INFORMATIVE NOTE

PLMJ
SOCIEDADE DE ADVOGADOS, RL

LITIGATION

THE "NEW" CIVIL PROCEDURE CODE

The "new" Civil Procedure Code (the "NCPC") came into force on 1 September 2013 and applies to pending declaratory actions, except in respect of the rules on the determination of the form of declaratory process and the rules governing procedural acts in the pleading phase. In the same way, from 1 September 2013, the NCPC also applies to all the pending enforcement actions, with the necessary adaptations.

Law no. 41/2013, which approves a reform of the current Civil Procedure Code, was published on 26 June 2013. The essential aims of the new Code are to i) strengthen the powers of the judge in terms of flexibility, appropriateness in form and effective management of the case with a view to achieving the proper and fair conduct of the proceedings, ii) allow the judge stricter control over compliance with deadlines (in the absence of special provision, 10 days), iii) introduce measures to simplify procedure and strengthen the ability to defend against the use of delaying actions, iv) reformulate the procedure for ordinary declaratory proceedings, v) strengthen the principle of the concentration of the process or appeal on the same judge, vi) create a new concept: the 'prior hearing', vii) change the status of the enforcement agent and increase the powers of the enforcement judge and viii) bring greater simplicity and speed to enforcement proceedings.

The "new" Civil Procedure Code (the "NCPC") came into force on 1 September 2013 and applies to pending declaratory actions, except in respect of the rules on the determination of the form of declaratory process and the rules governing procedural acts in the pleading phase. In the same way, from 1 September 2013, the NCPC also applies to all the pending enforcement actions, with the necessary adaptations. The provisions on the documents serving as the basis for enforcement (in Portuguese *títulos executivos* and referred to here as "enforcement titles"), forms of enforcement process, enforcement applications, procedure for the introductory phase and ancillary events that are declaratory in nature only apply to enforcement proceedings issued after the legislation comes into force. Furthermore, the new legislation does not apply to interim injunctions issued prior to its entry into force.

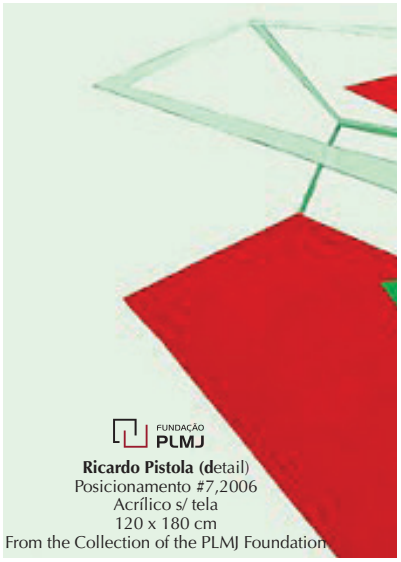
With the entry into force of this legislation the rules in Decree-Law no. 303/2007 of 24 August - with the amendments now introduced but with the exception of the changes to the double conformity rules[1] - will apply to all appeals, even those brought against decisions made in actions issued before 1 January 2008.

Between 1 September 2013 and 1 September 2014, if an error is made in respect of the legal rules that apply through the application of these transitional rules, the judge must correct it or invite the party that made the error to do so.

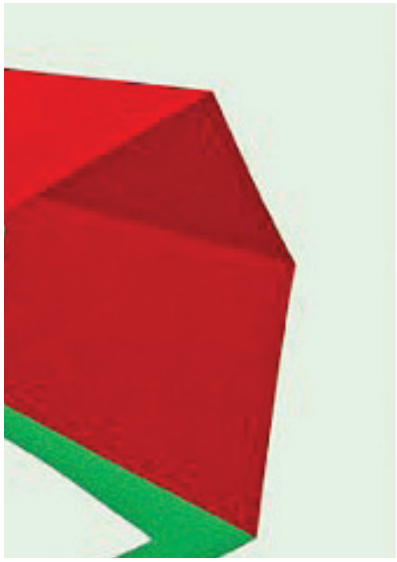
Besides the repeal of other legislation, the repeal of the Simplified Civil Procedure Rules (Decree-Law no. 211/91of 14 June) and the repeal of Experimental Civil Procedure Rules (Decree-Law no. 108/2006 of 8 June) should be noted.

1 In other words, the prohibition on appealing against judgments of the appeal court that confirm the decision at first instance without a dissenting vote and without essentially different grounds does not apply to a decision made, even after the entry into force of the NCPC, in the context of actions issued before 1 January 2008.

THE "NEW" CIVIL PROCEDURE CODE



Ricardo Pistola (detail)
Posicionamento #7,2006
Acrílico s/ tela
120 x 180 cm
From the Collection of the PLMJ Foundation



WE WILL NOW LOOK AT THE MAIN CHANGES INTRODUCED BY THE NCPC.

A) INTERIM INJUNCTIONS – REVERSAL OF THE LITIGATION (REVERSAL OF THE LITIGATION)

In the context of interim injunctions the most significant change - aimed at greater procedural speed and economy - that the NCPC introduces is the 'reversal of the litigation', provided for in article 369. Fundamentally, this measure allows the applicant for an interim injunction to make such an application without having to first issue the main action to which the interim injunction is ancillary. This reversal can never occur in the case of specific interim injunctions of seizure and attachment and, in other cases, it only applies in the case of anticipated interim injunctions (i.e. prior to the issue of the main action). In any case, reversal of the litigation depends on two requirements being met: 1) if the material acquired in the proceedings makes it possible to form a certain conviction of the existence of the right being protected and 2) if the nature of the injunction granted is appropriate to achieve the definitive composition of the proceedings.

An application must be made for the reversal of the litigation and this application may be made up to the closing of the final hearing. In cases in which the respondent is not heard prior to the initial decision on the granting of the injunction, the respondent may oppose the reversal of the litigation at the same time as challenging the injunction granted. It is important to note that a decision to refuse the reversal of the litigation cannot be appealed, whereas a decision to allow it may be appealed, but only together with an appeal against the decision on the injunction. For these cases there remains only one appellate level, with no appeal to the Supreme Court of Justice.

When the injunction is granted and the reversal of the litigation allowed, the respondent is given notice to challenge the existence of the right protected by the injunction if he so wishes. For this purpose, he must begin an action within 30 days of the notification of that decision becoming final. In this new action burden of proving the requirements for the right protected by the injunction is on the applicant (defendant in this new action). The success of this action implies the expiry of the injunction granted. On the contrary, the decision made in the context of the injunctive proceedings becomes the definitive composition of the proceedings if a) the respondent does not bring the said action to challenge it, b) the action brought comes to a standstill for 30 days because of the negligence of the claimant (the respondent in the interim injunction) or c) the proceedings against the defendant (applicant for the injunction) are dismissed and the claimant does not bring a new action in time to take advantage of the effects of bringing the previous action[2].

In this context, it is also important to point out that under the NCPC, in the case of the specific interim injunction for seizure or attachment, the creditor is not required to prove a justified fear of the loss of the financial guarantee when the object of the seizure or attachment is the asset that was transferred by a legal transaction and the credit claimed in the main action originates from the debt arising, in whole or in part, from the price of the respective acquisition.

B) INTRODUCTION OF LIMITS ON THE ABILITY TO BRING A THIRD PARTY ACTION

The NCPC eliminates the possibility for holders of parallel rights merely connected with those of the claimant to bring claims - but independent in relation to the claimant's claim in the pending proceedings (*intervenção coligatória activa*) - after the proceedings have started. This possibility has been eliminated because it could adversely affect the progress of such proceedings by making it necessary to reformulate the whole pleadings phase, whether completed or still in progress.

2 i.e. in the 30 days from the date on which the judgment dismissing the proceedings becomes final, which remains unchanged under the NCPC.

In such cases, it is still possible for the person in question to bring their own action and subsequently seek to joinder of the actions in order to achieve a joint trial.

In cases in which the defendant makes an application to join a third party on the basis of asserting a possible right of recourse against that third party (*intervenção acessória provocada*), that will allow him to recover from the harm caused to him by the possible loss of the case, the judge has the power, by means of an decision that cannot be appealed, to definitively reject the application when he holds that the aim of the application is to delay the proceedings because it does not represent a real and serious interest of the defendant and unduly interferes with the normal progress of the case.

Besides this, in cases in which the defendant accepts the debt claimed from him without reservation and only pleads a reasonable doubt as to the identity of the person of the creditor to which he must make the payment, applying for the joinder of the third-party alleged to be the creditor (*oposição provocada*), it is established the defendant must immediately deposit the amount or the thing due. It is only by doing this that the defendant will be released from the proceedings and the litigation will continue between the two possible creditors.

C) THE EVIDENCE – NEW DEADLINES AND STATEMENTS BY THE PARTIES

In this respect it is first of all important to point out that the NCPC requires that all the evidence is presented and requested in the mandatory pleadings, that is, the Statement of Claim and the Defence, even though, in accordance with the defence presented, these pleadings may be altered in later pleadings by the other party.

After the pleadings, the parties may also present documentary evidence up to 20 days before the date on which the final hearing takes place and not after this moment, unless filing such evidence has been impossible up to that moment or such filing has become necessary as a result of a later occurrence. In the latter case, the filing does not prevent the evidential steps from being taken, unless the opposing party cannot examine the documents in the act itself, even with suspension of the of the works for the time necessary, and the court considers the document relevant and declares that there is a serious inconvenience in proceeding with the hearing. Thus, when the filing occurs in the discussion and trial hearing, this does not, as a general rule, have the potential to interrupt that hearing.

The NCPC introduces a new way to give evidence – statements by the parties – in which, at his own initiative and up to the beginning of the oral arguments at first instance, a party may ask to give statements of facts in which he was personally involved or of which he has direct knowledge. The party that gives statements is subject to the duty of cooperation and truth, which means that he must answer everything asked of him, submit to any necessary inspections and make available anything asked of him. The judge conducts the examination of the party making a statement and the counsel for the parties may only ask for clarification. If, in his statements, the party admits any fact, that fact is duly taken into account by the judge as an admission of fact with the respective effects. In other words, it cannot be retracted and has full probative value. If the statements of the party do not amount to an admission, their value as evidence is at the discretion of the court.

Furthermore the NCPC reduces the maximum number of witnesses that each party may present by half – to 10 – and this limit also means 10 additional witnesses in the case of a counterclaim. In light of the nature and extent of the items of evidence (*temas da prova*), the judge may, by an unappealable decision, allow the examination of a number of witnesses above this legal limit. In parallel, the presentation of witnesses is established as the general rule. In other words, the party that presents witnesses is responsible for ensuring that they appear in court. For witnesses to be summonsed by the court, the party that is calling the witness must make express application to the court for this purpose.

D) SINGLE FORM OF PROCEDURE AND LIMITATION ON THE PLEADINGS

The NCPC introduces an important reformulation of the rules on the forms of common declaratory proceedings which means that there is now only a single procedure. This rule change results in the elimination of the summary procedure (*processo sumário*) which was, despite everything, similar to the of the (*acção ordinária*). The simplified summary procedure for small claims (*processo sumaríssimo*) is also eliminated and, in any event, its scope of application had, for some years, been essentially absorbed by the procedure designed to enforce compliance with financial obligations arising from contracts (Decree-Law no. 269/98of 1 September, which remains in force)[3].

The scope of the Reply and Defence to Counterclaim changes so that it is only admissible (i) in cases in which the Claimant seeks to respond to the counterclaim presented by the Defendant and (ii) in actions seeking a declaration that a right or fact does not exist, whether to challenge the facts constituting the evidence alleged by the Defendant, or to allege facts that impede or extinguish the right on which the Defendant seeks to rely. Furthermore, the Reply to Reply and Defence to Counterclaim (*Tréplica*) disappears.

Furthermore, the implementation of a new model prior hearing will have repercussions right away in this phase, specifically in respect of the way in which the pleading are prepared. At this stage the parties now have to concentrate on the allegations of the essential facts that ground their respective claims and this acts as a disincentive to any verbosity.

E) THE NEW FIGURE OF THE PRIOR HEARING (*AUDIÊNCIA PRÉVIA*)

The prior hearing is mandatory as a matter of principle. It is only dispensed with in undefended actions[4] and in actions that must come to an end with the curative order as a result of the admissibility of a dilatory exception[5], as long as this has been raised in the pleadings.

3 Special rules are established both for cases with a value below half the value required for the case to be susceptible of appeal (€15,000.00), such as (i) the unavailability of the option to use a panel of expert witnesses (perícia collegial) and (ii) the special procedure after the pleadings; in cases with a value above the first instance jurisdiction limit (€5,000.00), the maximum number of witnesses is reduced to 5 and the time for oral arguments is also reduced.

4 The failure to defend an action cannot result in an admission as a result of, namely, (i) the defendant's lack of capacity, (ii) the defendant, having been served by public notice, has not done any act in the proceedings, (iii) when the facts at issue depend on documentary evidence.

5 Cases that prevent the examination of the merits of the case.

When there is a prior hearing, its objective is to: (i) attempt to reach a settlement between the parties, (ii) the exercise of the adversarial process, under the rule of oral proceedings, in relation to the matters to be decided in the curative order that the parties have not had the opportunity to discuss in the pleadings, (iii) oral debate aimed at remedying any insufficiencies or inaccuracies in the facts alleged, (iv) the issuing of the curative order, (v) the issuing, after debate, of a subsequent order aimed at identifying the subject matter of the dispute and listing the topics of the evidence and (vi) after hearing counsel for the parties, programming the steps to be taken in the final hearing[6].

It should be noted that, in the context of the NCPC, the curative order is only intended to deal with dilatory exceptions and procedural nullities, as well as to examine immediately, in whole or in part, the merits of the cause of action. In other words, this order is no longer intended to select the material relevant to the decision. This selection now occurs in a later order destined to identify what it at issue in the dispute and to determine items of evidence (*temas da prova*). In relation to the items of evidence o be produced, it is no longer a case of specifying each and every one of the disputed points but rather to determine what the dispute is between the parties on determined principle matters, noting them generically, leaving the description of the facts that, in relation to each main item, are taken a proven or not proven for the decision on the issues of fact.

The judge may dispense with the prior hearing when, in actions that are going to proceed, its only purpose is to discuss the positions of the parties, make the curative order and determine, after debate, the adequacy in terms of the form, the simplification or the speeding up of the process. Once the parties have been served with notice, if any of them intend to challenge the judge's order (exception made to the curative order, which may only be challenged by way of appeal, in general terms), they must do this by making an application, within 10 days, for the prior hearing to actually take place with the aim of dealing with the points being challenged. As under the old rules, the order that identifies what is at issue in the dispute and determines the items of evidence may be challenged by the parties.

6 Namely, the number of sessions, probable duration and respective dates.

F) FINAL HEARING AND JUDGMENT – A SINGLE JUDGE, A SINGLE DECISION

The NCPS provides that once the final hearing comes to an end, the proceedings are closed and sent to the judge to hand down the judgment within 30 days. This differs from the previous situation in that now the judgment will always be handed down by the judge who heard the trial.

As a result of the innovation in respect of the items of evidence of the, there will be no more procedural steps exclusively reserved to issues of fact once the production of evidence has come to an end. On the one hand, the distinction between arguments on the issues of fact and arguments on the legal issues of the case is abolished. This means that once the production of evidence has finished, there will be oral arguments in which the lawyers present the conclusions of fact and of law that they have drawn from the evidence produced. On the other, hand it will be in the judgment itself, and no longer in a prior and independent decision on the grounds of fact, that the judge must declare which facts he or she finds proven and not proven by reference to the evidence produced and the other elements of the proceedings.

Finally, the NCPC establishes the principle that the final hearing cannot be postponed. This innovation provides that the suspension of the proceedings by agreement of the parties – allowed for periods that do not exceed a total of three months – is subject to the condition that such suspensions do not result in the postponement of the final hearing that has already been scheduled. A further innovation is the rules that a sound recording must be made of the final hearing regardless of whether or not an application is made for this.

G) APPEALS - STRENGTHENING OF THE ROLE OF THE SECOND INSTANCE ON ISSUES OF FACT

The major change in this area lies in the appeals court's ability to alter the decision on the issues of fact "in order to enable it to reach the material truth"[7]. For this purpose, the new law requires (as apposed to the option that existed under the previous rules) the appeal court to order the re-presentation of the

7 Page 19 of the Explanatory Memorandum.

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evidence, to reconsider the evidence or to annul the decision. In fact, the appeal court is now under a duty to alter the decision made on the issues of fact, if the facts held to be undisputed, the evidence produced or a later document require a different decision. The NCPC, indeed, goes even further and imposes a duty on the appeal court to order not only the re-presentation of the evidence, but also the production of new evidence.

It is also important to bear in mind that the NCPC establishes a rule that decisions taken under the principles of procedural management and appropriateness of form and on atypical procedural nullities cannot be appealed.

There is exception to this new rule is for cases in which such decisions give rise to a violation of the principles of equality or the adversarial principle, or affect the procedural acquisition of facts or the admissibility evidence.

Equally important in this area are certain significant changes introduced by the NCPC: (i) the range of appeal court judgments that can be appealed by way of review is broadened[8], (ii) an appeal by way of revision is allowed beyond five years after the decision becomes final when the decision addresses rights relating to the personality, (iii) when, following the annulment or revocation of the decision appealed or extension of the issues of fact, a new decision has been handed down in the lower

8 Allowing appeal by way of review of a judgment dismissing the case against the defendant or any of the defendants as to one or more of the applications or appeals.

Another important point is the introduction by the NCPC, in the context of enforcement proceedings, of the possibility to extinguish those proceedings on the basis of an agreement to pay the debt subject to enforcement in instalments or under a comprehensive agreement.

court and a new appeal or review has been brought in respect of that decision, whenever possible, that appeal or review is sent to the same judge and (iv) when the appellant provides security to secure the suspension of the effects of the judgment being appealed, the security remains in place until the final unappealable decision is made. The entity that provided the security is given notice id the debtor does not pay within 30 days of the final decision.

H) ENFORCEMENT PROCEEDINGS – CHANGES TO THE SET OF DOCUMENTS SERVING AS THE BASIS FOR ENFORCEMENT AND POSSIBILITY WITHDRAWING THE ENFORCEMENT FOR PAYMENT IN INSTALMENTS/COMPREHENSIVE AGREEMENT

In enforcement proceedings, one of the most important innovations lies in the issue of enforcement titles (*títulos executivos*) - the documents that serve as the grounds for enforcement. The following documents are no longer considered as enforcement titles: (i) private documents signed by the debtor, which create or recognise financial obligations the amount of which is determined or can be determined by a simple mathematical calculation in accordance with the clauses of the said document, and (ii) private documents constituting and obligation to deliver a thing or perform a service. In practice, documents that contain admissions of debt, invoices signed by the debtor or statements signed by the debtor are no longer considered as enforcement titles and, as a consequence, these documents no longer guarantee direct access to an enforcement action. On the contrary, the NCPC expressly classifies as enforcement titles debt securities, even if they are unsecured (for example, a cheque not presented for payment within the legal period)[9].

Another important point is the introduction by the NCPC, in the context of enforcement proceedings, of the possibility to extinguish those proceedings on the basis of an agreement to pay the debt subject to enforcement in instalments or under a comprehensive agreement[10].

Any such agreement must provide for the payment of fees and of the enforcement agent. The agreement must be communicates up to the transfer of the asset seized or attached or up to acceptance of the proposal in the case of a sale by sealed bids. If the enforcement creditor declares that he does not waive the seizure or attachment carried out in the enforcement proceedings, the same is converted into a mortgage and/or pledge. In this case, the creditor benefits from the guarantee of priority of the earlier seizure or attachment. It should be noted in the context of the agreement that there is nothing to prevent new guarantees being provided in addition to the seizure or attachment (converted into a mortgage and/or pledge). The enforcement may be renewed, upon application, in the following cases: (1) default in payment of one of the agreed instalments, which causes the remainder of the instalments to fall due[11], (2) in the case of an agreement to pay in instalments, upon the application

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of any creditor requesting immediate payment of their credit. In this case, the enforcement creditor is given 10 days' notice to give up the guarantee or also request payment of his credit. In the latter case, the payment agreement no longer has effect[12]; (3) in the of a comprehensive agreement, when there is a default, 10 days after formal written notice of the default is given by the enforcement creditor or any other creditor[13].

Furthermore, enforcement proceedings no longer follow the single form and there are now two forms of procedure: the ordinary and summary. The latter applies when the enforcement title is deemed by the law to be more secure (judicial decision or arbitral award, application for special debt recovery proceedings (*injunção*) with enforcement form), when the initial objective of the seizure or attachment is pre-defined (a financial obligation that has fallen due, or is guaranteed by a mortgage or pledge) and in respect of debts with a lower value (an obligation that is due with a value equal to or lower than double the first instance jurisdictional limit). In these cases, as a general rule, the law dispenses with preliminary order and prior summons of the enforcement debtor and proceeds immediately with the seizure or attachment of he assets.
Another important change introduced by the NCPC is to provide that the judgment can be enforced within the declaratory action proceedings[14], as well as dispensing with the judicial order for the attachment of bank balances.

9 As long as, in this case, the facts constituting the underlying relationship appear in the document itself or are alleged in the enforcement application.
10 The comprehensive agreement is made not only between the enforcement creditor and debtor, but also with the other creditors making claims. The agreement may consist of a simple moratorium, in a full or partial forgiveness of the debt, in the full or partial substitution of the guarantees or in the setting up of new guarantees. The enforcement creditor and the creditors making claims maintain their rights against anyone jointly liable for the debt and against guarantors.
11 In this case, the seizure or attachment begins with mortgaged or pledged assets, and it only passes on to other assets if the former are insufficient. If these assets have been disposed of, the renewed execution proceeds against the person that acquired them.
12 In this case, if the enforcement creditor does not see anything within the deadline, he is deemed to have given up the guarantee.
13 Such default causes the agreement to expire.
14 If the enforcement title is a judgment of the court, the joining of application with different aims is allowed.

Furthermore, the NCPC has removed certain powers from the enforcement agent. These powers return to the sphere of the judge and the court in the context of the enforcement proceedings. In particular, the court secretary now has power to decide on the preliminary admissibility of applications for enforcement (and consequently to also refuse the same). Certain decision-making powers also return to the judge[15].

This strengthening of the powers of the court is also a reflection of the smaller number of cases in which the preliminary order is dispensed with.

I) SPECIAL PROCEEDINGS – PROTECTION OF THE PERSONALITY

Besides the general reorganisation of special proceedings, the most substantial alteration involves the removal of proceedings for the protection of the personality from the group of proceedings with voluntary jurisdiction[16]. This implies greater regulation of such proceedings. The respondent is no longer summonsed to present a defence but is rather immediately summonsed to the hearing at which the defence is presented. The following are important innovations that impose greater regulation: (i) the absence of either of the parties from the hearing does not prevent the production of evidence and subsequent decision; (ii) for the application to proceed, it is necessary to determine the actual behaviour to which the respondent is subject and, if applicable, the deadline for compliance as well as the compulsory pecuniary sanction for each day of delay in compliance or for each infraction, (iii) the possibility for a provisional decision to be made within the proceedings themselves, which cannot be appealed and is subject to later alteration or confirmation in the said proceedings, when the examination of the evidence offered by the applicant makes it possible to recognise imminent and irreversible injury to the physical and moral person.

If, in the alternative, there is no clear conviction that there is a threat or there are special grounds of urgency that justify the said provisional measure, (iv) the urgent character of the appeals, (v) the enforcement of the decision is of the court's own motion and in the proceedings themselves, whenever the enforcement measure includes the enforcement of an order made in special debt recovery proceedings, and is accompanied by the immediate payment of the compulsory financial sanction.

The NCPC places great emphasis on the need for a high level of specialisation on the part of the lawyers who handle these proceedings in order to take advantage of the new procedural framework that has been created. It also seeks to achieve greater material justice (as opposed to justice that is merely formal or procedural in nature), together will a faster conclusion of the proceedings. These objectives will only be achieved if those involved in the proceedings, in particular, the lawyers, have a true vocation for this work and are focused on each case in which they act.

15 Such as the power to decide on whether or not the condition precedent has been met or whether or not the creditor or third party has performed their obligation, the authorisation to divide real property that has been seized, the authorisation of the acts necessary to the conservation of the pledged credit right, the appointment of an administrator for any establishment seized, the early sale of the assets seized or attached, and the provision of accounts in enforcement of provision of services.

16 These proceedings are no longer subject to the inquisitorial principle, to the deadline of 15 days to hand down the judgment, to the possibility of altering the decision on the basis of supervening grounds and the fact that there is no appeal to the Supreme Court of Justice.

PLMJ'S civil, commercial and criminal litigation practice area has one of largest teams of lawyers working in this area in Portugal with more than forty lawyers currently spread between the firm's offices in Lisbon, Oporto and Faro. With their strong academic backgrounds and extensive experience, these lawyers are perfectly positioned to respond to all their clients' needs in this area.