LISBOA SCHOOL OF ECONOMICS & MANAGEMENT

ISEG SINCE 1911

Chapter VII

The Juridical Relation

Filipe Santos Barata

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.

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).

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.

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

1. 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.

2. 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.

The juridical relation has two sides:

i. An active side, corresponding to the holder of the subjective right (active subject).
ii. 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.

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.

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.

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

The potestative rights are usually divided into:

i. 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);

ii. 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);

iii. 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).

d) Classification of subjective rights

i. 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);

ii. 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);

iii. 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);

iv. 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"*);

v. Property subjective rights – are reducible to money (*"in rem"* rights - property rights on a property; credit rights; literary or artistic property rights);

vi. Non-property subjective rights – not capable of pecuniary expression (personality rights - right to life, honor, freedom; family rights - the right of children to education);

vii. 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);

viii. 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"*).

e) Juridical Situations

i. 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;

ii. 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;

iii. 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.

5. Elements of the Juridical Relation

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

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

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

iv. 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.

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;

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;
- 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.

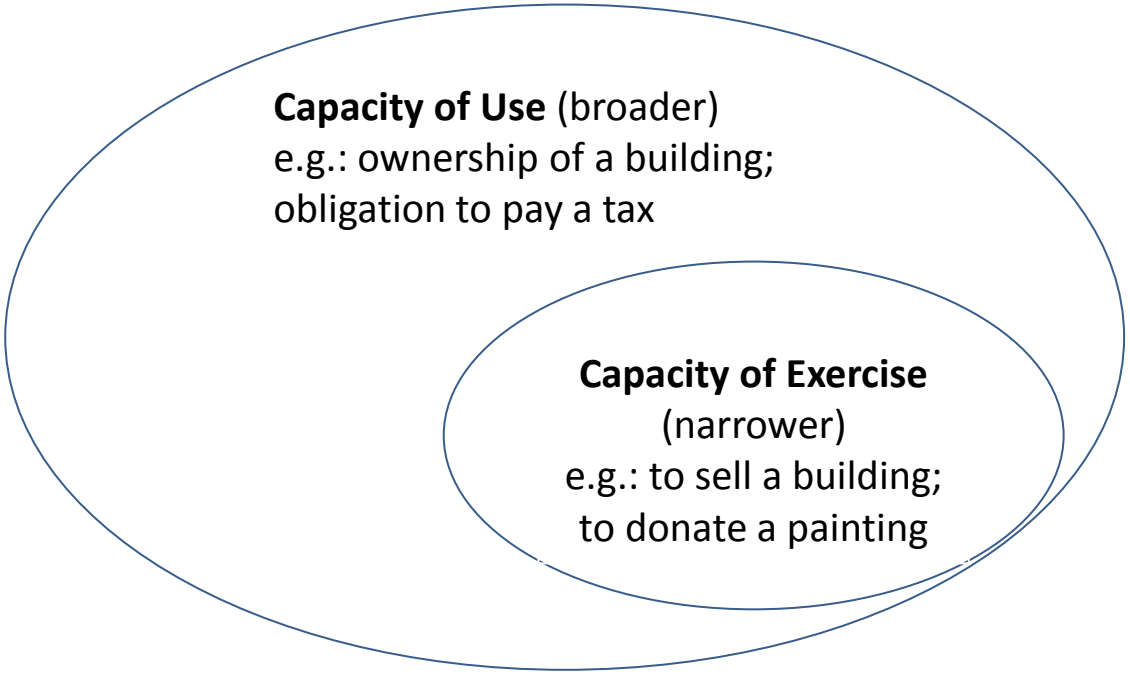
- Legal personality ceases with death (art.68, no.1, of the CC), being this fact the only cause of its term, as regards to natural persons.

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:

- 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).



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.

- Rights of personality regarding goods of physical personality:

i. 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);

ii. 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:

i. 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);

ii. 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);

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

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

- Rights of personality regarding goods of juridical personality:

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

ii. 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;
- 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:
  - 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).

- 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;

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.

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

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:

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

ii. 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, Labour Code), or, at the minimum age, as defined in Penal Law, as for criminal liability (16 years – art.19 , Penal Code).

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.

- 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:

i. 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);

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

iii. 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.

(Art. 127, 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;
- 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, …;

- 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).

- 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;
  - ❑ 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.

- 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.

- 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.

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);
- 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).

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).
- 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:

i. 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);

ii. 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);

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

- 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):

i. 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"*);

ii. 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:

i. Death of the child;

ii. Majority of the child (art.130, CC);

iii. Emancipation of the child (art.132, CC, notwithstanding the regime of art.1649);

iv. 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:

i. Death of both parents;

ii. Inhibition of the parental custody, as regarding the regency of the son;

iii. Impediment of the parents of the exercise of parental custody, for more than 6 months;

iv. 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).

- 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):

i. Tutor - the executive organ of guardianship;

ii. 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);

iii. 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:

i. 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;

ii. 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.

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).

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, 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"*).

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).

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:

i. 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.

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

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

iv. 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;

v. 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.

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:

i. 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;

ii. 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);

iii. 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 statement made by who was accidentally incapable to understand its sense, or did not have the free exercise of his will, is voidable (*"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).

iv. 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.

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

c) Disqualification (*"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.

The disqualification is similar to the interdiction, but is based on a minor severity reason. Disqualification 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 disqualification at the end of a lawsuit, as it happens with interdictions, becomes necessary (art.156 of the CC, with reference to art.140).

The person in relation to whom a disqualification process pends is called *"inabilitando"*. If the disqualification 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).

The effects of disqualification 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 disqualification is suppressed by the institute of legal representation in the figure of the Curator.

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

b) 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.

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

i. Proof of termination of the causes that led to the disqualification;

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

d) Accidental Incapacity

It is said that is vitiated by accidental incapacity, the statement 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:

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

ii. 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:
    - *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 (*"comandita"*).

A) Associations and Foundations

Creation of Associations and Foundations:

- 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.

The 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:

a) 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).

b) 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).

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).

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).

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:

i. *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;

ii. *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;

iii. *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).

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).

B) Civil companies and Commercial companies

Societies/Companies unfold into two kinds:

B.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.

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 CSC (*"Código das Sociedades Comerciais"*) is applicable (art.1, no.4, of the CSC).

B.II) Commercial Companies:

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;
- 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).

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.

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

a) General Companies (*"Sociedades em Nome Colectivo"*) – articles 175º to 196º of CSC;

b) Quota Companies (*"Sociedades por Quotas"*) – articles 197º to 270º-G of CSC;

c) Share Companies (*"Sociedades Anónimas"*) – articles 271º to 464º of CSC;

d) Companies in Partnership (*"Sociedades em Comandita"*) – articles 465º to 480º of CSC.

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.

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:
  a) Performance of thing (*"Prestação de coisa"*) (*"de dare"*) – it reflects the delivery of one or several things. This provision may be:
     i. To provide (*"prestar"*) - delivering something to the lender, for his/her use and fruition, but which property remains with the debtor;
     ii. 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.

b) Performance of fact (*"Prestação de facto"*) - can be of two types:

   i. 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);

   ii. 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).

- 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:

  a) 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).

  b) 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).

- 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:
   - 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.

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.

b) Simple or Composed/Complex (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).

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).

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).

Consider the following examples:

1) 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;

2) 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.

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 specific horses.

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;
- 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 - perishable or deteriorative (e.g. food, pencil, pen, ink, battery of a mobile phone); the inconsumable or non-consumable things are those which regular use does note imply their destruction (e.g., ruler, hammer, book, chair) (e.g.:, a book is something not consumable; however, books intended for sale in a bookshop are consumable things).

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.

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).

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).

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:

- 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;

- *"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.
- 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.

8. Juridical Fact

It is any event which produces effects on the juridical order.

Types of juridical facts:

i. 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.

ii. Involuntary Juridical Fact (*"facto jurídico involuntário"*) – natural facts, independent of the will of oneself (cataclysms - wind, rain, volcanic eruption, tornadoes, tsunamis).

The voluntary juridical facts or juridical acts may be:

a) Lawful Juridical Acts – those in accordance with the Legal Order (marriage, donation, loan).

b) Unlawful Juridical Acts – those opposed to the Legal Order and involve a penalty for its author:

- 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;
- 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.

- 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).
- 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).

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).

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 statement is enough to validate the businesses, not requiring, therefore, the knowledge of the other party (will).

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).

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).

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).

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.

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 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.

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:

A) 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:

- *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).

- *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.

Any of these means of self-tutelage have five requirements that legitimize it:

1) Existence of a self right or third person right which is intended to enforce/ assert or secure;
2) Impossibility to recourse in time to normal coercive forces (police officers, judiciary organs, courts);
3) Indispensability, necessity and urgency of the behavior;
4) Proportionality in the action of the agent so that it does not exceed what is necessary to avoid the sacrifice of the right;
5) Appropriate analysis/weighting so that higher interests are not sacrificed.

B) 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:

i. *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:

- 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).

ii. *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).

iii. *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).