

International **Comparative** Legal Guides



Class & Group Actions 2021

A practical cross-border insight into class & group actions work

13th Edition

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Expert Chapters

- 1** **Collective Actions in the UK: Is the Dam Beginning to Burst?**
Chris Warren-Smith, Pulina Whitaker & Alexandre Bailly, Morgan, Lewis & Bockius LLP
- 8** **International Class Action Settlements in the Netherlands**
Jan de Bie Leuveling Tjeenk & Dennis Horeman, De Brauw Blackstone Westbroek N.V.
- 16** **Developments and Trends in Collective Actions**
Gregory Starner, Matthew Devine, Sonja Hoffmann & Alexandra Diehl, White & Case LLP
- 21** **Antitrust Impact in Class/Collective Actions**
Vivek Mani & Darwin V. Neher, Cornerstone Research
- 26** **Use of Appropriate Privacy Disclosures in Non-U.S. Class and Collective Proceedings**
Loree Kovach & Lauren McGeever, Epiq

Q&A Chapters

- 30** **Australia**
Clayton Utz: Colin Loveday & Andrew Morrison
- 39** **Belgium**
Linklaters LLP: Xavier Taton & Gert-Jan Hendrix
- 50** **Canada**
Blake, Cassels & Graydon LLP: Jill Lawrie & Daniel Szirmak
- 58** **China**
Fangda Partners: Frank Li & Rebecca Lu
- 67** **France**
Aramis: Aurélien Condomines & Pierre Galmiche
- 74** **Germany**
Clifford Chance: Burkhard Schneider
- 85** **Hong Kong**
Deacons: Paul Kwan & Michelle Li
- 94** **Italy**
Portolano Cavallo: Micael Montinari, Luca Tormen & Laura Coriddi
- 102** **Korea**
Hannuri: Jeong Seo & Sangwook Park
- 109** **Netherlands**
De Brauw Blackstone Westbroek N.V.: Jan de Bie Leuveling Tjeenk & Dennis Horeman
- 116** **Portugal**
Campos Ferreira, Sá Carneiro – CS Associados: João Maria Pimentel & Ana Sofia Rendeiro
- 123** **Switzerland**
Eversheds Sutherland Ltd.: Peter Haas
- 131** **USA**
Norton Rose Fulbright: Daniel M. McClure & Matthew A. Dekovich

Digital Edition Chapter

- 139** **The Use of Statistical Evidence in Class Action Litigation**
E. Allen Jacobs, Kelly Lear Nordby, Michael J. McDonald & Dubravka Tomic, Berkeley Research Group

Portugal



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1 Class/Group Actions

1.1 Do you have a specific procedure or set of rules for bringing, handling, and/or legally resolving a series or group of related claims? If so, please outline this.

Under general procedural law, there is a set of rules for bringing or handling a group of related claims. Where claims are identical, related to each other or depend on the consideration of the same facts or law and there are no procedural obstacles to rule those claims together, groups of claimants are entitled to bring their claims together in one proceeding, as well as to request the court to aggregate their lawsuits whenever they have filed separate proceedings.

Moreover, Law no. 83/95 establishes a specific procedure for handling a series or group of related claims. This specific procedure is called “*acção popular*”. Also, the Portuguese Constitution grants all citizens, independently or through associations, the right to bring a class action, namely in order to:

- a) promote the prevention, cessation or the judicial persecution of infringements against public health, consumer rights, retail investors’ rights regarding financial instruments, quality of life and preservation of the environment and cultural heritage, among other rights, as well as request compensation for any injured parties based on the violation of such rights; and
- b) guarantee the defence of State property or property of the Autonomous Regions or of the local authorities.

1.2 Do these rules apply to all areas of law or to certain sectors only, e.g., competition law, security/financial services? Please outline any rules relating to specific areas of law.

Aggregation of claims under general procedural rules is applicable to all areas of law and sectors.

Legal provisions set forth in Law no. 83/95 (“*acção popular*”) are neither exclusively applicable to restricted areas of law nor to particular sectors. Notwithstanding, such law does refer to certain areas where class actions shall be applicable (see the list provided in paragraph a) of question 1.1).

The Securities Code also provides specific rules regarding the awarded compensations and their management in class actions aimed at protecting individual or collective interests of retail investors in financial instruments.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim determines the claims of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

As a general rule, the procedure set forth in Law no. 83/95 provides for the management of claims by means of a class action. Furthermore, as a rule, all members of the group will be bound and affected by the final verdict. This rule can be excluded by the judge when he considers that certain aspects of the case justify a restriction on the extent of the decision’s effects or when the case is dismissed due to insufficient evidence.

The situation is different regarding claims that have been aggregated under general procedural rules. In this case, the procedure is managed together, but the judge can render a different decision in each claim.

1.4 Is the procedure ‘opt-in’ or ‘opt-out’?

Law no. 83/95 establishes an “opt-out” scheme.

Once the petition for the class action is received, the interested parties will be summoned to the proceedings, in order to, within the term fixed by the judge: (i) be able to join the proceedings; (ii) declare their consent to be represented by the claimant; or, otherwise (iii) declare that they do not wish to be represented by the claimant. In the latter case, the decision will not be applicable to them.

After being summoned, even if the parties potentially affected by the infringement do not take any of the actions described above, they are considered as being part of the group. Consequently, individuals’ belonging to the class is presumed, unless the injured parties affirmatively declare that they have no desire to participate and be bound by the proceedings, and the award will be applicable to them unless the case is dismissed for lack of evidence or the judge decides otherwise based on the given case.

The claimant’s representation can be refused by the interested parties until the end of the collection of evidence, or an equivalent stage, by stating so in the proceedings.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

Portuguese law does not specify a minimum number of claims that can be managed under the procedure.

1.6 How similar must the claims be and what are the legal requirements for proceeding on a class or group basis? For example, in what circumstances will a class action be certified or a group litigation order made?

In a class action, the claimant will represent all parties with an interest or right in the relevant class action. As a rule, either the parties are affected by the same or similar conduct, or the rights and interests harmed are related.

There is no specific mechanism of certification applicable to class actions. Nonetheless, before the trial the court shall decide if the lawsuit may proceed as a class action or, otherwise, shall be converted into a common procedure. The judge can dismiss the case once he receives the statement of claim whenever he concludes that, despite the class action being acceptable from a procedural point of view, it is very unlikely to be successful, provided that the Public Prosecutor has previously been heard.

1.7 Who can bring the class/group proceedings, e.g., individuals, group(s) and/or representative bodies?

Class/group proceedings can be brought by:

- a) individuals (citizens with political and civil rights), regardless of whether or not they have a direct interest in the case, provided that their claim is not purely individual, i.e., that collective interests are at stake;
- b) associations and foundations that defend the relevant interests at stake;
- c) local authorities, regarding the interest of their residents within their respective area;
- d) the Public Prosecutor, where cultural heritage or consumer rights are in question; or
- e) the Directorate-General for Consumers, where consumer rights are in question.

1.8 Where a class/group action is initiated/approved by the court, must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action – before or after court approval – permitted or required? Are there any restrictions on such advertising?

Once the application for the class action is filed and the court does not immediately reject it, the relevant interested parties will be summoned to the proceedings in order to, within the term fixed by the judge, be able to join the proceedings (accepting the proceedings at whatever stage they are at) and declare their acceptance to being represented by the claimant, or, alternatively, that they do not wish to be represented by the claimant. In the latter case, the final decision will not be applicable to them. Please see question 1.4.

The writ of summons will be made by means of one or various announcements made public through the media or public notice (whether referring to general interests or geographically localised interests), without having to identify the specific recipients. With regard to the action, at least the first claimant (when there are several) and the defendant or defendants will have to be identified, also mentioning the request and grounds for the action.

When it is impossible to determine the actual interested parties, the above-mentioned writ of summons will be drafted with reference to: a) the relevant scope determined from the specific circumstances or features; b) the geographic area where such parties live; and c) the group or community of which they are a part.

1.9 How many group/class actions are commonly brought each year and in what areas of law, e.g., have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Privacy; Mass tort claims, e.g., disaster litigation; Environmental; Intellectual property; or Employment law?

Although, in general, this type of action is not very common in Portugal, there has been an increase in these proceedings in recent years. The majority of the class actions brought were aimed at protecting environmental rights, public works, assets belonging to the public domain and, most recently, financial services and competition law. However, class actions may be brought in all of the fields referred to in the question.

The first known class action on competition matters was filed in 2015 by the Observatory of Competition against a television channel for anti-competitive practices against the clients and any potential clients of the channel.

In the field of financial services, a few class actions against private and public entities were brought by a group of private investors, following the collapse of the Espírito Santo Group, in 2014.

As regards the class actions pending in the last few years, the following have been filed (amongst others): a) class action brought by a local associative movement against the Portuguese State, asking for compensation for the losses suffered by several companies and families during the fires that occurred in Portugal in October 2017; b) class action filed by the association “Terra da Morte Lenta” against the Portuguese steel company “Siderurgia Nacional” due to the atmospheric pollution allegedly caused by this company; c) class action brought by the Portuguese Association for Consumer Protection against several mobile operators asking for reimbursement of the amount charged to their clients after a price increase without prior notice; d) class action filed against the State by an association of alleged victims of an outbreak of Legionella for compensation of those victims.

1.10 What remedies are available where such claims are brought, e.g., monetary compensation and/or injunctive/declaratory relief, and what are the limitations on remedies, if any?

Portuguese law does not foresee any specific limitations on remedies, which may include:

- a) Monetary compensation for civil liability – the party liable for breach of the relevant interests or rights of the injured party/injured parties will indemnify them for such damages. Liability may arise from a deliberate or negligent breach and, under certain circumstances, applies regardless of culpability. The general time limit to claim civil liability is a three-year period following the date when the claimant became aware of its right for compensation. Law no. 83/95 provides that injured parties have a three-year period to demand the right to receive the compensation that was set in the final award. A global amount may be set for non-identified injured parties. The Securities Code, regarding class actions in relation to damages suffered in connection with the subscription or purchase of financial instruments, provides, in particular, that an entity should be designated for the receipt and management of any compensation payable to the investors that are not individually identified. Such entity should either be a guarantee fund (if created by the entity managing the relevant regulated market or settlement or

clearing system), the plaintiff association or one or more of the investors that started the class action. The compensation owed to investors that end up not being identified shall revert either to the aforementioned guarantee fund or, in the absence of it, to the investors' compensation scheme managed by the Securities Regulator.

- b) Conservatory acts/interim measures/injunctions to prevent or cease the breach.
- c) Criminal liability – Law no. 83/95 specifically provides that interested parties have the right to claim or participate in public proceedings for breach of relevant interests of a criminal nature.

1.11 Are there any limitations in your jurisdiction on global/cross-border class or group actions, including any limitation on the ability of international claimants to participate in such actions?

Portuguese law does not foresee any specific limitations on global/cross-border class or group actions.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies, e.g., consumer organisations or interest groups?

Class actions may be filed by associations and foundations duly incorporated that defend the interests at stake, whether or not they have a direct interest in the case, and by local authorities regarding the interests of their residents within their respective geographical jurisdiction.

2.2 Who is permitted to bring such claims, e.g., public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Please see question 1.7.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law, e.g., consumer disputes?

Representative actions may be brought in the same circumstances as class actions brought by individuals.

However, Portuguese law does establish certain compulsory features for associations and foundations:

- a) they must have legal personality;
- b) they must expressly include, in their articles of association, objectives for the defence of the interests in question in these types of action; and
- c) they must not carry out any kind of professional activity competing with companies or independent professions.

In this regard, Portuguese law goes further to specify the particular areas covered, such as public health, consumer rights, quality of life and environmental protection, cultural heritage and public dominion (but representative action procedures can deal with other areas of law).

2.4 What remedies are available where such claims are brought, e.g., injunctive/declaratory relief and/or monetary compensation, and what are the limitations on remedies, if any?

The remedies are as described in question 1.10.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Within civil and administrative court procedures, the trial is by a judge.

3.2 How are the proceedings managed, e.g., are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The proceedings are dealt with before administrative and civil courts and always managed by a judge. Should the proceedings refer to competition or intellectual property law, they will be dealt with and ruled on by a specialist court and judge.

3.3 How is the group or class of claims defined, e.g., by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The group or class is not defined by a previous certification of the class, as described in question 1.6.

There will be no "cut-off" date by which claimants must join litigation, as in the absence of any action the decision will be applicable to relevant interested parties, as described in question 1.4.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can determine preliminary issues, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided? If a judge determines certain preliminary factual issues, are those factual determinations binding on a later jury?

The methods of the court are determined on a case-by-case basis.

The court can order preliminary issues related to matters of law and matters of fact, and these issues are resolved by a judge. The judge's decision is binding but parties are entitled to lodge an appeal against the same.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

There are no strict case management procedures.

Nonetheless, Law no. 83/95 itself sets forth some specific procedures that help with ruling on a case with many parties and interests, such as allowing the Public Prosecutor to replace the claimant if he settles or withdraws the case, and allowing the judge to request further evidence besides that which is produced by the parties.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

There are no restrictions on the nature or extent of evidence. Expert evidence can be requested by the parties and the judge. The judge may also be assisted by an expert with competence and capacity to help him examine the facts. Also, during the trial, parties' counsel may also be assisted by an expert in technical non-legal matters.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Under Portuguese law, there are:

- witnesses that provide their oral testimony, generally about facts, in the final hearing (thus during the trial); and
- experts that prepare a report before trial and that may attend the final hearing in order to provide explanations or clarifications thereupon.

Pre-trial witness evidence (given in writing or orally) and pre-trial expert evidence can be obtained, provided that there is a valid concern of not being able to obtain evidence later on.

3.8 If discovery is permitted, do courts typically phase such discovery, such as bifurcating discovery between class discovery and merits discovery?

Discovery as applicable in common law jurisdictions is not provided in Portuguese law. Under Portuguese procedural law, evidence is, in general, provided by the parties. Nonetheless, parties have the right to ask the court for the submission of documents in the possession of the counterparty or of a third entity in order to prove facts alleged in the proceedings. The court orders the party or the third party to submit those documents if it deems them relevant to the decision of the dispute.

Should the parties fail to provide non-confidential documents or information without due cause, the court may apply a fine and apprehend the document in question. Also, the court will take such refusal into consideration when examining the remaining evidence. The reversal of the burden of proof against the party who unlawfully refused to provide information or documentation can be applicable, too.

Within class actions, in particular, judges are allowed to request, at their own initiative, more evidence than is permitted under general procedural law.

3.9 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Under Portuguese law, there is no obligation to disclose documentary evidence either before court proceedings begin or as part of the pre-trial procedure.

3.10 Can the parties challenge the admissibility of expert testimony prior to or after a determination as to whether a claim can proceed on a class or group basis?

The admissibility of expert testimony must be challenged after being requested by a counterparty or decided by the judge.

3.11 How long does it normally take to get to trial?

It normally takes from one to two years to get to trial. Interim proceedings are urgent; thus, they usually take a few months.

3.12 What appeal options are available, including whether an appeal can be taken immediately of a decision certifying a class or entering a group litigation order?

The appeal options regarding class actions are those available for ordinary actions. Under Portuguese law, there are two appeal instances (the second essentially rules on matters of law, only).

Whenever a decision violates a constitutional right, parties can also appeal to the Constitutional Court.

There is no mechanism of previous certification under Portuguese law (see question 1.6). Nonetheless, the judge can: dismiss the case once it receives the statement of claim and immediately realises that the claim is very unlikely to proceed, in which case an appeal can immediately be taken; or decide on some procedural matters or on the merits before the beginning of the trial, in which case, in general, parties are only allowed to appeal after the rendering of the final decision at first instance.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

No, there are no time limits on bringing or issuing court proceedings, except for the ordinary terms of criminal and civil statutes of limitations (see question 1.10).

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

If the statute of limitations is brought by the parties, the court has no discretion to waive these time limits.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Under Portuguese law, when the interested party cannot invoke his/her right during the last three months of the term, for reasons of fraud or *force majeure*, limitation periods are suspended for as long as the party is prevented from exercising his/her right.

4.4 Does the filing of a class or group lawsuit toll the limitation period by which any individual who falls within that class or group would have to bring his, her, or its own individual claims?

Portuguese law does not set forth such a rule, nor is there relevant case law on this matter.

Since Portuguese law provides for an opt-out scheme, one can argue that: a) limitation periods applicable to the rights of individuals who do not exclude themselves from the class action are considered suspended with the filing of such action; and b) on the other hand, should an individual encompassed by the class action choose to bring an individual claim in a separate lawsuit instead, limitation periods are not tolled by the filing of the class action.

5 Remedies

5.1 What types of damage are recoverable, e.g., bodily injury, mental damage, damage to property, economic loss?

All types of damage are recoverable.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g., covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

In the event the product has not yet malfunctioned and caused injury, but may do so in the future, any costs of medical monitoring may only be recovered if such monitoring is requested by the court within the corresponding class action.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Where supra-individual interests are considered, the gains obtained by the defendant with the conduct that caused damages can be taken into consideration. However, in general, such analysis should not have a punitive scope, as under Portuguese law punitive damages are not recoverable, except if expressly agreed between the parties. Notwithstanding, recent case law is beginning to recognise some forms of punitive damages.

5.4 Is there a maximum limit on the damages recoverable from one defendant, e.g., for a series of claims arising from one product/incident or accident?

Generally, there is no maximum limit on the damages recoverable from one defendant. Notwithstanding this, the law establishes some specific cases in which there is a cap on the damages recoverable, such as damages caused by traffic accidents and electric or gas facilities, regardless of culpability.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages are quantified based on the losses actually suffered.

5.6 Do special rules apply to the settlement of claims/proceedings, e.g., is court approval required? If so, what are those rules?

No, special rules do not apply to the settlement of claims/proceedings, other than those providing the possibility of replacement of the claimant by the Public Prosecutor where the case is settled. In any case, the settlement needs to be confirmed by the court.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Claimants are exempted from paying court fees in class actions, unless the case is dismissed for being manifestly unfounded.

Without prejudice to the above, as regards court fees, other incidental expenses and the legal costs for bringing the action, the successful party may recover the amounts paid within the proceedings. In respect of legal fees, they shall be allocated by the judge at the end of the proceedings in accordance with the complexity and value thereof. However, Portuguese courts tend to limit the amount of legal fees that shall be paid by the losing party to an insignificant amount.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

The liability for the claimants' court fees is joint and several in nature.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

When a member of the group/class discontinues his/her claim before the conclusion of the group/class action, this member will still have to pay court fees and his/her discontinuance does not exempt him/her from this responsibility.

6.4 Do the courts manage the costs incurred by the parties, e.g., by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

The costs are assessed by the court at the end of the proceedings. The only "cap" imposed on costs concerns legal fees, as described in question 6.1 above.

7 Funding

7.1 Is public funding, e.g., legal aid, available?

Legal aid is available and may include the exemption from court fees and lawyer fees.

7.2 If so, are there any restrictions on the availability of public funding?

According to Portuguese law, it is necessary to prove that one is in economic need in order to be entitled to legal aid.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Funding through conditional and contingency fees is not allowed, as the Portuguese Bar Association Statute – in accordance with the principles adopted in the majority of European countries – imposes a prohibition on *quota litis*.

7.4 Is third-party funding of claims permitted and, if so, on what basis may funding be provided?

Although the law does not provide for a specific regime, in general, third-party funding is not prohibited.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes, consumers' claims can be assigned to a consumer association or representative body and brought by that body (please see question 2.3).

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Yes, consumers' claims can be brought by a professional commercial claimant that purchases the rights to individual claims in return for a share of the proceeds of the action, according to the general civil law terms regarding the assignment of credits.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

According to Portuguese law, interested parties have the right to claim or to participate in public proceedings concerning breach of relevant interests of a criminal nature. Notwithstanding this, according to certain case law, civil class actions are the appropriate method of obtaining compensation for these types of damages.

8.4 Are alternative methods of dispute resolution available, e.g., can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

The matter can be referred to an Ombudsperson, in accordance with the general terms. Mediation and arbitration are also available in accordance with the general terms.

According to Portuguese law, mediation and arbitration are only possible if the counterparty consents and/or agrees, and the matter is not a class action (*"ação popular"*) in the sense of Law no. 89/95.

8.5 Are statutory compensation schemes available, e.g., for small claims?

Statutory compensation schemes are not available.

8.6 What remedies are available where such alternative mechanisms are pursued, e.g., injunctive/declaratory relief and/or monetary compensation?

Within arbitration, the remedies available are those foreseen in ordinary proceedings, including interim measures.

An ombudsperson has no judicial authority.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims may be brought by residents of other jurisdictions. There are no specific rules to restrict "forum shopping".

9.2 Are there any changes in the law proposed to promote or limit class/group actions in your jurisdiction?

No, there are no proposed changes to the law to promote or limit class/group actions in Portugal. However, there are new European Union rules that are under discussion and approval on collective redress – notably in the consumer rights field and areas such as financial services, data protection and environmental law – that will lead to some changes in this area.



João Maria Pimentel is a Partner in the Litigation and Arbitration and Restructuring and Insolvency practices. He has more than 20 years of experience in court and has a deep knowledge of the workings of the judicial and arbitration courts, where he represents clients' interests in civil, commercial and financial disputes. He also boasts vast experience in insolvency procedures, advising on both company recovery and liquidation, acting in the defence of creditors' and investors' interests, and assisting directors on compliance with their legal duties.

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Campos Ferreira, Sá Carneiro – CS Associados was incorporated at the end of 2009 and its priority is to establish a professional relationship of proximity with its clients, based on the quality of the legal services provided and the direct and permanent involvement of its Partners through the whole legal counselling process.

In order to achieve its purpose, CS Associados assists its clients only in the legal areas where it possesses specialised competence and in which its distinctive quality is widely recognised in the market. The lawyers in the litigation and arbitration department have taken part in relevant legal proceedings in recent years, representing clients at all stages of the process and collaborating with reputable foreign law firms in international proceedings. The team's experience encompasses all areas of law (such as civil and commercial litigation, enforcement proceedings and criminal law) and

includes cases before civil and criminal courts. The firm's litigation and arbitration team has also acted in multijurisdictional proceedings and actions before the highest arbitration bodies.

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