

MACAU

Macau Perspectives on the Hague Principles

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Introduction and Preamble

31.01 Macau is a Special Administrative Region (hereafter SAR) within the People's Republic of China (hereafter PRC).¹ Although it is very small with an area of 30.8 square kilometers and a population of 656,700 only,² it enjoys a high degree of 'autonomy' according to the Basic Law of the Macau Special Administrative Region of the People's Republic of China (Macau Basic Law), in which the relationship between the Central Government and the SAR is set.³ The SAR has the power of administration, legislation, and final adjudication.⁴ Only very few laws, mainly those related to the national security and sovereignty, made by the Central Government as Attachment III to the Macau Basic Law are applicable to the territory of Macau. Macau itself can make all other laws including public and private ones.⁵ Due to the fact that Macau can have its own private laws independent of and different from those in Mainland China, Macau is an independent 'country', or territorial unit, in the sense of private international law (PIL).⁶

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¹ There is another SAR established on 1 July 1997 within China namely, Hong Kong which has a very similar political status to and enjoys the same degree of autonomy as Macau under the policy of 'One Country, Two Systems' advocated by the late leader, Mr Deng Xiaoping.

² These figures were released by the Statistics and Census Bureau of Macau as of 15 June 2018 <<https://www.dsec.gov.mo/Statistic.aspx?NodeGuid=dc9859c9-480f-4f5d-96ce-0e4242455672>> accessed 8 June 2020.

³ The Macau Basic Law can be found at <<http://bo.io.gov.mo/bo/i/1999/leibasica/index.asp>> accessed 8 June 2020. All the laws of Macau mentioned in this chapter can be found at this website, which will not be quoted again.

⁴ See Arts 16–17 and 19 of the Macau Basic Law.

⁵ The power of the SAR is much broader than that of a province in Mainland China and it is also the present author's view that the autonomy enjoyed by the SAR is more than that of a state in a federal country such as in the US, see Chapter II of the Macau Basic Law.

⁶ 'The laws previously applicable in Macau will basically remain unchanged [after the handover] ...' See Arts 8 and 18 of the Macau Basic Law. Hereinafter, the term 'country' is, of course, used in the sense of PIL in this chapter. This essay will concentrate on the legislation after 1987 since only after that, Macau began to have the power of making its own legislation for PIL legally detached from those of Portugal. Macau did gain some legislative power after Portugal declared in 1976 that Macau was not a Portuguese colony any longer but a territory belonging to China under the governance of Portugal. However, between 1976 and 1987, Macau did not make any legislation on PIL. See Liu Gaolong and Zhao Guoqiang, *Aomen Falv Xinlun (New Commentaries on Macau Laws)* (Aomen Jijinhui 2005) 4–7 (hereafter Liu and Zhao, *New Commentaries on Macau Laws*); Huang Jin and Guo Huacheng, *Aomen Guojisifa Zonglun (General Part of Private International Law in Macau)* (Aomen Jijinhui 1997) 25–35 (hereafter Huang and Guo, *General Part of Private International Law in Macau*).

Although there had been statutes on PIL which came into force in Macau prior to 1987 they were only the extension of Portuguese legislation to Macau owing to the fact that Macau was a Portuguese colony at that time. This was the case with the 1966 Portuguese Civil Code, which extended its effects to the territory of Macau in 1967. Interestingly enough, while the 1980 Rome Convention⁷ came into force in Portugal on 1 September 1994 when Macau was still a Portuguese colony,⁸ Portugal did not extend its applicability to Macau.⁹ The true reason is not known, but it could be presumed that by that time Macau had already been in the process of transfer to China and Portugal wanted to leave this issue for China.¹⁰ The Rome Convention, therefore, has never been applicable in Macau. **31.02**

Recent codifications of PIL in Macau mainly took place in the course of the transfer of Macau from Portugal to China, the motherland. This process had initially started long before the date of 20 December 1999 when China formally resumed its sovereignty over the territory of Macau and the SAR of Macau was established. It was namely back in 1987 when Macau obtained its own legislative power to enact PIL rules, independently of Portugal, due to the signing of the Sino-Portuguese Joint Declaration on the Question of Macau¹¹ which instituted the transitional period for the transfer of sovereignty. Yet, the ‘localization’ of laws in Macau, ie, the transformation of the previous Portuguese laws applicable in Macau into laws enacted in the name of the relevant Macau authorities was done at a slow speed. The Macau Civil Code based on the previous Portuguese Civil Code,¹² in which most Macau conflict rules including its contractual choice of law rules can be found, was not promulgated until 3 August 1999,¹³ although there were some minor amendments adopted in 1991 to meet the urgent practical needs.¹⁴ A few points need to be clarified before the contractual choice of law rules in Macau can be examined in detail. **31.03**

⁷ See Consolidated version of Convention on the law applicable to contractual obligations [1980] OJ L 266/1 (hereafter Rome Convention).

⁸ For the date on which Rome Convention came into force in Portugal, see <http://ec.europa.eu/civiljustice/applicable_law/applicable_law_por_en.htm> accessed 8 June 2020.

⁹ For the information of which international convention was/is applicable to Macau in the field of PIL, see <<http://cn.io.gov.mo/Legis/International/1/14.aspx>> accessed 8 June 2020; Huang and Guo, *General Part of Private International Law in Macau* (n 6) 19–20.

¹⁰ After the handover, the previous applicable international conventions in the field of PIL are still applicable in Macau. Macau can join a new international convention in this field without Mainland China but with its support. Macau can also request Mainland China to extend the applicability of an international convention that is applicable to Mainland China to Macau if Macau thinks it necessary, such as, for example, in 2005 with the New York Convention of 10 June 1958 on Recognition and Enforcement of Foreign Arbitral Award. However, Mainland China cannot ‘force’ Macau to accept an international convention. See Art 138 of the Macau Basic Law.

¹¹ This declaration was signed on 13 April 1987.

¹² It was the 1966 Portuguese Civil Code as mentioned earlier.

¹³ It came into force on 1 October 1999. The Portuguese version of this law can be found at <<http://pt.io.gov.mo/>> accessed 8 June 2020. The laws in Macau usually only have Portuguese and Chinese versions unless indicated otherwise in this chapter. Conflict rules are found in Chapter III, Title I of Book I in the Macau Civil Code for which a version of English translation is available in J Basedow, G Ruhl, F Ferrari, and P D M Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 3463–3472.

¹⁴ These changes were made by the Decree law No 32/91/M. One change was that the personal law of a Macau habitual resident was changed into Macau law rather than the previous law of ‘nationality’; another change was that the word of ‘Portugal’ in the Civil Code was replaced by ‘Macau’. These changes have been incorporated into the 1999 Macau Civil Code later. Besides those in the Macau Civil Code, some conflicts rules can also be found in the Macau Maritime Law. The Macau Maritime Law was publicized on 13 December 1999, the sixth day after which it came into force. By researching all the legislations in Macau, the current author found that conflicts rules mainly exist in two places, ie the Macau Civil Code and the Macau Maritime Law. In addition, Arts 130 and 131 in the Macau Civil Registration Code are conflicts rules regarding the formal validity and substantive validity of marriage between two non-local persons. This code was publicized on 18 October 1999 and came into force on 1 November 1999.

31.04 First, as said already, the Macau Civil Code that is the most important source for conflict of laws rules was derived from the 1966 Portuguese Civil Code. Although the ‘localization’ of laws in Macau provided a good chance for Macau to update, modernize, and adapt the previous applicable laws in Macau so that the new laws in Macau could go along with the contemporary trend and be more compatible with the ethnic, cultural, and historic reality of Macau,¹⁵ not many changes had been made for the new Macau Civil Code in general and for the provisions on the issues of choice of law in that code in particular. This was the case with its contractual conflict of laws rules. More concretely, one author said: ‘After the process of localization, the Macau Civil Code retains almost 90 per cent of the content of the original Portuguese Civil Code of 1966.’¹⁶ By examining the similarities and differences between the conflict of laws system in Macau and that in Portugal, a Portuguese expert on PIL commented: ‘... the Macau conflict of laws codification has respected the essential options and even the majority of the solutions of its predecessor: the conflicts system of the 1966 Portuguese Code [and remained loyalty on fundamental issues]’.¹⁷ Therefore, the Macau conflict of laws system is strongly influenced by and substantially resemble the Portuguese counterpart. Accordingly, it has also inherited the Portuguese PIL tradition embedded in the Continental European tradition.¹⁸ Like its predecessor, the Macau conflict of laws system is mainly composed of neutral bilateral conflict of laws rules.¹⁹ It comprises a general part that deals with the general problems of conflict of laws such as characterization, *renvoi*, and public policy, etc.²⁰ and a specific part that provides specific conflicts rules which have been further classified into seven subsections dealing respectively with personal law, law regulating legal acts, obligations, real rights, family relationships, co-habitation, and succession on death.²¹ As will be seen, contractual conflicts rules can mainly be found in the subsections of personal law, legal acts, and obligations.

31.05 Second, due to the fact that Macau is a jurisdiction belonging to the civil law family, court decisions in Macau, theoretically, are not a source of law and do not formally have binding legal effects.²² However, it is not novel that courts in Macau make decisions by citing earlier cases as ‘persuasive’.²³ It is, therefore, necessary to research court cases to know the law in practice.

¹⁵ See Liu and Zhao, *New Commentaries on Macau Laws* (n 6) 7–9, 18–21.

¹⁶ See I C Tong, *Macau Contract Law* (Kluwer Law International 2009) 21 (hereafter Tong, *Macau Contract Law*).

¹⁷ For changes brought about by the Macau Civil Code and a systemic comparison between the provisions on choice of law in Macau Civil Code and those in Portuguese Civil Code, see Rui Manuel Moura Ramos, ‘The Private International Law Rules of the New Special Administrative Region of Macau of the People’s Republic of China (2000) 60 *Louisiana Law Review* 1281 (hereafter Ramos, ‘Private International Law Rules’); for the citation, see the same article, at 1294.

¹⁸ Portugal historically belongs to the Continental European civil law family and the 1966 Portuguese Civil Code was strongly influenced by the German Civil Code and the 1942 Italian Civil Code, see Huang and Guo, *General Part of Private International Law in Macau* (n 6) 20, 29; Ramos, ‘Private International Law Rules’ (n 17) 1282.

¹⁹ Ramos, ‘Private International Law Rules’ (n 17) 1294.

²⁰ See Arts 13–23, Section I, Chapter III, Title I, Book I of the Macau Civil Code.

²¹ See Arts 24–62, Section II, Chapter III, Title I, Book I of the Macau Civil Code.

²² See Tong, *Macau Contract Law* (n 16) 22.

²³ For example, see Case 102/2006 decided by the Court of Second Instance (CSI). This is a case regarding recognition and enforcement of a non-local judgment. In making the decision, a series of earlier cases were cited as ‘authority’. In Macau, there are three tiers of Courts ie the Court of First Instance (CFI), the Court of Second Instance and the Court of Final Appeal (CFA). This case and other cases of CSI and CFA can be found at <<http://www.court.gov.mo/p/pdefault.htm>> accessed 8 June 2020. Court decisions in CFI are not reported in Macau. The position of court decisions in Portugal is pretty much the same, see D M Vicente, ‘Sources and General Principles of Portuguese Private International Law: An Outline’ in A Bonomi and P Volken (eds), *Yearbook of Private International Law*, vol IX 2007 (Sellier, European Law Publishers and Swiss Institute of Comparative Law 2008) 257, 259 (hereafter Vicente, ‘Sources and General Principles’).

Given that Macau is an open market and actively engaged in transactions with the neighbouring regions, such as Hong Kong, Taiwan, and Mainland China, as well as some foreign countries, PIL cases should not be and, actually, are not rare in Macau.²⁴ Nevertheless, one cannot find many court decisions thoroughly analyzing PIL issues, especially choice of law issues. A systematic research by the current author²⁵ found that most court decisions dealing with PIL issues in Macau are those regarding the recognition and enforcement of non-local judgments²⁶ and international jurisdiction,²⁷ whereas no case has been specifically analysing choice of law issues.²⁸ This phenomenon may be attributable to the following reasons: One is that many PIL cases may have been settled in the Court of First Instance (CFI) and did not go to the Court of Second Instance (CSI) and the Court of Final Appeal (CFA). One cannot find those cases because court decisions in CFI are not reported in Macau²⁹; a second reason is that, as has happened in other jurisdictions, many PIL cases may have been simply treated as 'domestic' cases by disregarding foreign elements and gone unnoticed as *lex fori* has simply been applied. Thus, the present author, regretfully, can only provide limited discussions according to the law in force.

Third, while legal doctrine developed by scholars in Macau is not a formal source of law, it may have influence on legislation and provide guidance for court decisions, as is the case with its former suzerain Portugal.³⁰ It is normal that courts in Macau seek guidance from scholarly commentaries and cite scholar's opinions in making their decisions.³¹ However, to be a lawyer or jurist in Macau was historically a privilege of Portuguese people.³² Although some local lawyers have been trained since the transition, local legal professionals are still far from being enough in Macau, let alone those specializing in PIL.³³ Scholarly materials relied on for interpreting laws are mostly from Portugal or translated from Portuguese yet.³⁴ In addition, quite a few Portuguese jurists have stayed after the handover and are still working in Macau. Therefore, it is so far the legal doctrines advocated by Portuguese scholars that still dominate in Macau.³⁵ In fact, given the unique geographical position and the strong cultural

²⁴ This view was shared by my colleagues such as Prof Io Cheng Tong who is teaching civil law and often reads some civil law cases, Mr Miguel Chan who was teaching civil procedure law and often read some cases respecting civil procedure law and Mr Henry Ho who is a lecturer in the law faculty.

²⁵ To write this chapter, the author has researched all the reported court decisions dealing with PIL issues in CSI and CFA since the handover.

²⁶ The author found tens of such cases for every year.

²⁷ The author found few such cases.

²⁸ However, in a case about international jurisdiction, to determine whether the Macau court had jurisdiction for the contractual liability, the court had to determine where the contractual obligation should have been performed, for the purpose of which, choice of law issues were touched superficially, see Case 4/2007 of CFA and Case 346/2006 of CSI.

²⁹ See n 23.

³⁰ See Huang and Guo, *General Part of Private International Law in Macau* (n 6) 12–13; Vicente, 'Sources and General Principles' (n 23) 259; Rui Manuel Moura Ramos, 'Portuguese Private International Law at the End of 20th Century: Progress or Regress?' in S C Symeonides (ed), *Private International Law at the End of the 20th Century: Progress or Regress?* (Kluwer Law International 2000) 349, 350–351 (hereafter Ramos, 'Portuguese Private International Law').

³¹ For example, see Case 99/2005 of CSI, 7; Case 102/2006 of CSI, 6; Case 346/2006 of CSI, 5; Case 2/2006 of CFA, 11, 13, 15, 18–22, 24; Case 4/2007 of CFA, 13–14, 16. One can see that scholars' opinions and publications have been extensively invoked in these cases.

³² See Liu and Zhao, *New Commentaries on Macau Laws* (n 6) 23.

³³ See Liu and Zhao, *New Commentaries on Macau Laws* (n 6) 23–24; Huang and Guo, *General Part of Private International Law in Macau* (n 6) 20; Jiao Hongchang, *Gangao Jibenfa (The Basic Laws of Hong Kong and Macau)* (Beijing Daxue Chubanshe 2007) 223, 232.

³⁴ This can be proven by the fact that in the cases cited in n 31, those quoted scholarly publications are mainly from Portugal.

³⁵ See n 31. See also JAF Godinho, *Macau Business Law and Legal System* (LexisNexis 2007), the Abstract of the book.

and economic ties Macau has with Mainland China, Hong Kong, Taiwan, and beyond in Southeast Asia, it is predictable that Macau should and will develop its own legal doctrines independent of those of Portugal.³⁶ However, a system of independent legal doctrines depends on a group of *mature* scholars' debating, meditating, and refining the laws and the legal theories, which, obviously, takes time³⁷ and has not been established in Macau yet.³⁸ No wonder that some said: 'Although we have local laws in Macau, we have no local legal doctrines [advanced by local legal scholars].'³⁹ Thus, realistically, one could not expect any innovative doctrine on contractual choice of law from Macau to be taken into discussion in the following text.

- 31.07** Fourth, although some revision has been made for the Macau Civil Code since its entry into force in 1999, so far there has not been any initiative to revise its conflicts system, let alone its contractual conflicts rules.⁴⁰ Regretfully, according to the current author's estimation, Principles on Choice of law in International Commercial Contracts (2015) (hereafter Hague Principles) as a whole or any part therein cannot be incorporated into Macau's legislation in the near future. Nevertheless, theoretically speaking, broadly accepted international customs and usages could be resorted to as 'persuasive authority' by Macau judges in judicial practice.⁴¹ Thus, once the Hague Principles have gained its popularity, it could be referred to in Macau cases as well.⁴²
- 31.08** Bearing these points in mind, the author will now turn to the specific comparisons between the Hague Principles and Macau law.

Article 1—Scope of the Principles

- 31.09** In Macau, the capacity of natural persons shall be governed by their personal laws⁴³ while matters involving the internal organization and administration of companies shall be governed by personal laws of the concerned corporates.⁴⁴ The legal relationships respecting agency, whether internal or external, has been given separate conflict rules that are different from those for international commercial contracts.⁴⁵ The issues of determining the applicable law for arbitration agreement and choice of court agreement have also been dealt with distinctly.⁴⁶

³⁶ For example, in the field of business, especially international trade, Macau law was influenced by Hong Kong law, see Huang and Guo, *General Part of Private International Law in Macau* (n 6) 1, 23, fn 2. In family matters, Macau was, *de facto*, influenced by Mainland China, owing to the ethnic and cultural ties.

³⁷ See IC Tong, *Minfa Jichu Lilun Yu Aomen Minfa De Yanjiu* (*A Study on the Basic Theories of Civil Law and Macau Civil Law*) (Zhongshan Daxue Chubanshe 2008) 271–272.

³⁸ *Ibid.*

³⁹ See Liu and Zhao, *New Commentaries on Macau Laws* (n 6) 23–24.

⁴⁰ See <<http://bo.io.gov.mo/bo/i/99/31/codcivcn/declei39.asp>> accessed 8 June 2020.

⁴¹ See Guangjian Tu, *Private International Law in Macau* (Macau Foundation/Social Science Publishing House 2013) 66 (hereafter Tu, *Private International Law in Macau*).

⁴² *Ibid.*

⁴³ See Art 24 of Macau Civil Code.

⁴⁴ See Art 31 of Macau Civil Code.

⁴⁵ See Art 38 of Macau Civil Code.

⁴⁶ See Art 29 of Macau Civil Procedure Code; Art 36 of Macau International Commercial Arbitration Law (Decree Law No 55/98/M), which basically has followed the UNCITRAL Model Law on International Commercial Arbitration (1985) (United Nations, Vienna).

Article 2—Freedom of Choice

Conflict of laws rules concerning international commercial contracts in Macau are stipulated in Articles 40 and 41 of the Macau Civil Code. Article 40(1) states that contractual obligations ‘are subject to the law, explicitly or implicitly, chosen by the parties’.⁴⁷ Therefore, the principle of party autonomy is generally respected in Macau law. However, nothing has been said about how to deal with ‘movable conflict’ ie whether the parties are allowed to change their choice and if so, when it is the latest time to do so⁴⁸ and whether *dépeçage* is permissible.⁴⁹ Although party autonomy is the basic principle for conflicts rules on contractual obligations, a limitation on the parties’ autonomy is set by Article 40(2), which provides that the law chosen by the parties must be ‘a law whose application fulfills a serious interest of the contractors or has a connection with one of the relevant elements of the legal act under private international law’.⁵⁰ In other words, one may say that the governing law chosen by the parties must have substantial interests in or connections with the case, which means the parties are prevented from choosing the law of a third country with which the case has no connection at all (a ‘neutral law’).⁵¹ **31.10**

Article 3—Rules of Law

The status of non-State law (‘rules of law’) is unclear in Macau. **31.11**

Article 4—Express and Tacit Choice

As already indicated above, the parties are not necessarily required to make a choice of law for their contract in an explicit way and they are allowed to do so implicitly.⁵² However, the practice has not clearly defined the distinction between an implicit choice of law and the absence of choice of law. The criteria delimiting an implicit choice are not established yet, although it is said that an implicit consent between the parties must be ‘visible’ from the circumstances of the case.⁵³ More specifically, a choice of court clause or arbitration agreement is not treated as a determinative factor of choice of law. Neither is it clear whether it should be taken as a relevant factor at all in this regard. Given the strong tendency of favoring the application of *lex fori* among Macau judges, the current author presumes that in a case where both of the parties invoke Macau law in the court proceedings, Macau law would be applied by accepting *de facto* an implicit choice of *lex fori* under the circumstances.⁵⁴ **31.12**

⁴⁷ These rules are applicable to obligations arising out of legal acts and the substance of legal acts. See Art 40(1).

⁴⁸ Art 3(2) of Rome Convention and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/06 (hereafter Rome I Regulation).

⁴⁹ Art 3(1) of the Rome Convention (n 7) and Rome I Regulation (n 48).

⁵⁰ See Art 40(2) of Macau Civil Code; Ramos, ‘Private International Law Rules’ (n 17) 1290.

⁵¹ There is no such limitation in Art 3 of the Rome Convention and Rome I Regulation but the application of mandatory rules of the European Community or a relevant country cannot be prejudiced, see Art 3(3) of the Rome Convention (n 7) and Art 3(3)(4) of the Rome I Regulation (n 48).

⁵² See Art 40(1) of Macau Civil Code; see also n 47 and accompanying text.

⁵³ See Art 40(1) of Macau Civil Code.

⁵⁴ See nn 25–30 and accompanying text.

Article 5—Formal Validity of the Choice of Law

- 31.13** As for the formal validity of a choice of law agreement, no particular conflict rule is devoted to this issue in Macau. However, according to the current author's view, a systematic reading of the conflict rules part in the Macau Civil Code indicates that it might be subject to the conflict rules dealing with the same issue for a legal act in general. Pursuant to this understanding, a choice of law agreement [legal act] shall be held as formally valid if it satisfies the requirements of the law applicable to the substantive validity of the choice of law agreement [legal act], those of the law of the place where the choice of law agreement [legal act] was made [done], or those of the law referred to by the conflicts rules of the place where the choice of law agreement [legal act] was made [done].⁵⁵

Article 6—Agreement on the Choice of Law and Battle of Forms

- 31.14** As to the substantive validity of a choice of law agreement, Macau law does not directly touch upon this issue, not even slightly. In the current author's view, the judge will presumably apply one of the following laws: the *lex fori*,⁵⁶ the law agreed upon by the parties to govern the main contract, ie, the law purportedly agreed to, or personal law of the concerned party.⁵⁷

Article 7—Severability

- 31.15** Generally speaking, a choice of law agreement could be regarded as being autonomous and independent of the main contract in Macau.⁵⁸ The invalidity of the main contract does not necessarily render a choice of law agreement invalid. A typical example, where one could figure out the invalidity of the main contract coincides with that of its choice of law agreement, is that one or both of the parties lack in legal capacity according to their personal laws.⁵⁹

Article 8—Exclusion of *renvoi*

- 31.16** The general principle in Macau conflicts system is that a foreign law pointed to by a Macau conflicts rule only refers to the domestic substantive law of a foreign country and does not include its conflicts rules.⁶⁰ Thus, it seems that *renvoi* has been rejected by Macau PIL on the whole. However, to meet the goal of international harmony of decisions, a simplified version of *renvoi* has been kept in Macau PIL as an aid tool. This is considered to allow, in some cases, to lead to the application of a law that engenders preferable and more favourable results.⁶¹

⁵⁵ See Art 35 of Macau Civil Code.

⁵⁶ See nn 25–30 and accompanying text.

⁵⁷ See Arts 24, 34, 40 of Macau Civil Code.

⁵⁸ See nn 41–42 and accompanying text.

⁵⁹ See nn 43–44 and accompanying text.

⁶⁰ See Art 15 of Macau Civil Code.

⁶¹ For the Portuguese version of *renvoi* and the differences between this version and the Macau one, see Ramos, 'Portuguese Private International Law' (n 30) 365–368; Ramos, 'Private International Law Rules' (n 17) 1284.

Renvoi can occur in one of the following situations: First, the conflicts rule of the law designated by the Macau conflicts rule points to another law and that law considers itself as applicable, ie, *transmission*.⁶² Second, the conflicts rule of the law designated by the Macau conflicts rule refers back to Macau domestic substantive law, ie, *remission*.⁶³ Nevertheless, the application of *renvoi* cannot disfavour the validity of legal acts or legal status.⁶⁴ Another limitation on *renvoi* which is exactly concerned with the present discussion is that this device has no role to play if the parties have made a choice for the applicable law in cases where party autonomy is permissible.⁶⁵ As a result, in the case of choice of law in contractual obligations, *renvoi* is excluded without providing the parties with the authority to choose the law of a country including its conflicts rules. 31.17

Article 9—Scope of the Chosen Law

To fully resolve the disputes concerning international commercial contracts, there are, at least, three laws that must be applied according to Macau conflicts system, ie, personal laws of the parties governing the legal capacity to enter into the contract respectively, the law governing the formal validity of the contract (legal act), and the law governing other issues.⁶⁶ Therefore, when one says that the law chosen by the parties shall be applicable to their contract, one means only those issues in the narrow sense of the contract, rather than in the broadest sense.⁶⁷ Apart from the issues of legal capacity and formal validity, all other substantive issues, however, shall be governed by the law chosen by the parties, such as the interpretation, the performance, rights and obligations, prescription and limitation period, etc.⁶⁸ 31.18

Article 10—Assignment

The Macau conflicts system does not prescribe any specific provision dealing with those issues related to the assignment of receivables or the like. 31.19

Article 11—Overriding Mandatory Rules and Public Policy (*ordre public*)

In the process of ‘localization’ of Macau law,⁶⁹ an article for overriding mandatory rules in general was introduced into the Macau Conflicts system, according to which the legal rules in Macau law that must be mandatorily applied pursuant to a specific object or objective shall prevail over a foreign applicable law designated by Macau conflicts rules, including its contractual conflicts rules.⁷⁰ Thus, it seems that the courts in Macau will only apply its own overriding mandatory rules, ie local overriding mandatory rules and not any of a third 31.20

⁶² In this kind of *renvoi*, there may be, even, four or more laws involved, see Huang and Guo, *General Part of Private International Law in Macau* (n 6) 104–110.

⁶³ See Art 16 of Macau Civil Code.

⁶⁴ See Art 17(1) of Macau Civil Code.

⁶⁵ See Art 17(2) of Macau Civil Code.

⁶⁶ See Arts 24, 35, and 40 of Macau Civil Code; see also nn 43–44, 55–57 and accompanying text.

⁶⁷ See Tu, *Private International Law in Macau* (n 41) 235.

⁶⁸ *Ibid.* See also Art 39 of Macau Civil Code.

⁶⁹ See nn 7–14 and accompanying text.

⁷⁰ See Art 21 of Macau Civil Code; Tu, *Private International Law in Macau* (n 41) 154.

country. A closer look, however, will find that overriding mandatory rules of a third country could be applied in cross-border cases concerning non-contractual obligations, where the law of common habitual residence of the parties is applied.⁷¹ Directly related to the present discussion is that a third country's overriding mandatory rules regarding formality of a legal act (including contract) could also be applied by Macau courts.⁷²

31.21 In Macau, there is not much to be said for 'public policy' because no cases have been reported so far with regard to how it was applied in practice, let alone a particular notion for it in the field of commercial law, although Article 20 of the Macau Civil Code recognizes this mechanism, as in many other jurisdictions.⁷³ It is still too early to say in which way the Macau courts will exercise this tool in the context of choice of law, whether defensively or offensively.⁷⁴ However, a holistic reading of Article 20 does give the impression that the Macau courts would apply this device defensively rather than offensively. This is because, on the one hand, the substantive rules of a foreign law designated by a Macau conflicts rule can be discarded only if the application of these foreign substantive rules will *significantly* offend the fundamental local principles and values. On the other hand, the relevant substantive rules in Macau law cannot replace those of the designated foreign law, insofar as some other suitable rules in that designated law could be applied to the case.⁷⁵

31.22 Macau conflicts system does not accept any application of foreign public policy.

Article 12—Establishment

31.23 In Macau, 'establishment' refers to the place of *de facto* central administration of the concerned legal entity.⁷⁶

Law Applicable in the Absence of Choice of Law by the Parties

31.24 In the absence of the parties' choice, Article 41 of the Macau Civil Code adopts the 'closest connection' test to find out the applicable law.⁷⁷ This is in contrast with its predecessor, which resorts to the law of the place where both parties have their habitual residence, and failing that, the law of the place of signing the contract or the law of the habitual residence of the party providing interests in a no-reward contract.⁷⁸ Nevertheless, there is no indication of how this test should be applied. Neither presumptive rules, as in the 1980 Rome Convention,

⁷¹ Under this situation, the mandatory rules in the law of the place where the disputed act was committed or where the damage sustained could be applied by Macau Courts, see Art 44 (3) of Macau Civil Code.

⁷² It is the mandatory rules of the country whose law governs the substance of the legal act that could be applied by Macau courts when the legal act could be formally valid according to the law of the place where the legal act was made or the law referred to by the conflicts rules of that place, see Art 35 of Macau Civil Code.

⁷³ See Art 20 of Macau Civil Code.

⁷⁴ In cases of recognition and enforcement of non-local judgments, there might be a tendency that Macau courts employ the tool of 'public policy' offensively in some cases. For example, see Case 29/2003 of CSI.

⁷⁵ See Art 20 of Macau Civil Code. The situation in Portugal is similar, see Ramos, 'Portuguese Private International Law' (n 30) 368–369.

⁷⁶ See Art 31 of Macau Civil Code; Tu, *Private International Law in Macau* (n 41) 210.

⁷⁷ The wording of Art 41, however, indicates a 'more closely connected' test but given a chain of candidate laws in PIL cases, this Art is essentially prescribing a 'most closely connected' test in the view of the present author.

⁷⁸ See Art 41 of Macau Civil Code; cf Art 42 of the Portuguese Civil Code; Ramos, 'Private International Law Rules' (n 17) 1290.

