of one or of both parties (testament).

Chapter VII – The Juridical Relation

d)

- Singular Juridical Businesses (*"Singulares"*) – when is just one person that intervenes in the business (testament).
- Bi-lateral Juridical Businesses ("Bilaterais") – when is more than one person that intervene in the business (sale, lease).

e)

- Formal or Solemn Juridical Businesses (*"Formais ou Solenes"*) – require that the intention of the parties should be externalized in a particular way (e.g.: by written document, deed, purchase and sale of a property).
- Non-Formal or Non-Solemn Juridical Businesses (*"Não Formais ou Não Solenes"*) – do not require the externalization of the will of the parties in any particular way (e.g.: purchase and sale of a cake in a pastry shop).

Chapter VII – The Juridical Relation

f)

- *"In rem"* Juridical Businesses *"quoad constitutionem"* (concerning the constitution) - their perfection (i.e., the validity or effectiveness) depends, besides the manifestation of will, on the practice of an act of delivery of the thing, albeit symbolic (tradition) - *comodatum*, loan, deposit, lease.

- *"In rem"* Juridical Businesses *"quoad effectum"* (concerning effects) - all the others, i.e., those that do not rely on tradition to be perfect (e.g.: promissory contract, purchase & sale).

Chapter VII – The Juridical Relation

g)

- Juridical Businesses *"Recipiendos"* - businesses are intended to someone in particular and determined (i.e., whose business declaration is addressed to someone that is clearly identifiable) – e.g.: work proposal submitted by company **X** to worker **Y**; selling proposal of car **Z** to person **A** by representative **M**.

- Juridical Businesses *"Não Recipiendos"* - the business is intended to someone indeterminate (i.e., whose business declaration is addressed to someone not identifiable) – e.g.: job posting in the newspaper; catalogs or promotional sale of clothing at supermarkets.

Chapter VII – The Juridical Relation

h)

- Commutative Businesses (*"Comutativos"*) – the performance of each of the parties are determined (purchase and sale of an apartment, where the provision of the buyer is determined - to pay the price – 500.000 euros -, and the provision of the seller is also determined – to deliver the apartment).

- Aleatory Businesses (*"Aleatórios"*) – the performance of each party are not yet certain (future sale of thing - art.880, no.2, CC; contract of game and bet - art.1245, CC. The uncertainty in aleatory business, can be linked to: the performance itself; the realization of one of the performances; the value of the performance; the achievement and value of the performances.

Chapter VII – The Juridical Relation

8.2. Contracts

- ✓ Contract - agreement of wills, aimed at creating, modifying or terminating juridical relations.

- ✓ Fundamental principles:

a) The Principle of Contractual Freedom (*"Princípio da Liberdade Contratual"*) (logical corollary of private autonomy) - faculty that parties have, within the limits of the law, to freely determine the content of the contracts; to celebrate different contracts from those set forth in the CC or to include in these the clauses that they want (art.405 of the CC).

Chapter VII – The Juridical Relation

- The principle of contractual freedom unfolds in 4 aspects:

- Freedom to contract – the power that individuals are free to express and use, to freely create between themselves, those agreements designed to regulate their interests;

- Freedom to set for the contractual content – faculty to model the contents of the contract;

- Freedom of selection of the negotiation type – faculty to choose the contract to be executed;

- Freedom of stipulation – faculty of modeling the specific content of the contractual type which is chosen to be executed.

Chapter VII – The Juridical Relation

- However, the intrinsic freedoms to the principle of contractual freedom are not absolute and are subject to restrictions or limitations:

- To the freedom to contract - there are certain cases where: people have a legal duty or obligation to contract (when one or both parties have assumed the obligation to conclude a specific contract, through the institute of the promissory-contract - arts.410 and following of the CC); it is forbidden to contract with certain people (parents and grandparents can not sell to children and grandchildren, without consent of the others - art.877 of the CC); the consent or assent of others (alienation or encumbrance of movable or immovable property belonging to a couple - arts.1682 and 1682-A of the CC) is required, when one of the parties does not have the required freedom, as regards the content of the contract (Adherence Agreements / Standard Agreements).

Chapter VII – The Juridical Relation

- To the freedom to set the contractual content - generally encompassed in words of art.405 of the CC: "within the limits of the law." These limits start with the requirements stated in arts.280 and following of the CC, regarding the object of the legal business, and in art.398, no.2 of the CC, regarding the content of the contractual provision.

b) Principle of Consensuality or Freedom of Form (*"Princípio da Consensualidade ou da Liberdade de Forma"*) - translates the idea that the perfection of the contract is achieved by mere agreement of will between parties, i.e., "the validity of the negotiation declaration does not depend on the observance of a specific form, except when the law requires it"(art.219, CC).

Chapter VII – The Juridical Relation

c) Principle of Good Faith (*"Princípio da Boa-Fé"*)- translates the imposition to the parties of having an honest and conscientious behaviour, in order not to affect the result of the legitimate interests of the parties, but instead reflecting the ethics that must dominate (or should dominate) the whole Law of Obligations. This principle should be present throughout the process of making a contract, namely:

- At the time of its conclusion (art.227, no.1, CC);
- At the time of its interpretation and integration (art.239, CC);
- At the time of its execution, being analyzed in the exercise of rights and the fulfillment of obligations deriving from it (art.762, no.2, CC).

Chapter VII – The Juridical Relation

d) Principle of the binding force (*"Princípio da Força Vinculativa"*) – according to which, once celebrated, the fully valid and effective contract constitutes mandatory law between parties (art.406, CC). From this principle the following derive:

- Contractual punctuality - determines that all contract terms are to be observed, i.e., must be fulfilled, point by point;
- The non-retractility (*"irretractabilidade"*) or contractual irrevocability (*"irrevogabilidade contratual"*) - determines that the contractual arrangements are non-retractible or irrevocable, except by mutual consent of the parties;
- The intangibility of the contractual content - determines that the content of the contracts can not be modified, except by mutual consent of the parties.

Chapter VII – The Juridical Relation

- ✓ Types of contracts:

a)

- ➢ Formal or Solemn contracts - require certain procedures for their conclusion. The requirement of form may have a legal or conventional justification (arts.220 and 221 of the CC). Besides form, sometimes are required certain procedures for the conclusion of a contract:

- Form of the contract - how it reveals itself, how to externalize the declarations of will of both parties. Thus, if a contract requires writing, the written document constitutes the form;

Chapter VII – The Juridical Relation

- Contract formalities - may stand outside the legal business itself, serving as a complementary match; e.g.: the deposit of the written contract (obligation of deposit of employment contracts with foreign people, before the *Autoridade para as Condições de Trabalho*).

- Agreed Contracts (*"Contratos consensuais"*) - do not require a special form in order to be executed (art.219 of the CC).

b)

- Unilateral contracts – they generate obligations only to one of the parties (donation);
- Bilateral contracts – they generate obligations for both parties (purchase and sale).

Chapter VII – The Juridical Relation

c)

- Sinalagmatic Bilateral Contracts (*"contratos bilaterais sinalagmáticos"*) –rights and obligations emerge for both parties, reciprocal and interdependent (purchase and sale, in which, besides others, there are duties to deliver the thing and to pay the price). It is the reciprocity and the interdependence between emerging provisions of the same bond that qualifies the sinalagmatic contract;

- Non Sinalagmatic Bilateral Contracts (*"contratos bilaterais não sinalagmáticos ou imperfeitos"*) – initially, the duties refer only to one party and latter, eventually, obligations to the other party may emerge, after the fulfillment of the first duties (mandate).

Chapter VII – The Juridical Relation

d)

- Nominated Contracts (*"contratos nominados"*) – they have a *nomem iuris*, attributed by the legislator (sale, donation, society, lease, mandate);

- Non-nominated Contracts (*"contratos inominados"*) – they were not "baptized" by the legislator, not having thus, any *nomem iuris* [franchising contract (franchise); know-how agreement (technology transfer); countertrade contract (commodity exchange)].

e)

- Typical contracts (*"contratos típicos"*) - typicality arises from the existence of a legal regulation (sale, lease). The typicality contract does not prevent private autonomy, because the parties can freely conform its respective contents;

Chapter VII – The Juridical Relation

- Atypical contracts (*"contratos atípicos"*) - absence of legal regulation, i.e., they are based on atypical rules.

f)

- Free Contracts (*"contratos gratuitos"*) – one of the parties withdraws the advantages, being supported the sacrifices by the counterparty (donation);

- Onerous Contracts (*"contratos onerosos"*)- there are advantages and sacrifices for both parties, even if there is no balance between them (purchase & sale, even if the price is too low or too high in relation to the market value). Onerous contracts can be distinguished in:

Chapter VII – The Juridical Relation

- Commutative Onerous Contracts (*"contratos onerosos comutativos"*) - the object and value of the performances to be provided is already determined, although these performances are indeterminate (the sale of 500 kg of oranges for 250 euros);

- Aleatory Onerous Contracts (*"contratos onerosos aleatórios"*) - one of the performances is of uncertain achievement (in a betting contract or in an insurance one of the performances may or may not be performed, in reason of an future an uncertain act).

g)

- *In rem* Contracts *quoad effectum* (regarding effects) - determine the transmission of *in rem* rights; the *in rem* right is transmitted by mere effect of the contract (art.408, no.1, CC), which implies that the transfer or creation of *in rem* rights is not on the dependency of the tradition of the thing (purchase & sale).

Chapter VII – The Juridical Relation

- *In rem* Contracts *quoad constitutionem* (regarding the constitution) – the tradition of the thing is a constitutive element of the contract; without the delivery of the thing, there is no celebration of the legal business (*comodatum*; loan; deposit).

h)

- Mixed contracts (*"contratos mistos"*) - when the regimes of two or more typical businesses are gathered in the same contract, but in which the parties do not follow the typical forms prescribed by law. The legal businesses lose autonomy. There are four common types:
- Multiple or Combined Contracts (*"múltiplos ou combinados"*) - one party is enrolled in several provisions of different contractual types, through a single contribution (purchase and sale with the obligation to transport and assemble the thing);

Chapter VII – The Juridical Relation

- Contracts of double type or twinned (*"contratos de duplo tipo ou geminados"*) – one of the parties is enrolled to the typical provision of a contract and the counterparty to the one of another contract (sale of land to the contractor, leaving the seller with an apartment in the building; doorman);

- Mixed Contract *stricto sensu* or cumulative (*"contratos mistos stricto sensu ou cumulativos"*) - with one contractual type only, one can pursue the typical purpose of other contract (purchase & sale and donation, also designated by mixed donation – *"doação mista"*);

- Additional Contracts (*"contratos complementares"*) – a contract with accessory typical obligations of other business (lease with heating).

Chapter VII – The Juridical Relation

i)

- Union or Coalition of Contracts (*"união ou coligação de contratos"*) – negotiating inter-connection in which the contracts do not lose their individuality. The classic tri-partition of union contracts is based on:

- External union - the union is material (several purchase & sale contracts executed in a given moment, for a given customer, in the same store);
- Internal union - there is a relation between the adjustment of a contract and the celebration of another (loan made to workers of a bank with subsidized interest – *"juro bonificado"*);
- Alternative union - the conclusion of a contract removes the celebration of another (e.g.: rents the house if situation X happens, but buys it, instead, if situation Z happens).

Chapter VII – The Juridical Relation

9. Guarantee (*"Garantia"*)

9.1. The Guarantee on Juridical Relations

- ✓ It is the susceptibility of co-active protection of the position of the active subject of the juridical relation, giving the holder of the interest the means for its effective realization.

- ✓ The main purpose of the warranty is to protect the rights of citizens, through the use of coercive means, which are integrated in the figure named as juridical guardianship (*"tutela jurídica"*). The latter can be of two types:

- ➢ Private tutelage or self-tutelage (*"tutela privada ou auto-tutela"*) – the one that is carried upon by the holder himself of the infringed right, and that is licit only on an alternative basis (arts.1 and 2, CPC). The following are examples of private tutelage:

Chapter VII – The Juridical Relation

- Direct action (*"Acção Directa")* - art.336 of the CC: a situation in which is considered justified the use of force in order to preserve or realize the right itself, if there is failure to recourse timely to normal coercive means, and once the agent uses only the strict force to the necessary extent, in order to prevent the damage (e.g.: it is permissible to break a gate as a defense of a passage servitude – *"servidão de passagem"*).

- Self-defense (*"Legítima Defesa"*) - art.337 of the CC): a situation in which it is considered justified the act that is intended to remove any aggression directed against the agent or a third party, provided that in aggression and in defense the requirements set forth by law are verified: current and unlawful aggression; and necessary and proportionate defense (unlike what happens in direct action, in self-defense there may be a disproportion between damages, as long as it is not evident).

Chapter VII – The Juridical Relation

- State of necessity (*"estado de necessidade"*) - art.339 of the CC: unlike direct action and self-defense, the state of necessity is not directed against the acts of third parties; it aims to protect the rights endangered by forces of nature or by persons, other than those against whom the needed action is directed. Thus, the action that destroys or damages things of others in order to remove the actual danger of a manifestly higher harm, either of the agent, or of a third party, is licit.

- In the state of necessity it is only permissible to sacrifice things or property rights. The destruction or damage of such property depends on the verification of the following assumptions: the existence of a present danger; that danger threatens a legal right regarding the person or the property of the agent, or of a third party; the defended interests are clearly superior, in relation to the sacrificed interests.

Chapter VII – The Juridical Relation

- State Public tutelage or hetero-tutelage (*"tutela pública estadual ou hetero-tutela"*) - is that one which is held by the State and that respects the principle of effective judicial tutelage, under art.20 of the CRP. State tutelage can take the judiciary form (Courts), and Administrative (Police: PSP, GNR).

- State tutelage has got, as main purpose, the compliance of legal rules.

- Main types of State tutelage:

a) Preventive Tutelage - a set of measures destined to prevent the breach of the legal order or to prevent the breach of legal rules. This type of tutelage can meet various forms, assuming special importance two of them:

Chapter VII – The Juridical Relation

- Security measures - measures which aim to put categories of people who are considered to be dangerous, in a situation in which they will not be able to practice crimes in the future (art.30 of the CRP).

- Trial procedures (*"procedimentos cautelares"*) - a set of measures which can be taken by the citizen, in order to avoid the damage of a right. The following are called preliminary or incidents of a judicial action (arts.381 and following, CPC): provisional restitution of possession (art.393, CPC); suspension of social resolutions (art.396, CPC); provisional maintenance (art.399, CPC); attachment – *"arresto"* (art.406, CPC); embargo of a new construction (art.412, CPC); enrollment – *"arrolamento"* (art.421, CPC).

Chapter VII – The Juridical Relation

b) Compulsive Measures (*"medidas compulsivas"*) - intended to act upon the perpetrator of a specific rule, in order to force him to adopt a particular behavior that he omitted hitherto . The legal order does not provide any compulsive means of depriving freedom (art.27 of the CRP).

c) Repressive tutelage (*"tutela repressiva"*) - is reflected in the organization of sanctions as a result of the breach of legal rules (please revisit the classification of sanctions that were studied, regarding juridical rules).

Chapter VII – The Juridical Relation

9.2. The Guarantee of Obligations

- ✓ If the debtor fails to comply spontaneously with its performances, the creditor will have certain guarantees at his/her disposal, which allow him/her to defend his/her position, as well as to exercise his/her right. What ensures compliance with the creditor is the debtor's assets.

9.2.1. General Guarantees of Obligations

- ✓ Consisting of all attachable goods (*"bens penhoráveis"*) of the debtor who can answer for his/her debts (art.601, CC).

Chapter VII – The Juridical Relation

- ✓ Not all assets are attachable:

- ➢ Non-attachable assets (*"bens impenhoráveis"*) - essential goods (bed, table, clothing); goods without significant economic value; buildings and objects pertaining to the public worship (graves).

- ➢ Relatively non-attachable goods (*"bens relativamente impenhoráveis"*) – State property and of Legal Entities, allocated for public utility purposes.

- ➢ Partially non-attachable goods (*"bens parcialmente impenhoráveis"*) – periodic labor wages: wages, salaries and pensions.

Chapter VII – The Juridical Relation

9.2.2. Means of Conservation of Patrimonial Guarantee (*"garantia patrimonial"*)

- ✓ They serve to assure that the decrease of the assets of the debtor does not endanger the satisfaction of credits. They are:

- ➢ Declaration of nullity (*"declaração de nulidade"*) – granting of legitimacy to creditors to require the declaration of nullity of the acts of the debtor that lower its assets so as to endanger their credits (art.605, no.1, CC). Once declared null and restored what had been provided, the assets are integrated in the debtor's assets and are back to be a general guarantee of obligations (art.605, no.2, CC).

Chapter VII – The Juridical Relation

- E.g.: **A** sells **B** a farm, setting between themselves a bargain price; **A** intends to avoid an imminent seizure by **C**, considering the existence of a large debt in favor of **C**, now due and not yet paid by **A**.

- Subrogation (*"sub-rogação"*) - when the debtor does not acquire the assets that is entitled to, the law allows the creditor or creditors of the debtor to step in in the exercise of such rights. The subrogation action is legitimate only to the creditor when the exercise of such action is essential to guarantee the satisfaction or guarantee of his right (art.606, CC). The subrogation, such as the declaration of nullity, even if exercised by only one of the creditors, is extendable to all others (arts.609 and 605, no.2, CC).

Chapter VII – The Juridical Relation

- Ex: **A** owes **B** EUR 500.000. **B** requires the payment, but **A** justifies himself, saying that he does not have the money (which is true). However, **B** knows that **K** owes EUR 350.000 to **A**. And **B** also knows that **A**, by inertia, neglect, or any other reason, has not demanded compliance by **K**.

- *"Impugnação Pauliana"* - where the debtor executed a dispositive act (*"acto dispositivo"*), which makes impossible the full satisfaction of his credits or the worsening of this impossibility; creditors can challenge (*"impugnar"*) such acts (art.610, CC), since his credit is previous; since there is an impossibility or worsening of the impossibility of full satisfaction of the claim and, in some cases, when there is bad faith by the debtor and the third party (art.612, CC).

Chapter VII – The Juridical Relation

- Ex: **A** sells **B** a farm, setting between themselves a bargain price; **A** intends to avoid an imminent seizure by **C**, considering the existence of a large debt in favor of **C**, now due and not yet paid by **A**.

- Preventive Attachment (*"arresto preventivo"*) – It is a kind of inventory, a juridical immobilization of assets. Being decreed the seizure, any acts executed in relation to the seized property are ineffective, in relation to the creditor that requires the arrest. The debtor can not dispose effectively of his assets, in respect to the creditor which requested the preventive attachment (art.619, CC).

Chapter VII – The Juridical Relation

- Law is concerned about the conservation of certain assets, which are in the custody of the Court, so that they can, typically, serve the seizure (*"penhora"*) when the creditor requires it, at the moment of the enforcement procedure.

9.2.3. Special Guarantees of Obligations

- ✓ Guarantees provided by law, by juridical business or by a judicial sentence, to some creditors, regarding the debtor's assets; these can be personal or *"in rem"*.

Chapter VII – The Juridical Relation

9.2.3.1. Personal Special Guarantees of Obligations

- ✓ Those in which one or more persons, besides the debtor himself, are liable, with their assets, to fulfill the obligation. There is, thus, a quantitative increase of the guarantee of the creditor. Personal guarantees are:

- ➢ Personal Guarantee (*"Fiança"*) – when a third party (personal guarantor – *"fiador"*), ensures, with his own assets, the compliance of an obligation of others (credit right), staying personally liable towards the creditor (art.627, no.1 and 2, CC). The guarantor has the benefit of prior *excussio* (*"excussão prévia"*), i.e., has the right to refuse the payment of the debt while the assets of the main debtor are not all executed (art.638, CC).

Chapter VII – The Juridical Relation

- Sub-personal guarantee (*"sub-fiança"*) - corresponds to the situation where someone secures a personal guarantor. It is a double guarantee (art.630, CC).

- Credit Mandate (*"mandato de crédito"*) - when a person undertakes, before other, to give credit to a third party, acting on behalf and for his own account. If the mandate is accepted, whoever instructed the other to give credit is placed in the position of guarantor of the one who was given credit (art.629, CC).

- ✓ When a debt has, simultaneously, a personal guarantee and an *"in rem"* guarantee, the guarantor has the right to demand, first, the execution of the *"in rem"* guarantee before being required, himself, to pay the main debt (art.639, CC).

9.2.3.2. *"In rem"* Special Guarantees of Obligations

- ✓ Those that fall on certain specific assets, whether belonging to the debtor himself or to a third party, giving preference to the creditor in payment for the value of those assets. By virtue of *"in rem"* guarantees, the creditor acquires the right to be paid in preference to other creditors, by the value or the income of certain assets, provided certain requirements are verified, namely:

- ➢ Such assets are subject to registration;
- ➢ The guarantee has been registered;
- ➢ Do not compete with special privileges.

Chapter VII – The Juridical Relation

- ✓ Real guarantees stated in the CC:

- ➢ *"In rem"* consignment (*"consignação de rendimento"*) – the income of certain property (movable or immovable, subject to registration), answers, in a privileged manner, by the fulfillment of the obligation - art.656, CC.

- ➢ Pledge (*"penhor"*) – movable assets, credits and other non mortgaged rights of the debtor or of a third party are its object. The pledge agreement is an *"in rem"* contract (gives the creditor the right to satisfaction of his claim with preference over other creditors). The pledge is constituted only when the asset that is given in pledge is delivered to the pledgee (*"credor pignoratício"*) - art.666, no.1, CC.

Chapter VII – The Juridical Relation

- Mortgage - privileged allocation of a certain asset to the responsibility of a certain debt, which means that the creditor has the privileged right to be paid by the value of those mortgaged assets. It refers, in particular, to real estate, automobiles, ships and aircraft (arts.686 and 688, CC). The mortgage must be registered and when it falls on property it must be made by an authentic document (deed). There are three types of mortgage:

- Legal mortgages - directly conferred by law (art.704, CC).

- Judicial mortgages - are decided by Court (art.710, CC).

- Volunteer mortgages - may arise from contract or unilateral business (art.712, CC).

Chapter VII – The Juridical Relation

- Privileged Credits (*"privilégios creditórios"*) - when the law grants certain creditors the ability to be paid in preference to other creditors, in attention to the nature of their claims (art.733, CC). Credit privileges need not to be registered and can be: movable (*"mobiliários"*) – movable assets; or immovable (*"imobiliários"*) – non-movable assets (art.735. º CC).

- Retention right (*"direito de retenção"*) - when someone is in possession of something that belongs to others and must deliver it, he/she may refuse to do it if that thing has caused damage or expense, for as long as he/she is not compensated for the caused damage, or reimbursed for the expenses spent on the asset (art.754, CC).

Chapter VII – The Juridical Relation

- Seizure (*"penhora"*) – it consists on the seizure, by the Court, of the assets deemed necessary to cover, through its value, the due compensation, by removing these assets from the debtor and affecting them to the proper purposes of the enforcement (art.820, CC).

Chapter VII – The Juridical Relation

10. General Theory of Juridical Businesses

10.1. Negotiation Declaration (*"declaração negocial"*)

- ✓ It is the behavior that creates the appearance of exteriorization of a certain content of negotiation intent, being the negotiation will characterized by an intention to perform certain juridical binding effects.

- ✓ This utterance, expressly or implied declaration, of a subjective will, is called a declaration of will (*"declaração de vontade"*).

- ✓ The declaration implies an exteriorized act adequate to turn public a certain intent or content of thinking of its author.

Chapter VII – The Juridical Relation

✓ Types of declarations (art.217, CC):

- Express declaration (*"declaração expressa"*) - a declaration totally recognizable and made within the usual standards of a declaration: by word, writing or any other direct means of manifestation of the will.
- Verbal declaration: **L** says to **C**: "I want to buy your dining room furniture for 5 thousand Euros".
- Written declaration: the following clause in a contract: "By this promissory agreement, the First Party promises to sell to the Second Party, which in turn promises to buy the First, the urban building located...".
- Gestural declaration: **C** raises her arm in order to bid for an art piece that is being auctioned.

Chapter VII – The Juridical Relation

- Other direct means of expression of will: **J** goes to a supermarket, puts products in his cart, passes with them by the cashier, pays them with his debit-card and leaves the building without saying a word.

- ✓ Tacit declaration (*"Declaração Tácita"*)- a declaration which is implied without the need of being declared in a clear and express way. E.g.: In a contract, **A** declares that he sells the furniture that is in apartment **Z**, which forms part of the inheritance of his father. When **A** declares that he is selling those things that can only belong to him if he accepts the inheritance, one can deduce, with all the probability, that he accepts the inheritance. They are two separate declarations: one is expressed (the sale of furniture), and the other is tacit (the acceptance of the inheritance). The latter is deduced from the former.

Chapter VII – The Juridical Relation

- ✓ The value of silence - the silence has no value as business declaration, except in cases provided in art.218 of the CC:
- ➢ When the law says so (arts.923, no.2, and art.1054, of the CC);
- ➢ When it is usual to proceed in such a way - repeated social practices of each activity and of the socio-cultural context (auctions);
- ➢ When there is an agreement (*"convenção"*) on this – it results from the existence of previous negotiation stipulation between the parties of a juridical business, whereby they have agreed to attribute a particular value to silence.

Chapter VII – The Juridical Relation

- ✓ Structure of the negotiation declaration:

- ➢ *"Declarante"* – the person which makes the declaration.

- ➢ *"Declaratário"* – person or group of persons to whom the declaration is intended. The *"declaratário"* can be: determined or determinable.

- In order for the negotiation declaration to be valid it is necessary that both *"declarante"* and *"declaratário"* possess legal capacity (arts.67 and 69, CC) of use and of exercise of rights.

Chapter VII – The Juridical Relation

➢ Content - what is declared.

- In order for the declaration to be valid, the object upon it is made, must be possible. For that purpose, it is necessary that the object respects the requirements of art.280 of the CC:

❑ Possibility - physical and legal;
❑ Compliance – with mandatory rules, with morality and with public order;
❑ Determinability.

- A negotiation declaration is null whose object is a trip to Jupiter; the purchase of Belem Tower; the commitment to make an assault or to kill someone.

Chapter VII – The Juridical Relation

- Note – as stated in art.281 of the CC, if only the purpose of the juridical business is contrary to law or public order, or offensive to moral standards, the business is null only when the purpose is common to both parties.

- Form – the way it is declared, i.e., the way the will is externalized; the appearance that the declaration assumes.

- The general rule, in Civil Law, is the freedom of form in legal transactions, enshrined in the principle of consensualism (*"princípio do consensualismo"*): the validity of the negotiating declaration does not depend on the existence of a specific form, except when the law requires it (art.219, CC).

Chapter VII – The Juridical Relation

- The way it is declared (form) can be:

- Legal - when the law requires a certain form, under penalty of nullity (arts.220 and 221, CC);

- Voluntary - when parties, freely and of their own initiative (that is, without a previous obligation to it), adopt a particular form (art.222, CC)-

- Conventional – when parties agree to start using, for the future (e.g.: notices between parties in a contract), a certain form for the celebration of the juridical business, in accordance with the principle of private autonomy (art.223, CC).

Chapter VII – The Juridical Relation

- The requirement of legal form results from concerns of legal certainty, ease of proof and protection of the values in question. The written (and signed) document exists to prevent the rejection of the declaration (unless if grounded in false declaration) and the discussion in testimonial terms of what was said and of the exact terms agreed by the parties.

- From the legal standpoint of view, written documents can be (art.362, CC):

- Authentic - made by public entities (or exercising public functions). These documents are recorded, with the legal formalities, by public authorities within its jurisdiction or, within the circle of activity assigned to it, by a public notary or other officer provided with public faith (*"fé pública"*); all other documents are deemed private – public deed (art.363, no. 2, CC);

Chapter VII – The Juridical Relation

- Authenticated - private documents, corroborated by parties, before a notary, in terms prescribed in notary laws (art.363, no.3, CC);

- Private - drafted by private persons and executed by its authors (except for *"assinatura a rogo"*).

- Failure of the legal form means there is a defect (*"vício"*) of nullity, when another sanction is not specifically provided in the law (art.220, CC).

- The verbal ancillary stipulations prior to the legally required document for the business declaration, or those contemporary to it, are null and void, unless the determining reason of the form is not applicable to them and if is proved that they match the will of the author of the declaration (art.221, no.1, CC).

Chapter VII – The Juridical Relation

- The stipulations following the document are subject to the prescribed legal form for the declaration only if the special requirements reasons of the law are applicable thereto (art.221, no.2, CC).

10.2. Means of creation of Juridical Businesses

- Juridical business are formed in various ways, which are:

- Classical model – proposal *versus* acceptance;
- Joint Contractual declaration (*"declarações contratuais conjuntas"*).

Chapter VII – The Juridical Relation

10.2.1. Formation of the Juridical Business through Proposal followed by Acceptance

- ✓ Proposal - act of declaration addressed to someone. It comprises two structural elements in its composition:
  - ➢ Propositional content (*"conteúdo proposicional"*) – content of the negotiation proposal;
  - ➢ Communicative prefix of the proposal (*"prefixo comunicativo da proposta"*) - when one says: "I am willing to…"; "I will do it this way…".
- ✓ The one that makes a proposal is the proponent (*"proponente"*). To whom that proposal is addressed, it is called the recipient (*"destinatário"*). If the proposal addresses a majority of people, it is said to be an offer to the public (*"oferta ao público"*).
- ✓ Until its acceptance, a proposal is not a legal business. When accepted, the meeting of wills between both parties, sets up a legal business.

Chapter VII – The Juridical Relation

- ✓ The contractual proposal has three requirements:
- ➢ The proposal must be complete – it must cover all points to be integrated into the future legal business. The completeness of the proposal varies with the degree that the proponent wants.
- ➢ The proposal must be precise – it must not raise any questions about its components, since all human language is ambiguous.
- ➢ The proposal must be formally adequate – provided in a sufficient way to the contract whose formation is directed to.

Chapter VII – The Juridical Relation

- ✓ Invitation to contract (*"convite a contratar"*):
- ➢ A message indicating the willingness to initiate a dialogue directed to the formation of one or more contracts.
- ➢ Someone has contractual initiative, but does not indicate the terms that he/she is willing to contract.
- ✓ The invitations to contract are invitations to the submission of a proposal. These calls are incomplete or formally inadequate, not fulfilling the essential requirements for the formation of a contractual proposal.

Chapter VII – The Juridical Relation

- ✓ Proposal to the public (public offer):
- ➢ Contractual proposal addressed to an undetermined circle of people.
- ➢ The public proposal may aim at the execution of one contract, as well as several contracts.

- Public notice (*"anúncio público"*) – it is a necessary condition of a public proposal. The declaration may be made by notice published on one of the newspapers of the residence of the *"declaratário"*, when is addressed to an unknown person or whose whereabouts are unknown (art.225, CC).

- ➢ The plurality and the personal undifferentiating of the recipients are requirements for the set of repetitive content posts to be qualified as a public announcement.

Chapter VII – The Juridical Relation

- ✓ Possible reactions before a proposal:

a) Acceptance – affirmative answer, accordingly, consistent with the terms of the proposal (art.232, CC). The acceptance has three requirements:

- Acceptance must be made accordingly – must be made accordingly to the terms of the proposal. The content of the confirmation must be the same as the one on the proposal, although the communicative prefix is different.

- The acceptance must have formal adequacy – if the proposal has been formulated with a formal level higher than that required by law, the proper way to its acceptance will be, normally, of non inferior level of that which was used in the proposal.

Chapter VII – The Juridical Relation

- Acceptance must take into consideration the time – the acceptance is effective only when it is received during the lifetime of the proposal.

- With acceptance there is a loss of efficacy, in a positive way, i.e., the proposal is absorbed by the contract. If the proposal is addressed to more than one person, an acceptance does not entail the loss of effectiveness of the proposal.

- Late acceptance – the receptor has reacted positively to the contractual proposal, but did so after the deadline. The proposal is not in force, so there is no contract. However:
- The proponent is free to acknowledge the acceptance as effective, which allows to enforce the contract; there is, so, an extension of efficacy (art.229, no.2, 1st part, CC).

Chapter VII – The Juridical Relation

- If the proponent (*"declarante"*) does not accept the acceptance of the recipient (*"declaratário")*, the first assumes a duty to notify immediately the acceptor that the contract is not completed, otherwise he/she may have to answer for any damage (art.229, no.1, CC).

b) Rejection - significant declaration of not accepting the proposal issued by one of its recipients. The rejection prevents subsequent uptake by the one who rejects it. The rejection extinguishes the effectiveness of the proposal, whenever it has a single recipient, i.e., it leads the proposal to its end and its effects cease. The rejection determines the forfeiture of the proposal. However, if the recipient rejects the proposal, but accepts it later, the acceptance prevails, since it reaches the power of the proposer, i.e., that he knows about it at the moment or before the rejection – withdrawal rejection (*"retractação da rejeição"*) - art.235, no.1, CC.

Chapter VII – The Juridical Relation

c) Forfeiture (*"caducidade"*) - when there is a silence on the part of who should accept the proposal, it will run until the time of its lifetime runs out. To verify the forfeiture of the proposal one must pay attention to the time limit "set by the proponent or agreed by the parties" (art.228, no.1, §a, of the CC):

- Deadline set by the proponent – term that the proponent has set for the duration of proposal.

- Deadline "agreed by the parties" – time agreement of the parties for future constitution of the contract.

Chapter VII – The Juridical Relation

- Any change in the agreed term is effective only if constitutes a term extension.

- When a deadline has not been set up, several hypotheses arise:

c1) If the "proponent requests an immediate response" (art.228, no.1, §b of the CC), the proposal is effective "until, in normal conditions, this (proposal) and its acceptance reach their destination". In this case, one count for its duration, only the times of transmission of the proposal and any eventual reaction, without any gap between one and the other. Either the accepter responds immediately or else the proposal loses its effectiveness.

Chapter VII – The Juridical Relation

c2) In those cases where a term has not been set forth, neither an immediate response requested, art.228, no.1, § c of the CC applies. This is the solution to proposals made to "a missing person or, in writing, to a present person“. The proposal is effective for an equal time period of the proposals which call for immediate response, plus 5 days. Examples:

- Mail: 3 days proposal + 5 days + depending on the formality that is used for the acceptance;
- Telephone: 0 days proposal + 5 days + depending on the formality that is used for the acceptance;
- Internet: 0 days proposal + 5 days + depending on the formality that is used for the acceptance;
- Fax: 0 days proposal + 5 days + depending on the formality that is used for the acceptance.

Chapter VII – The Juridical Relation

d) Revocation (*"revogação"*) - unilateral declaration of the proponent which terminates the effectiveness of the proposal for the future. The Portuguese law is based on the general principle of irrevocability of the proposal (art.230, no.1, 2nd part, of the CC). However, the proposal may be revoked:

- If it is a proposal made to the public (art.230, no.3, of the CC), and since the form of revocation is equivalent to the form of the proposal (e.g.: publication in the newspaper);

- If the proposal is addressed to specific recipient and the proponent thus established, under the terms of the proposal itself (if the right to revoke the proposal has been reserved); as a result of the reservation set forth in art.230, no.1, 1st part, of the CC.

Chapter VII – The Juridical Relation

e) Counterproposal (*"contraproposta"*) - is the rejection of the proposal, but taking advantage of a specific part of the proposal. When there is a change of one element of the proposal, a counterproposal arises (a new proposal). This takes advantage of almost all the elements of the rejected proposal. The counterproposal must have the same requirements as a standard proposal, for the formulation of a contract (art.233, CC).

- ✓ Offer and acceptance are negotiating declarations for the formation of a contract. The negotiating declarations can be:

Chapter VII – The Juridical Relation

- *"Recipiendas"* - issued in terms of being able to be received by a specific and determined recipient.

- *"Não Recipiendas"* - issued in terms of being able to be received by the public or by an indefinite number of people (proposals made to the public - public announcements).

- ✓ Time and place of effectiveness of the proposal and acceptance:

- Most of the declarations of contractual proposal and acceptance become effective when the recipient is aware of them in an effective or assumed way.

Chapter VII – The Juridical Relation

a) Effective knowledge - once the proposal is known by the recipient, it is effective.

b) Presumed knowledge:

- If the declaration is received by the recipient, following the criterium of the law (art.224, no.1, CC), knowledge is presumed when it "comes to his/her power", unless it is received in such a way that, without his/her fault, it can not be known by the recipient (art.224, no.3, CC).

- If the declaration has not been timely received by the recipient, for his/her exclusive fault (art.224, no.2, CC). The declaration becomes effective at the time that would have, normally, been received.

Chapter VII – The Juridical Relation

- ✓ Proposal and acceptance called *"recipiendas"* are considered effective on the place where they were received or known (art.234, CC).
- ✓ The proposal to the public (*"não recipienda"*) is effective on the place where it was transmitted.
- ✓ Criteria for determining the lifetime of the proposal:
  - ➢ Time that the proponent fixes for its duration;
  - ➢ The proponent fixes day and time;
  - ➢ The proponent seeks an immediate response – one must count five days from the date of arrival of the proposal to the recipient.

Chapter VII – The Juridical Relation

- In the constitution of juridical businesses rules a general principle of Civil Law, which is the principle of good faith. Is called fault *in contrahendo,* or guilt in the formation of contracts, the disloyal action, taken in bad faith, of one of the parties, in the negotiation or execution of a contract (art.227, no.1, CC).

- Thus, for example, the party who initiates negotiations without the intention to come to celebrate the deal, or the one who breaks long negotiations, unreasonably, or which is absent at the day of the notarial deed, also unreasonably, or refuses to sign it, despite having already agreed to its terms, answers for damages caused to the other party.

Chapter VII – The Juridical Relation

- ✓ Losses subject to indemnification (*"prejuízos indemnizáveis"*) regarding fault *in contrahendo* comprise only what is called as the negative contractual interest, i.e., the necessary to place the victim in the situation that would exist if they had not developed and initiated negotiations and the preliminary acts for the formation of that contract.

- ✓ It stays out the compensation for the positive contractual interest, which would compensate, as needed, in order to put the victim in the situation that would exist if the contract would have been concluded.

Chapter VII – The Juridical Relation

10.2.2. Formation of Contracts through Joint Contractual Declarations

- ✓ Joint Contractual Declarations – declarations with identical content, which express the contractual agreement in a single text, signed by each of the parties.

- ✓ General Contractual Terms (*"Cláusulas Contratuais Gerais – CCG"*) - art.1, no.1, of the LCCG (Decree-Law no.446/85 of 25th October): a set of prebuilt negotiating arrangements, without prior individual negotiation. The provisions may cover the majority of the content of the business or comply only to a part of it. Previous drafting before signing the contract.

Chapter VII – The Juridical Relation

- ✓ The phenomenon of generalization of adhesion contracts, in which each of the parties merely accepts, or not, without having the opportunity to negotiate or to propose the alteration of the terms, has justified legal concerns, because of the need for consumer protection and the regulation of abusive or problematic content in juridical businesses.

- ✓ One highlights the following identifying characteristics of the CCG:

- Generality (pre-preparation for a set of juridical businesses);
- Rigidity (thought to be non-negotiable);

Chapter VII – The Juridical Relation

- Inequality between parties (different bargaining power);
- Formulate nature (drafts).

✓ The regime of protection of the general contractual terms determines the nullity of abusive terms (contrary to good faith), extensively identified in the diploma.

✓ The protection is not limited to business relations set up with consumers, applying also, albeit with more flexible rules, to contracts between entrepreneurs.

Chapter VII – The Juridical Relation

11. Interpretation of Juridical Businesses

- ✓ The CC has no provisions for the interpretation of legal businesses; however, arts.236, 237 and 238 arise as a methodological way of interpreting contracts, based on an interpretation of each of the negotiation declaration.

- ✓ Art.236 of the CC devotes a subjective interpretation of contracts through three rules which articulate between themselves:

- ➢ Rule 1 - rule of the feeling of the recipient (*"impressão do destinatário"*) – all negotiation declaration comprises a declarant (*"declarante"*) and a recipient (*"declaratário"*).

Chapter VII – The Juridical Relation

- Who makes the declaration is the declarant (*"declarante"*), called as real declarant; who receives the declaration is the real recipient.
- The normal recipient is conjectured from a real recipient. It is a standard figure for an hypothetical situation that does not actually exist. It is projected from the reality, from the generalization, from circumstances or characteristics in which the real recipient founds himself. A business declaration must be interpreted by removing from it, the meaning that a normal person, of average skills, would withdraw if he/she would be in the position of the recipient.
- The following are elements of interpretation of the legal business:

- ❑ The letter of the business;
- ❑ The circumstances of time and place (which includes negotiations);

Chapter VII – The Juridical Relation

- The purpose intended by the parties (the practical desired effects);
- The law;
- The uses.

- The interpretation is done by the feeling of the normal recipient projected from the real recipient.

- Rule 2 - Rule of accountability to the declarant - if the meaning of the normal recipient has no value, one must analyze the effect that the declarant was waiting for, because if the sense that the recipient gave to the declaration was not the sense that the declarant was waiting for, the declaration is worthless.

Chapter VII – The Juridical Relation

- The normal declarant is viewed by a set of elements similar to those of the normal recipient. The meaning of the declaration should always be attributed to the normal declarant.

- Rule 3 - rule of the real will (*"regra da vontade real"*) - the real will consists in the meaning that the declarant has given to the declaration. As such, it is essential that the recipient is aware of that sense.

- Only when the meaning of the declaration is known can one get to know the feeling of the recipient and attribute it to the declarant.

Chapter VII – The Juridical Relation

- If the recipient understands the meaning, there is a real effective understanding - art.236, no.2, CC.

- If the recipient does not know the meaning, there is a normal understanding - art.236, no.1, CC.

➢ The rules of art.236 apply to:

- Proposal followed by acceptance;
- Proposal followed by counterproposal and acceptance;
- Invitation to contract followed by proposal and acceptance;
- Joint contractual declarations.

Chapter VII – The Juridical Relation

- When there is doubt about the meaning of the declaration, being the doubt the reason of interpretation, if one founds dissent (*"dissenso"*), the contract is ineffective (art.237. º CC), by means of its non-existence. In case of doubt on an interpretative meaning:

  - In a non onerous business – prevails the less burdensome meaning for the *"disponente"*;
  - In an onerous business – prevails the meaning that lead to a better balance of the provisions.

- In formal businesses a minimum of verbal correspondence of the interpretation with the text of the declaration is required (art.238, CC).

Chapter VII – The Juridical Relation

12. Integration of Juridical Businesses

- ✓ In order for a gap to exist in a contract, the existence of a contract is necessary in which a certain element is lacking.
- ✓ According to art.239 of the CC, the subjective integration of the declaration must be made according to three perspectives:
- ➢ The legal content - based on the law, through subsidiary rules ("normas supletivas");
- ➢ Hypothetical or conjectural will - the will that parties would have had if they had foreseen the omitted point;
- ➢ The contractual justice - based on the dictates of good faith.

Chapter VII – The Juridical Relation

13. Elements that can integrate the content of Juridical Businesses

13.1. Condition

- ✓ Future and uncertain event or fact to which the parties subordinate the production of effects of the juridical business or its resolution. It is not known if the event or fact will occur or not (art.270, CC).

- ✓ Elements of the concept of condition:
- ➢ Future nature of the act or event – there is no condition if the fact that the parties report to is contemporary or past, with respect to the moment of the business;
- ➢ Uncertain nature of the future event or fact – the uncertainty is evaluated in an objective way, regarding the verification (or not) of the condition;

Chapter VII – The Juridical Relation

- Conventional nature of the act or event – the condition depends on the stipulation of the parties, because there is no condition when the future act is set forth in the law.

- Suspensive Conditions and Resolutory Conditions (*"condições suspensivas e condições resolutivas"*)

- Suspensive Condition:

- A clause that provides that the contract is effective only if a uncertain future event takes place. The production of effects of the contract is paralyzed as long as the conditional fact or event does not occur.

- If the suspensive condition is established, the effects of the business that had been suspended are produced.

Chapter VII – The Juridical Relation

- If the suspensive condition is lacking, the business will not come to be effective, even vanishing those effects already produced on the pendency of the condition.

- Resolutory condition:
- A clause that provides that the contract takes effect unless the condition occurs. The effects of the contract take place immediately after its conclusion, but may well be destroyed if the resolutory condition occurs.

- If the resolutory condition occurs, it ceases the effects of the juridical business, determining its resolution.

- If the resolutory condition does not occur, the precarious effects that the business was producing become definitive.

Chapter VII – The Juridical Relation

- ✓ Juridical conditions are valid only if they are suitable (*"idóneas"*). Licit and possible conditions are suitable.
- ✓ Conditions that are not contrary to law nor to public order, nor offensive to good manners, are considered licit (art.271, no.1, CC). In general, arbitrary conditions (e.g.: racial discrimination) and those restricting the freedom of individuals (e.g.: having to marry someone or being unable to marry a certain person; to adopt or not to adopt certain profession) are always illicit.

Chapter VII – The Juridical Relation

- ✓ Suspensive condition - **A** sells a pearl necklace to **B** by the price of **X**, being stipulated that the effects of the contract produce only when **B** finishes her course in Management.

- ✓ Suspensive condition - **A** agrees to pay **B** the amount of EUR 5.000, as a prize, it the latter finishes the construction work (ongoing) of the house of **A** in the agreed period (6 months).

- ✓ Resolutory condition – the lack of compliance by the tenant entails the resolution of the lease (art.1048, CC).

- ✓ Resolutory condition - **G** lends her car to **J** with the condition that she never dates **A**.

Chapter VII – The Juridical Relation

- ✓ Conditions which are physically verifiable, in the light of existent scientific knowledge, are possible (art.272, no.2, CC). For the condition to be invalid - by impossibility – it is not enough that is verification is unlikely; its non-verification must be certain.

- ✓ If not suitable, conditions are null, being considered illicit when they are contrary to law or to public order, or offensive to good manners (art.271, no.1, CC).

Chapter VII – The Juridical Relation

- ✓ The verification or non-verification of the condition has retroactive efficacy (art.276, CC).
- ✓ Pending of the condition (*"pendência da condição"*) - the period that goes from the celebration of the contract to the verification of the condition, or to the certainty that it can not be verified (art.272, CC).
- ✓ Other types of conditions:
- ➢ Causal conditions (*"condições causais"*) - when the conditional fact depends on a natural cause or on an act of a third person.
- ➢ Potestative conditions (*"condições potestativas"*) - when the verification of the conditional fact depends on the willingness of one of the parties.

Chapter VII – The Juridical Relation

13.2. Term

- ✓ Future fact, but certain, which the parties make depend the beginning or ending of the effects of the contract (art.278, CC).
- ✓ The certain term and the uncertain term:
- ➢ Certain term - where, besides having the certainty of the verification of the fact, the moment of its verification is known in advance.
- ➢ Uncertain term - whenever the moment of its verification is unknown, although it is certain (death).
- ✓ Despite the similarity between term and condition, the two figures are distinguished by the uncertainty (in the condition) of the verification of the future fact, and by the certainty (in the term) of the verification of the future fact.

Chapter VII – The Juridical Relation

- ✓ In the condition, the future event is uncertain, regarding the verification (it might happen or not). In the term, the future event is certain as to verification (it will certainly happen), but the moment of verification may not be known from the beginning (it can be uncertain as to when it will happen).

- ✓ Initial term *versus* final term:

- ➢ Initial Term - *A quo* - the effects of the contract start to produce themselves only after the verification of the future act, though certain, upon which they depend ("the present contract enters into force and produces its effects from the 1st of January 2012").

Chapter VII – The Juridical Relation

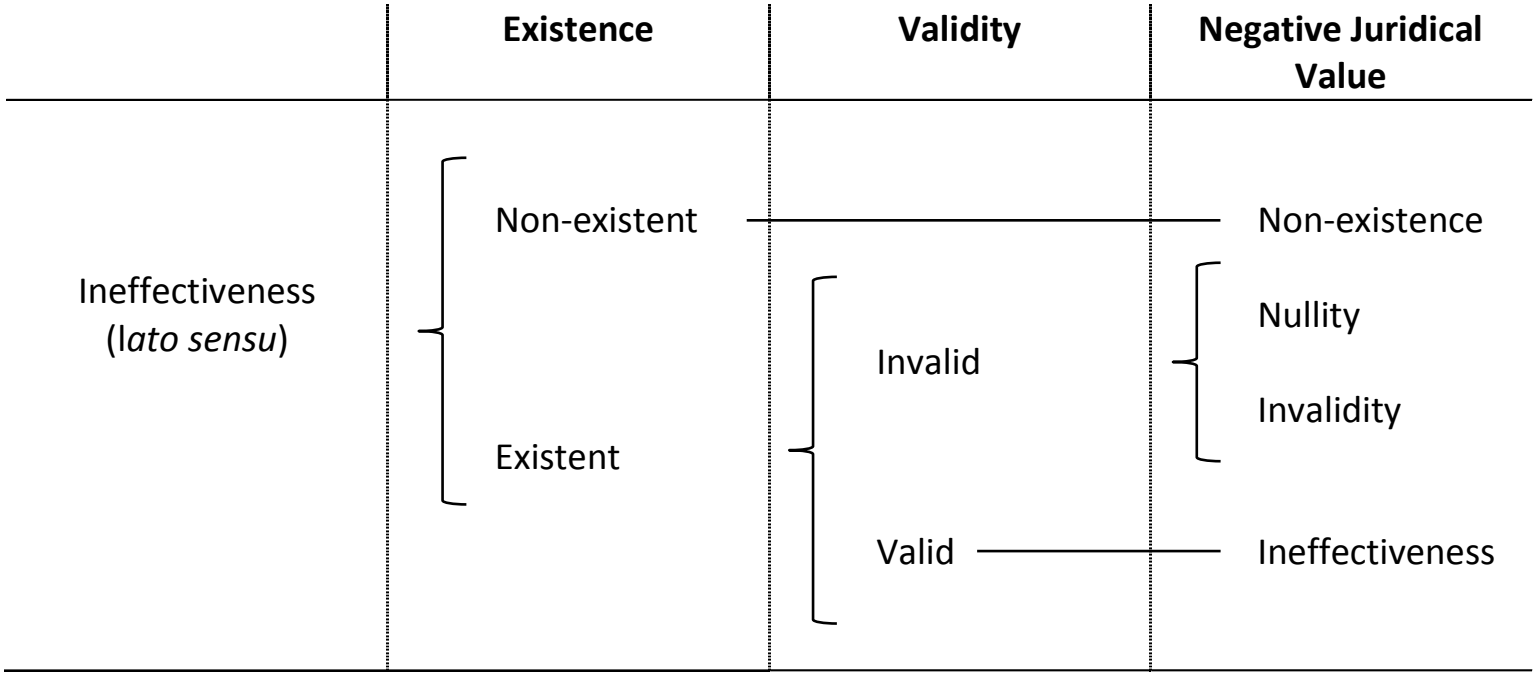
- Final term - *Ad quem* – it ceases the production of effects of the contract ("the contract has a duration of 6 months from the date of its signature ").

- Pending term (*"pendência do termo"*) - time period related only with the initial term and which occurs between the time of conclusion of the contract and the verification of the future and certain fact, in which the term consists.

14. Invalidities of Juridical Businesses

- The Law establishes various degrees of negative legal values, which can be listed in descending order of severity, i.e., starting with those that imply the complete absence of production of legal effects: legal inexistence (*"inexistência jurídica"*), nullity (*"nulidade"*), annulability (*"anulabilidade"*) and ineffectiveness (*"ineficácia"*) (*stricto sensu*).

Chapter VII – The Juridical Relation



Chapter VII – The Juridical Relation

a) Legal inexistence – is the most severe negative juridical value, being the one that entails greater disvalue by Law, in relation to the legal act, to the point of not recognizing him the production of any legal effects.

- ✓ When the law states that a particular act suffers from legal inexistence, it means that the act itself is considered legally irrelevant.

- ✓ The cases of legal inexistence previewed in Law are rare, being common to point out the following examples:

- Non-serious declarations (*"declarações não sérias")* - art.245, CC);

Chapter VII – The Juridical Relation

- Lack of awareness of the declaration and physical coercion (art.246, CC);
- Non-existent marriage (arts.1628 to 1630, CC).

✓ Besides these examples, the most exemplary case of legal inexistence is the dissent (*"dissenso"*) – lack of coincidence in the declarations of intentions of the parties. This can be:

❑ Manifest – the parties are aware that they have not reached an agreement;

❑ Hidden – the parties think they agreed, but they did not, actually.

b) Invalidity - legal businesses are invalid whenever there is an error in its production, or there is a production rule that is disregarded with respect to what is set forth, or in which is defective the will of the parties.

Chapter VII – The Juridical Relation

- ✓ The invalidity can be:

b1) Nullity - arts.285, 286, 291, 292 and 293, of the CC:

- ❑ Absolute nullity - any interested party has the legitimacy to enforce the defect that affects the contract (art.286, CC);
- ❑ Incurable nullity - does not cease by will of the concerned person or by the passage of time (art.288, CC);
- ❑ Nullity of automatic effectiveness – the defect of the contract excludes the production of effects in any case. The restoration of the previous situation is retroactive (art.289, CC);
- ❑ Null businesses - are invalid for themselves.

Chapter VII – The Juridical Relation

- The nullity may be declared at any time by anyone, and officially by the Court (art.286, CC).

b2) Annulability - arts.285, 287, 291, 292 and 293, of the CC:

- Relative invalidity - when the invalidity can be invoked only by the holder of the interest protected by the legal rule (art.287, CC);

- Remediable invalidity – the possibility to end the defect that affects the contract by the will of the parties in stake, through confirmation (art.288, CC), or the passage of time (art.287, no.1, CC).

Chapter VII – The Juridical Relation

- Non-automatic invalidity of efficacy (*"invalidade de eficácia não automática"*) – the non-production of effects occurs only when the interested one invokes the invalidity. The reconstitution of the previous situation is retroactive (art.289, CC).

- Annulled businesses – they are valid until they are annulled. The annulability requires the exercise of a potestative right to cancel, or not, the defect of the business.

- The annulability may be declared by the people that are entitled by law, within the year following the cessation of the defect which serves as grounds (art.287, no.1, CC) - the Court does not know, automatically, these defects.

Chapter VII – The Juridical Relation

- The regime of nullity differs from the one of annulability, in the following aspects:

	Nullity	**Annulability**
Effects:	It does not produce any effects	It produces effects
Knowledge:	Officious	It must be alleged
Legitimacy:	Any interested person	Protected by the legal rule
Argumentation:	At any time	Established term
Confirmation:	It is not confirmable	Confirmable

- In order to avoid any confusion between nullity and annulability, pay attention to the following table:

Chapter VII – The Juridical Relation

Nullity	Annulability
"The business is null"	"The business is cancellable"
"The business has been declared null"	"The business has been canceled"
"The nullity of the business may be required"	"The annulability may be required"
	"The business can be canceled"

- ✓ Both the declaration of nullity and the declaration of annulability have retroactive effects. The standard regime of the effects of the declaration of nullity and annulability impose its enforceability against third parties (art.289, CC).
- ✓ The reciprocal obligations of restitution that parties are incumbent of, by virtue of nullity or annulment, must be performed simultaneously (art.290, CC).

Chapter VII – The Juridical Relation

- ✓ Unenforceability (*"inoponibilidade"*) of the nullity or annulment (art.291, CC) - when a third party (purchaser) is engaged in the business and there was a declaration of nullity or annulment of the contract, and there will be the return of something that was entrusted to a third person, the enforceability to a third person is casted away as long as the five following cumulative conditions occur:
- ➢ Immovable or movable assets subject to registration;
- ➢ Good-faith of the third party (which is unaware of the defect of the business);
- ➢ Onerous nature ("onerosidade") of the business;
- ➢ Registration of acquisition prior to the registration of the legal action of nullity or annulment;
- ➢ Legal action of nullity or annulment proposed 3 years after the completion of the business.

Chapter VII – The Juridical Relation

- In this case, the third party is protected by good-faith, even though the general rule is that of its non-protection.
- Reduction (*"redução"*) (art.292, CC) - when there is a partial invalidity of the business, where the nullity or annulment does not determine the invalidity of the entire business, this one (the contract) can be reduced to the valid part.
- Conversion (*"conversão"*) (art.293, CC) - when there is an overall invalidity of the business, but this may turn itself into a different type of business, once it respects all the requirements of form and substance of the new business.
- *"Convalidação"* (arts.292 and 293, CC) – when one can take something from the business that was declared null or void.

Chapter VII – The Juridical Relation

c) Ineffectiveness *stricto sensu* - when an exterior obstacle precludes the production of legal effects.

- ✓ The unenforceability (*"inoponibilidade"*) is a particular case of ineffectiveness. For example, the marriage can not be invoked by the parties until it is registered (art.1669, CC). Note that the business is not invalid, but it simply does not produce all its effects while that exterior obstacle is not set away (the need of registration).

- ✓ Another example of inefficiency is the one of the special rights the partners in Commercial Companies, which can not be committed without the consent of the respective holders (art.55, CSC).

Chapter VII – The Juridical Relation

15. Lack and defects of Will ("falta e vícios de vontade")

15.1. Intentional divergence between the Declaration and the Real Will

a) Simulation - art.240, no.1, CC – it presents four requirements:

- Divergence between the negotiating declaration and the real will - the author of the declaration expressed a willingness which does not correspond to his/her real will. The parties did not want to conclude that business; they wanted to celebrate another business, or none; they lied in declaration; they created a fictitious business.
- Intentional divergence - the mismatch between the real will and the declaration is intentional.

Chapter VII – The Juridical Relation

- Simulated agreement between the parties - the recipient knows that the declaration does not match the will of the declarant. In collusion, declarant and recipient accept to celebrate a business that does not correspond to their real will. In the simulation, the parties of the business are combined between themselves.

- Purpose of misleading others - the simulation is a misleading intentional divergence. If both parties are combined, one part is not trying to deceive the other. Together, the parties intend to deceive someone who is not part of the business, but which can still see his/her interests harmed by that business.

- ✓ The simulation at the discretion of intent to deceive others is classified in art.242, no.1, of the CC, in:

Chapter VII – The Juridical Relation

- Absolute simulation (*"simulação absoluta"*) - when the parties do not want to celebrate the stated business, nor any other business. The declaration made by the parties does not match any willingness to enter into a business. The celebrated business is entirely fictional (fantastic sales). Here the simulated business is null (art.240, no.2, CC);

- Relative simulation (*"simulação relativa"*) - when the parties wanted to celebrate a business other than the stated one, hiding the actual realization of a different one, regarding subjects and/or the content (art.241, CC). The business that the parties actually wanted to celebrate is called as a concealed business (*"negócio dissimulado"*).

Chapter VII – The Juridical Relation

- ✓ The relative simulation relative can assume two distinct modes:

- ➢ Subjective relative simulation (*"simulação relativa subjectiva"*) – when the simulation falls on the subjects of the juridical business (the fictitious or simulated business presents two subjects, A and C, when the real concealed business presents three: the sale from A to B and the one from B to C; one subject is omitted with the intent of not paying the tax corresponding to a single transmission - ITM).

- ➢ Objective relative simulation (*"simulação relativa objectiva"*) – when the simulation falls on the content of the contract.

Chapter VII – The Juridical Relation

- ✓ The objective relative simulation can be:

- ➢ Simulation on the nature of the business - when the kind of the simulated business is diverse from the concealed business (**A** sells **B**, by public deed, the building **X**. What parties wanted to celebrate was, in fact, a donation. The business is simulated in order to evade the payment of stamp duty).

- ➢ Simulation on the value (fictitious simulated business) - **A** sells **B** a building **X** for EUR 100.000. The concealed business (real) - **A** sells **B** a building **X** for EUR 500.000. The simulative pact aims at the lowest possible payment of tax on the onerous transfer of property - ITM).

Chapter VII – The Juridical Relation

- ✓ Regime of the effects of the simulation:

- ➢ Simulated business - celebrated by declarations of the parties; business that the parties do not want, but pretended to want in order to deceive others; declared business; fake business - is null (art.241, no.1, CC);

- ➢ Concealed business – a business that parties wanted to have concluded (but did not state it); secret business:

- The concealed legal business is legally handled, keeping away its connection with the simulated business.

Chapter VII – The Juridical Relation

- The concealed business will not be affected in its validity, by the total invalidity of the apparent business, being its concealed nature irrelevant to its legal treatment.

- If the concealed business is of formal nature, it may be valid only if the required legal form has been observed in the simulated business (art.241, no.2, CC), and is not invalid for any other reason oblivious to the simulation, e.g., unlawful object (art.280, CC).

✓ The proof of simulation requires the demonstration of three requisites, namely, that there was a discrepancy between the declaration and the will of the parties; that there was an agreement between the parties; and that this was done in order to deceive a third one.

Chapter VII – The Juridical Relation

- ✓ Legitimacy to invoke the simulation – the nullity can be raised at any time:
  - ➢ By the simulators themselves (art.242, no.1, CC) without, however, the use of testimonial proof (art.394, no.2, CC);
  - ➢ By the heirs (*"herdeiros legitimários"*) during life of the author of the succession (art.242, no.2, CC);
  - ➢ By any third party, pursuant to the general regime of art.286, CC.
- ✓ Effects of nullity by simulation towards third parties:

Chapter VII – The Juridical Relation

- Art.243 of the CC is an exception to the enforceability rule towards third parties (art.289, CC). The nullity arising from the simulation can not be raised by the simulator against third party with good-faith.

- Requirements for the unenforceability of the simulation to third parties with good-faith:

- Invoked by the simulator (art.242, no.2, CC);
- The third person, in good faith, was unaware of the simulation;
- The acquisition is prior to the registration of the action of simulation.

b) Mental reservation - art.244 of the CC – it presents two requirements:

Chapter VII – The Juridical Relation

- Intentional issuance of a declaration that is contrary to the real will.
- The intent to deceive the recipient.
- ✓ In mental reservation, the deceived is the recipient of the declaration himself, whilst in simulation, the deceived is a third person.
- ✓ The mental reservation still differs from the simulation by the absence of covenant pact in mental reservation, which is obvious, considering that the one that is aimed by the misleading purpose of the declarant is the recipient.

Chapter VII – The Juridical Relation

- ✓ Effects:
- ➢ If the mental reservation is not known to the recipient, it is considered legally irrelevant;
- ➢ If the mental reservation is known to the recipient, it will have all the effects of the simulation.
- ✓ E.g.: By writing document, **Z** offers his car to his goddaughter **B**, provided she completes her university degree until July 31 of the present year; the delivery of the vehicle shall be suspended until the positive assessment of the last examination. **Z** does not want to donate the car and issues this declaration only the purpose of encouraging **B** to study harder.

Chapter VII – The Juridical Relation

- ✓ The declaration issued by **Z** is contrary to his real will and misleads **B**. It is said, therefore, to be a mental reservation in the declaration of **Z**. The declaration under mental reservation is valid and it legally binds the declarant. Thus, it is irrelevant whether or not **Z** wanted to donate the car to **B**; the truth is he said he wanted, so he will have to fulfill the contract, giving the car to **B**, if she finishes college until July 31 this year.

c) Non-serious declarations (*"declarações não sérias"*) - art.245, CC – it presents two requirements:

- ➢ Intentional issuance of an declaration contrary to the real will;
- ➢ The intent not to deceive anyone.

Chapter VII – The Juridical Relation

- ✓ Effects: non-serious declarations do not produce any legal effect. The are non existent.

- ✓ If the declarations induce the recipient in taking them seriously, in negotiating terms, without the declarant having clarified them, this will incur responsibility for the damage he/she causes to the recipient (art.245, no.2, CC).

- ✓ E.g.: In a theatre play, an actor on stage tells the entire audience "I will pay EUR 1.000 to the first person who brings me one straw hat".

Chapter VII – The Juridical Relation

- ✓ Once again, none of the present – assuming they are people of normal diligence - thinks the actor is being serious and actually wants to pay EUR 1.000 to whom delivers him a straw hat. The impersonation context of the play is enough for the recipients to realize (or should realize) the divergence between the will and the declaration.

15.2. Non-intentional Divergence between the Declaration and the Real Will

a) Lack of Awareness of the Declaration - art.246, CC - There is lack of awareness of the declaration when:

Chapter VII – The Juridical Relation

- Lack of will to action;
- Lack of will or awareness of the declaration.

✓ Effects:

- When the will of action lacks, the declaration is non-existent, because, where there is no will, there is no negotiating declaration;
- When there is will of action, but no awareness of the declaration, the declaration is null, not producing any effects;
- If lack of awareness is due to the fault of the declarant, this one is obliged to compensate the recipient.

Chapter VII – The Juridical Relation

- ✓ E.g.: **A** was asked for a show of beneficence in favor of homeless people. At the entrance, **A** leaves her coat in the locker room, not realizing that, in that specific day and place, the organization of the event was collecting donations of clothing, in the same place.

- ✓ The gesture of **A**, in the circumstances of the case, represents a legal declaration to the recipients (the persons who were receiving donations of clothing). It happens, though, that that gestural declaration does not match any will formed accordingly, nor has **A** realized that her behavior could be seen as a legal declaration of donation. There is, therefore, a lack of awareness of the declaration.

Chapter VII – The Juridical Relation

b) Physical coercion or absolute coercion - art.246 of the CC – there is physical coercion when the coerced person has no physical possibility to choose between different behaviors, being absolutely compelled to adopt one only.

- ✓ In physical coercion, the will of the declarant is annulled and replaced by the will of the person who is exercising that physical violence.

- ✓ Any act which forces a person's body to produce a gesture or act, or to adopt a behavior likely to be recognized as a legal declaration is considered as physical force.

Chapter VII – The Juridical Relation

- ✓ The physical coercion:
- Is a discrepancy between the declaration and the will;
- The will of the declarant is annulled or replaced by the one of the one that exercises coercion (*"coactor"*);
- It involves an act of physical force upon the declarant (an act which forces the body to produce a gesture or adopt a certain behavior that appears to be a legal declaration).
- ✓ Effects:
- ➢ When there is absolute coercion, the behavior of the coerced person does not produce any effect, being considered non-existent, because there is no will;

Chapter VII – The Juridical Relation

- There is no guilt of the coerced person (*"coagido"*), ergo, it will not fall upon him the duty of compensation.

- E.g.: There is physical coercion when the hand of a person is grabbed and forced to sign (the hand is forced to hold a pen and to write something).

- E.g.: There is also physical coercion when a person is caught and prevented from getting up at a general assembly, in which votes are counted by those who are standing and those who are up.

- E.g.: There is physical coercion when the will of a person was annulled and controlled by the will of others, in order to make a declaration (for example, through hypnoses).

Chapter VII – The Juridical Relation

c) Obstacle Error or Error in the declarative behavior - art.247, CC – it presents two requirements:

- Conscious issuance of a negotiating declaration;
- Unaware divergence between the real will and the declared intention, due to the inaccuracy of its formulation.

✓ Effects:

- The business in which an obstacle error arises is, in principle, annulled. In order for it to happen, it is enough to fulfill the requirement of knowability (*"cognoscibilidade"*) - art.247, CC.

Chapter VII – The Juridical Relation

- Filling out the requirement of knowability:

- Essentiality to the declarant on the element upon which the error falls;

- Knowledge, by the recipient (real knowledge or the duty not to ignore it).

- Thus, the knowability of the error is not necessary, but yes the knowability of the element upon which the error has focused.

- The annulment founded on error in the declaration does not proceed if the recipient accepts the business as the declarant wanted it (art.248, CC).

Chapter VII – The Juridical Relation

- ✓ In the error of the declaration, the law distinguishes between the calculation or clerical error (art.249, CC) and the error in the transmission of the declaration (art.250, CC).

- ✓ E.g.: **A** wants to buy the car **X**, which belongs to **B**, and intends to offer him EUR 25.000. He writes him a letter, but, mistakenly, swaps the 2 and the 5, writing the phrase: "I offer EUR 52.000 for your car **X**". **B**, very pleased, responds promptly by letter as follows: "Deal! I accepted to sell for the proposed price of EUR 52.000".

- ✓ There is here an error in the declaration; it is a material or mechanical error (*lapsus linguae*). If it is an error in writing, is a error in the declaration.

Chapter VII – The Juridical Relation

- If the error is of calculation or writing and is revealed by the text of the negotiating declaration or by the surrounding circumstances, it will not be possible to make its annulment, but instead the correction of the declaration.

- The error in the declaration can be known or unknown.

- E.g.: Known Error – **A** agreed with **B** to rent his house in Algarve in April and March 2012, and **B** should confirm this in writing. If **B** makes a mistake and writes April and May (instead of March), the error is known. That is, **A** is well aware of the mistake (error in the declaration).

Chapter VII – The Juridical Relation

- E.g.: Unknown Error – **A** has never spoken with **B** before. **A** sends **B** a letter, proposing the lease in April and May (he made a mistake: he meant March). **B** does not have a way to guess that there was an error in the declaration.

- If the error is known, the divergence is resolved by means of the interpretation of the legal business (art.236, no.2, CC). The known error is, thus, irrelevant and the business is valid according to the will of the parties, notwithstanding the mistake.

- Only the unknown error is a real error in the declaration, upon which depends the application of the regime of arts.247 and 248 of the CC.

Chapter VII – The Juridical Relation

- ✓ The regime of annulment by error of transmission is the one of art.247, CC, except if the error is due to willful misconduct (*"dolo"*) of the intermediate (art.250, no.2, CC). In this case, the regime of annulment is the general one, stated in art.287 of the CC, without the knowability requirement.

15.3. Defects of will

a) Error-defect (*"erro-vício"*) – art.251, CC – the non knowledge or the inaccurate knowledge of an essential event to the celebration of the business.

- ✓ Error in the formation of the negotiation will, which entails:
- ignorance of reality (when the subject ignores something that is relevant), or
- false representation of the reality (when the subject thinks that things are different from what they actually are).

Chapter VII – The Juridical Relation

- ✓ Error-defect: it is situated in the formative process of the negotiating will.
- ✓ Error obstacle: it is located after the formative process of the negotiating will, on the formulation of the will already formed.
- ✓ E.g.1: **A** goes to a car dealer to buy a car. He pretended to buy a red car. **A** suffers from color blindness (visual disturbance that prevents to distinguish some colors) and the lighting inside the booth was not much; he saw one that seemed red to him and he bought it. The car was green after all.
- ✓ E.g.2: **A** buys **B** a painting, thinking it was created by a certain famous painter.

Chapter VII – The Juridical Relation

- ✓ Cumulative legal requirements of the error-defect:

- ➢ Essentiality to the declarant - the error-defect which led to the conclusion of that type of negotiation, or with that party (*"contraente"*), or upon that object, is essential. The error is legally relevant (it only generates annulability) only if it is causal. It is said causal when, without the ignorance or the misrepresentation of the reason, the declarant would not want to celebrate any business, or would want to celebrate a different one (as regards some of its essential elements).

- E.g.: A cattle rancher buys 100 bags of animal food, convinced that each bag contains 25kgs, when, actually, each bag has 50kgs. In this case, strictly speaking, he only wanted to buy 50 bags.

Chapter VII – The Juridical Relation

- The real will (formed for that legal business) was to buy 100 bags of animal food. However, because the buyer thought each bag had only 25kgs, his conjecture will was to acquire only 50 bags (100 bags of 25kgs are equal to 2500Kgs; and 2500Kgs divided by bags of 50kgs, is equal to 50 bags).

- The first requirement of relevance of the error on the formation of the will is, thus, fulfilled.

➢ Recognition of the essentiality by the recipient - besides the error being essential to the declarant, it is essential that that essentiality is recognizable, at least, by the recipient.

Chapter VII – The Juridical Relation

- Basically, the recipient must know (or should know) that the element on which the error focused was essential to the declarant.

- **A** buys **B** a painting, thinking it was from a certain famous painter. Having no doubts that **A** only bought that painting, at that price, because he thought it to be from that specific painter, the error is causal, verifying, thus, the first requirement of relevance of the error. However, for the business to be annulled, it is still necessary that the recipient (in this case, the seller **B**) had recognized the essentiality to the declarant (buyer **A**).

Chapter VII – The Juridical Relation

- ✓ Four classes of error-defect:

a1) Error upon the object - art.251 of the CC - as the name indicates, the error on the object of the business focuses on the object (mediate or immediate) of a given negotiating business.

- ➢ E.g.: **A** proposes to **B** the purchase of the no.78 of *"Estrada da Luz"* when, after all, the building that he had seen was on no.80.

- ➢ Effects:

- The regime is equal to the one of error-obstacle (art.247, CC). It is annulled, in principle, provided they fulfill the two requirements of the error upon the object of the business: the essentiality to the declarant and the recognition of that essentiality by the recipient.

Chapter VII – The Juridical Relation

a2) Error on the person of the recipient (art.251, CC) – when the error falls on the identity or on the qualities of the recipient.

- The error on the declarant or on a third person, may eventually reveal, but under art.252 of the CC, a distinct error mode.

- E.g.: **A** sells **B** a motorcycle, making a 50% discount, because he confused **B** with **C** since they are siblings twins.

- Effects:

- The regime is equal to the error-obstacle - art.247, CC. It is annulled , in principle, to the extent the two requirements of the error about the person are met: the essentiality to the declarant and the recognition of that essentiality by the recipient.

Chapter VII – The Juridical Relation

a3) Error on the basis of the business - art.252, no.2, CC – by base of the business one means the circumstances of fact or law which led the parties to make a legal business with those features.

- Basically, the element over which the error falls is the set of circumstances upon which the parties founded their contracting decision.

- The error on the basis of business is a bilateral error. In a business, the parties give certain circumstances as verified, which one later discovers not to exist after all.

Chapter VII – The Juridical Relation

- E.g.: **A** (owner of a theater room) and **B** (music agent), celebrated a contract whereby **B** is authorized to use the room for a performance of the singer **C**. At the time of conclusion of the contract, neither **A** nor **B** knew that, a few hours before, the singer **C** had had a serious accident and after all, he could not come to the concert.

- In the example, the parts (**A** and **B**) based their decision to engage in certain circumstances (assuming the availability of **C** to give a concert), which turned out not to be correct.

Chapter VII – The Juridical Relation

- Anyhow, we consider that the error on the basis of the business, as a defect in the formation of the will, must have the same legal consequence that all other forms of error, i.e., annulment (instead of applying the regime of art.437, CC), since the following cumulative assumptions are observed:

- The circumstances where the parties founded their willingness to contract are fundamental;

- That those circumstances are common to both parties, and

- That the maintenance of the business is contrary to good-faith.

Chapter VII – The Juridical Relation

a4) Error about the causes ("motivos") (art.252, no.1, CC) - when the error falls on the determinant motives of the will, but do not pertain to the person of the recipient, to the object or to the basis of the business. It has a residual nature, covering all other situations of error that are not provided by other modalities.

- It is a mistake about the causes (reasons). Besides the fact that the recipient knows, or should know, the reason, the law requires here an agreement on the essentiality of the reason.

- E.g.: **A** buys **B** his house telling him that he is doing so only because his great-grandfather, Marquis *de Tomar*, was born there. If **B** accepts the essentiality of the reason and should this become incorrect, the sale is annulled.

Chapter VII – The Juridical Relation

- The mere fact that the recipient accepts the conclusion of the business, after the declarant having specified that certain reason that is essential for him, is not worth as a tacit agreement, once such behavior does not reveal, in all probability, an intention to accept that essentiality. The business is annulled only if it is shown that **B** accepted the essentiality of reason.

- Effects:

- It is annulled, provided there is an express or tacit agreement on the relevance of a particular reason upon which the error rests (art.251, no.1, CC).

Chapter VII – The Juridical Relation

b) Wilful misconduct (*"Dolo"*) (art.253, CC) – it is the error of the declarant, caused, maintained or not clarified, by conscious behavior of others.

- ✓ As the law states, the willful misconduct (*"conduta dolosa"*) may come from the recipient or from a third party. The author of the willful misconduct is called the deceptor (*"deceptor"*).
- ✓ Classifications of wilful misconduct :
- ➢ Positive wilful misconduct vs. negative wilful misconduct
- Positive wilful misconduct - is the use of any suggestion or artifice to create or maintain the declarant in error (by action).
- Negative wilful misconduct - is the lack of due clarification to the declarant of the error that the latter manifests (by omission).

Chapter VII – The Juridical Relation

- Illicit wilful misconduct vs lawful wilful misconduct

- Illicit wilful misconduct (*dolus malus*) – legally sanctioned deceit.
- Lawful wilful misconduct (*dolus bonus*) - not sanctioned deceit.

- Unilateral wilful misconduct vs bilateral wilful misconduct :

- Unilateral wilful misconduct - when there is deceit from only one of the parties.
- Bilateral wilful misconduct - when there is deceit from both parties of the negotiation.
- E.g.: **A** negotiates with **B** in order to buy him a room furniture. If **B** (seller) says that the furniture is mahogany, when is actually pine he is acting with positive wilful misconduct (to make someone falling into error).

Chapter VII – The Juridical Relation

- ✓ The “good wilful misconduct ”, under art.253, no.2, of the CC, covers the typical exaggerations of trade or advertising, as illustrated in the following examples:

- The taylor: “this is the best fabric ever; it lasts a lifetime”.
- The advertising of a laundry detergent: “this is the one that whiter washes!”

- ✓ Effects:

- ➢ The business celebrated with the will or wills which was/were intentionally flawed is annuled (art.254, no.1, CC);
- ➢ When the wilful misconduct comes from a third party, the business is totally annulled only if the recipient has knowledge of the wilful misconduct of that third person (art.254, no.2, of the CC).

Chapter VII – The Juridical Relation

- When a third person or others directly acquire any right from the business, there is annullability regarding only the third deceptor (*"enganado"*), or only the non-deceptor beneficiary (*"enganado"*) if the defect is known to the latter.

- Besides the annulment, and being the wilful misconduct an unlawful act, it automatically implies civil liability. As a rule, pre-negotiable civil liability (art.227, CC), which can lead to compensations by eventual damages caused by the business.

c) Moral coercion or relative coercion (art.255, CC) – is the disturbance of the will, by the illicit threat of a damage, with the intention of obtaining a declaration. When there is an illicit threat of a bad thing, in order to obtain a negotiating declaration.

Chapter VII – The Juridical Relation

- ✓ There is moral coercion when the coerced person (*"coagido"*) has still the freedom to choose between possible declarative behaviors, but only the behavior appointed by the coactor is the most reasonable choice, in relation to the threat.

- ✓ It is said coactor (*"coactor"*) the one who coerces (who exercises violence or threat); the coerced person (*"coagido"*) is the victim of moral coercion.

- ✓ The threat may be:

  - ➢ About the person of the declarant;
  - ➢ On a third person;
  - ➢ About goods of the declarant or of third parties.

Chapter VII – The Juridical Relation

- ✓ The moral coercion depends on the verification of five requisited that characterize it:

- Threat of an evil – to the person, to honor, to heritage;
- Unlawful threat;
- Intentionality of the threat;
- Causality;
- Severity of the evil and justified fear of consummation.

- ✓ E.g.: **D** owes money to **C**. **C** has seen **D** accepting a bribe to perform a certain administrative act. **C** threats to report him to the police for corruption, if he fails to pay the money he owes her.

Chapter VII – The Juridical Relation

- ✓ There is no coercion when the threat is the exercise of a right. Nor is it moral coercion the "simple reverential fear" (art.255, no.3, *in fine* CC) – the simple fear of displeasing a certain person to whom one is psychologically, socially or economically dependent, such as parents, boss or hierarchal superior.

- ✓ Effects:
- ➢ The main effect of verification of moral coercion is the annulability of the business (art.256, CC).
- ➢ To annulability one can add the compensation for damage for the declarant, as a rule, through pre-negotiable civil liability (art.227, CC).
- ➢ In the case of coercion by a third person, this must compensate also the recipient, when the latter should not be aware of the defect.

Chapter VII – The Juridical Relation

d) Accidental Disability (*"incapacidade acidental"*) - art.257, CC.

e) Usury Businesses (*"negócios usuários"*) - art.282, CC - This article comprises various circumstances (or modes) of usury, fitting proper to highlight the situation of need (figure near to moral coercion) of the remaining, despite the statutory scheme being the same.

- ✓ E.g.: **A** falls overboard. Not knowing how to swim and fearing drowning, he screams: "I will give one hundred thousand euros to whomever saves me".
- ✓ **A** formed his will (decided to give one hundred thousand euros to whomever saves him) and expressed it accordingly. But the will of **A** was formed in circumstances that vitiated his will (fear, fear of an evil: drowning), which turned to be a needing situation.

Chapter VII – The Juridical Relation

- ✓ The legal regime of usury (art.282, CC) determines the demand of verification of three cumulative conditions:

- Inferior position of the declarant – In order for usury to exist, it is necessary that the declarant finds himself in a situation of inferiority, resulting from, at least, one of the following circumstances:

- Fear (situation of need);
- Inexperience;
- Lightness;
- Dependence;
- Mental state;
- Weakness of character.

Chapter VII – The Juridical Relation

- Intention or awareness to exploit a situation of inferiority - when someone has the intention (or at least the awareness) to take advantage of the inferior position of the declarant, to get that excessive or unreasonable benefit. It is necessary intention or consciousness of:

- Being exploiting the situation of inferiority of the declarant, and
- The excessiveness or non-justification of the benefit.

- Excessiveness or non-justification of the benefit – The recipient or a third person gets an excessive or unreasonable benefit .

Chapter VII – The Juridical Relation

- ✓ These constraints of will are legally relevant when integrating two kinds of elements:
- ➢ Obtaining (or promise), to the recipient or to a third person, of excessive or unjustified advantages ;
- ➢ By force of a conscious utilization of the prior conditioning.

- ✓ Effects:
- ➢ Once verified the founding elements (*"elementos consubstanciadores"*) of usury, the business is annulled (art.282, CC).
- ➢ This annulability can not be applied (*"cominada"*) by the judge if the victim (*"lesado"*) or the recipient require the modification of the business, with recourse to equity ("*juízos de equidade*") (art.283, CC).

Chapter VII – The Juridical Relation

16. Representation

- ✓ The representation is the practice of a legal act on behalf of others, in order to produce the respective effects, in the sphere of those others (art.258, CC).
- ✓ For the representation to be effective, it is enough that the representative acts "within the powers devolving upon him" or that the represented realizes the ratification, in a supervening way.
- ✓ Modes of representation:
- ➢ Legal representation (*"representação legal"*) - when the representation is granted by law to legal representatives (parents, guardian, administrator of goods and, in some cases, curator). Their eligibility and the scope of their application result from the provisions which consecrate it for the effect of remedying the inabilities of minors (art.124, CC), of interdicted (*"interditos"*) (art.139, CC) and, eventually, of disable persons (art.154, CC).

Chapter VII – The Juridical Relation

- Organic Representation (*"representação orgânica"*) - when the representation results from the by-laws of a Legal Entity (art.163, CC). The representation of the Legal Entity fits to the one that statutes appoint or, in the absence of provision of the by –laws, to the administration or to whomever is appointed by it.

- Voluntary Representation (*"representação voluntária"*) - when the representation results from a voluntary act which assigns representative powers: proxy/power of attorney (*"procuração"*) - art.262, no.1, CC.

- Voluntary representation:
- The proxy/power of attorney, unless provided otherwise, shall have the required form for the business that the prosecutor should perform (art.262, no.1, CC).

Chapter VII – The Juridical Relation

- The proxy (*"procuração"*) is a unilateral legal business non-recipient (*"negócio jurídico unilateral não recipiendo"*), although in material terms the document should come to the power of the attorney.
- The three elements of the representation are as follows:

- Acting on behalf of others;
- Acting in the interests of others;
- Existence of a representative power (and its extension will come from the will of the principal, specifically manifested in the proxy).

- ✓ The voluntary representation can be:
- General - when it covers all patrimonial acts.
- Special - when it covers only the acts defined on it.

Chapter VII – The Juridical Relation

- E.g.: **A** owns a plot. **A** grants a proxy to **B** so **B** can sell the plot, on his behalf, for a price between **X** and **Y**. If **B** sells the land to himself, he is pursuing a business with himself, because he acts as a representative of the seller (**A**) and as a buyer.

- As a rule, the celebration of business with oneself is prohibited (art.261, CC), except in two situations: when the represented person authorizes, or when there is no risk of conflict of interest. Besides the cases mentioned in these two exceptions, the business with oneself is annulled.

Chapter VII – The Juridical Relation

- ✓ Capacity of the Attorney (art.263, CC) - the attorney does not need not have more than the ability to understand and to want, as required by the nature of business that he/she must perform.

- ✓ Replacement of the Attorney (art.264, CC) - the attorney can only be replaced by other if the represented person allows it, or whether the faculty of replacement results from the content of the proxy or from the juridical relation which determines it.

Chapter VII – The Juridical Relation

- ✓ Extinction of the proxy (art.265, CC) – it can occur when:
- ➢ The attorney declares, unilaterally, that he/she renounces the proxy, notwithstanding, if it is abusive, the possibility of generating civil liability;
- ➢ The proxy shall expire with the passage of time (a proxy has a specific deadline for its term);
- ➢ The legal relation that justifies the proxy ceases, unless other is the will of the represented person (principal);
- ➢ The represented person revokes the proxy, with the exception of the so called irrevocable proxies. The law admits that proxies may be constituted irrevocably when they are issued also in the interest of the attorney of a third person. In these cases, proxies may be revoked with just-cause (art.265, no.3, CC).

Chapter VII – The Juridical Relation

- ✓ Representation without powers (art.268 of the CC) - if someone acts on behalf of other, but does not have powers of representation, because there is no proxy; or, even existing a proxy, but the representation goes beyond its scope. In these cases, the celebrated business is ineffective. For the effects to be verified on the sphere of the alleged represented person (principal), it is necessary that the latter validates the business through the figure of ratification. This one is retroactive.

Chapter VII – The Juridical Relation

- ✓ Abuse of representation (art.269, CC) - when the action of the representative person stands within the scope of the proxy, but outside the instructions or against the interests of the represented one. The abuse of representation is verified:

- ➢ If the third party is acting in good-faith, the law protects the interests of good-faith;

- ➢ If the third party knows or should know the abuse of representation, it is as if there was no power of representation.

Chapter VII – The Juridical Relation

17. Time and its effect on Juridical Relations

- ✓ Time is a legal fact, non-negotiable, likely to have an influence in juridical relations.
- ✓ Measure of length of time - hours, minutes, seconds, months, years, centuries.
- ✓ Term/deadline - is a period of time that is fixed for the exercise of a right, to the fulfillment of a duty or to the production of certain juridical effects.

Chapter VII – The Juridical Relation

- ✓ Ways of fixing the term/deadline - by law, by an act of public administration, by court order or by will of the parties.

- ✓ Elements of the term:

  - ➢ Initial moment – *"a que"*
  - ➢ Duration
  - ➢ Final moment – *"ad quem"*

- ✓ Counting terms/deadlines - the legal rules of arts.279 and 296 of the CC apply.

- ✓ Deadlines are a form of extinction of rights.

Chapter VII – The Juridical Relation

- ✓ There are two types of deadlines:
- ➢ Statute of Limitations period (*"prazo de prescrição"*) - art.298, no.1, and arts.300 to 327 of the CC
- ➢ Forfeiture period (*"prazo de caducidade"*) - art.298, no.2, and arts.328 to 333 of the CC
- ✓ Regime differences between statute of Limitations and forfeiture:
- ➢ Conventional stipulations over forfeiture are admitted (art.330, CC); the same does not happen about the regime of statute of limitations, which is non-derogable (*"não derrogável"*) – art.300, CC.

Chapter VII – The Juridical Relation

- The forfeiture is officially assessed by Court (art.333, CC), unlike what happens with the Statute of Limitations, which must be invoked, not being able the Court to suppress it (art.303, CC).

- Forfeiture, in principle, does not comprise causes of suspension or interruption (art.328 of the CC), unlike the Statute of Limitations, which can be suspended (arts.318 to 321 of the CC) and interrupted (arts.323 to 327 of the CC).

- Forfeiture is prevented, in principle, only by the practice of the act (art.331, CC). The Statute of Limitations is interrupted by the subpoena (*"citação"*) or the judicial notification of any act which expresses the intention to exercise Law (art.323, no.2, CC).

Chapter VII – The Juridical Relation

- ✓ The regular period of statute of limitations is of 20 years (art.309, CC), providing law, to certain assumptions, a statute of limitations of five years (art.310, CC). There are shorter periods for the called presumptive statute of limitations (*"prescrições presuntivas"*) (which are based on the "presumption of compliance" - art.312, CC), which can be of six months (art.316, CC) or of two years (art.317, CC).

18. Evidence (*"As provas"*)

- ✓ Commands which are designed to demonstrate the reality of the legal facts (art. 341, CC).

Chapter VII – The Juridical Relation

- ✓ Burden of proof (*"ónus da prova"*) - whom is in charge of presenting the proof (art.342, CC):
  - ➢ Constituting facts (*"factos constitutivos"*) – it is the responsibility of whomever invokes a right;
  - ➢ Impediment facts, amending or extinctive (*"factos impeditivos, modificativos ou extintivos"*) – attributed to the one against whom the invocation is done;
  - ➢ In case of doubt, the facts must be considered as constitutive of law.
- ✓ Burden of proof in special cases - art.343, CC.
- ✓ There is reversion of burden of proof when there is: legal presumption; waiver of burden of proof; valid agreement to do so; whenever the law so determines (art.344, CC).

Chapter VII – The Juridical Relation

- ✓ Counter-proof (*"contraprova"*) – the opposing party to those that produce evidence (the party who bears the burden of proof), can oppose a counter-proof regarding the same acts (art.346, CC).

- ✓ Evidence in particular:

- ➢ Proof by presumption (*"prova por presunção"*) - art.349 and following of the CC – the presumptions are the illations that the law (art.350, CC) or the judger (art.351, CC) takes from a known fact in order to establish an unknown fact.

- ➢ Proof by confession (*"prova por confissão"*) - art.352 and following of the CC – the confession is the recognition that the party makes of the reality of a fact, which is unfavorable to him and favors the opposing party.

Chapter VII – The Juridical Relation

- Documental exhibit ("prova documental") - arts.362 and following of the CC - is the proof that arises from a document. A document is any object produced by man in order to reproduce or represent a person, thing or event. Written documents may assume several types under the law (art.363, CC):

- Authentic documents (*"documentos autênticos"*) - formally drawn up documents, in terms of law, by public authority (public deed, drawn up by a notary or other public officer) - testament, donation and sale of real estate.

- Private Documents (*"documentos particulares"*) - all documents which do not fall in the previous type – contract-promise, housing rental.

Chapter VII – The Juridical Relation

- Authenticated Documents (*"documentos autenticados"*) - private documents to be confirmed by the parties, before the notary.

- Expert evidence (*"prova pericial"*) - arts.388 and 389 of the CC – its end is the perception or appreciation of facts, by experts, when special expertise is needed, that the judges do not have or when the facts, concerning persons, shall not be subject to judicial inspection.

- Proof by inspection (*"prova por inspecção"*) - arts.390 and 391 of the CC – it aims the direct perception of the facts by Court.

- Testimonial evidence (*"prova testemunhal"*) - arts.392 and following of the CC - is made by means of witnesses and is permitted in all cases in which it is not directly or indirectly rejected.

Chapter VII – The Juridical Relation

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