Macau

By Prof. Dr. Tong Io Cheng
University of Macau

INTERNATIONAL ENCYCLOPAEDIA OF LAWS

– MACAU CONTRACT LAW

The Author

Tong Io Cheng was born in November 1972, in Zhongsan, China, and immigrated to Macau, where he made home, since 1979. He received his primary and secondary education in English, and the tertiary education (the Bachelor of Law Program) in University of Macau, in Portuguese. He then furthered his legal studies and obtained a Master degree in the Sun Yat-sen University, Guangzhou, and Ph.D, in the Chinese Academy of Social Sciences, Beijing, China, in the area of civil law.

Starting from 1998, he has been contracted as monitor by the faculty of law, giving lessons of Criminal Law to the second year students of the Bachelor of Law in Chinese language. He finished his internship in 2000, then registered as a Lawyer and invited to join as a partner in his law firm. At the mean time, he also finished the course of private notary administered by the Legal and Judicial Training Center of MSAR. Passing the examination, he was then appointed by the Macau Government as a Private Notary.

Owing to his strong academic interests, Tong Io Cheng suspended his professional career as a Lawyer and Private Notary in 2002, and joined the University of Macau as a full time academic. He was appointed associate professor in 2006. He is also the Coordinator of the Bachelor of Law Program in Chinese as well as the Director of Institute for Advanced Legal Studies. In 2007, he was appointed the member of Law Reform Consultative Committee of the Government of Macau Special Administrative Region of PRC; and in 2008, he was appointed the member of Chinese People's Political Consultative Committee, Jinan Committee.

In recent years, Tong Io Cheng has published two monographs, three books of translation, several book chapters and a number of papers in academic journals, in Chinese, Portuguese and English. He is also the executive coordinator of the "Journal of Juridical Science", a periodical published by the Faculty of Law of the University of Macau.

TABLE OF CONTENTS

Table of Abbreviations 9
Preface 10
General Introduction 11
§ 1.THE GENERAL BACKGROUND OF MACAU 11
I. Geography 11
II. Cultural Composition 11
III. Political System 11
§ 2. LEGAL FAMILY 15
§ 3. THE POSITION OF JUDICIARY 17
§ 4. DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW 19
§ 5. DISTINCTION BETWEEN CIVIL LAW AND COMMERCIAL LAW .. 21
Introduction To The Law Of Contracts 25
Chapter 1. The Notion of Contract 25
§ 1. GENERAL CONCERNS 25
§ 2. CONTRACT AS A JURIDICAL TRANSACTION AND A JURIDICAL FACT 25
§ 3. CONTRACT AS A SOURCE OF OBLIGATIONS 26
Chapter 2. Historical Background of the Macau Law of Contracts 27
§ 1. TERMINOLOGY AND ORIGIN 27
§ 2. THE SIGNIFICANCE OF NAPOLEON CODE TOWARDS MACAU CONTRACT LAW 27
Chapter 3. Classification of Contracts 29
§ 1. PRELIMINARY AND DEFINITIVE CONTRACTS 29
§ 2. CONSENSUAL CONTRACTS VS. SOLEMN OR FORMAL CONTRACTS 29
§ 3. CONSENSUAL CONTRACTS VS. REAL CONTRACTS 30
§ 4. SYNALLAGMATIC AND UNILATERAL CONTRACTS 31
§ 5. ONEROUS AND GRATUITOUS CONTRACTS 32
§ 6. COMMUTATIVE AND ALEATORY CONTRACTS 33
§ 7. OTHER CLASSIFICATIONS OF CONTRACTS 34
Chapter 4. Contracts and Torts 36
Chapter 5. Contract and Quasi Contracts 38
Chapter 6. Contract and the Law of Property 39
§ 1. GENERAL CONSIDERATIONS 39
§ 2. NO DISTINCTION BETWEEN LEGAL AND EQUITABLE OWNERSHIP 41
§ 3. CONVEYANCING 42
Chapter 7. Contract and Trust 44
Chapter 8. Good Faith and Fair Dealing 46
Chapter 9. Style of Drafting 48
Chapter 10. Sources of the Law of Contracts 49
§ 1. CODIFIED SOURCE 49

§ 2. NON-CODIFIED SOURCE 50
SELECTED BIBLIOGRAPHY 52
Part I. General Principles of the Law of Contract 60
Chapter 1. Formation of Contract 60
§ 1. GENERAL CONSIDERATIONS 60
§ 2. DECLARATION OF INTENT 60
§ 3. OFFER AND ACCEPTANCE 62
I. The Offer 63
II. The acceptance 67
III. Consideration 67
A. Consideration and causa are not requirements in Macau Law 67
B. Gratuitous Promises 68
C. Natural Obligations 68
§ 4. FORMAL AND EVIDENTIAL REQUIREMENTS 69
I. Formal requirements 69
A. Solemn contract 69
B. Kinds of legally required form 69
C. Function of the notary 70
II. Contracts and the law of Evidence 71
A. Documentary Evidence 73
B. Expertise 75
C. Judicial Inspection 75
D. Testimony 76
E. Presumptions 76
F. Statements under Oath and confession 78
III. Burden of Proof 78
§ 5. PRE-CONTRACTUAL LIABILITY AND NEGOTIATIONS 79
I. Introduction 80
II. Theoretical foundation of pre-contractual liability 80
III. Paradigmatic cases of pre-contractual liability 81
A. In the cases of invalid or ineffective contracts 81
B. In the cases of valid and effective contracts 81
C. In the cases when contracts are not concluded 81
IV. Concretization of pre-contractual duties 82
A. The pre-contractual duty to inform 82
B. The pre-contractual duty of loyalty 83
C. The pre-contractual duty of secret 83
V. Damages 83
Chapter 2. Conditions of Substantive Validity 85
§ 1. CAPACITY OF THE PARTIES 85
I. Introduction 85
II. Minors 85
III. Insanity 86
§ 2. LACK OF INTENT AND VICES OF INTENT 87
I. Introduction 87
II. Mistake 88

A. Mistake in the formation of will 89
B. Mistake in the declaration and its transmission 92
C. Mistake in the basis of transaction 93
III. Fraud 93
IV. Violence (duress) 94
V. Simulation 94
§ 3. OTHER CONDITIONS OF VALIDITY 98
I. The "object" of the rights of obligation 98
II. Laesio 100
§ 4. CONSEQUENCES OF A LACK OF SUBSTANTIVE VALIDITY 100
I. Invalidity: nullity and annulment 100
II. Retroactive effects of invalidity 101
III. Invalidity and the protection of third parties 102
Chapter 3. The Contents of a Contract 104
§ 1. DIFFERENT CONTRACTUAL CLAUSES 104
I. Introduction 104
II. Express and implied clauses of a contract 104
III. Standard clauses of contract 106
IV. Exemption clauses and limitation clauses 107
V. Penalty clauses 108
VI. Arbitration clauses 109
§ 2. INTERPRETATION 110
§ 3. CONDITIONAL CONTRACTS 111
I. Notion of condition and conditional contracts 111
II. Types of conditions 112
III. Requirements of a condition 112
IV. The effect of a pending condition and the verification and non-verification of a condition 112
V. Terms 113
Chapter 4. Privity of Contract 114
§ 1. THE RULE OF PRIVITY OF CONTRACT 114
I. Introduction 114
II. Contracts in favor of third parties 115
A. Notion and development 115
B. Rights and Duties of the Stipulator, the promisor and the third party 117
III. Contracts for person to be named 118
§ 2. TRANSFER OF CONTRACTUAL RIGHTS AND DUTIES 120
I. The assignment of credits 120
II. Sub-rogatio 121
III. The assignment of singular debt 122
IV. The transfer of contractual position 123
§ 3. SUBCONTRACTING 124
§ 4. OBLIGUE ACTION AND THE PAULIAN ACTION 125
I. The obligue action (sub-rogação do credor ao devedor) 125
II. The Paulian Action (impugnação pauliana) 125

Chapter 5. The Extinction of Contractual Obligations 127
§ 1. FULFILLMENT 127
I. Introduction 127
II. The notions of fulfillment and performance 127
III. Two important principles guiding the process of fulfillment 128
A. Fulfillment and the principle of good faith 128
B. The principle of punctuality 128
IV. Fulfillment and the completeness of performance 129
V. The conditions of a valid fulfillment 129
VI. Time and place of performance 131
VII. Who has to perform and to whom the performance shall be done 132
A. Who has to perform 132
B. To whom the performance shall be done 133
VIII. Evidence of fulfillment 133
§ 2. NON-FULFILLMENT 134
I. Introduction 134
II. Impossibility of fulfillment and delay not imputable to debtor 135
A. The impossibility of fulfillment not imputable to debtor 135
B. Delay in fulfillment not imputable to the debtor 136
III. Non-fulfillment and delay in fulfillment imputable to debtor 136
A. Non-fulfillment imputable to debtor 136
B. Delay imputable to debtor 137
IV. Creditor delay 139
§ 3. OTHER CAUSES OF EXTINCTION OF CONTRACTUAL OBLIGATIONS 141
I. Accord and satisfaction (dação em cumprimento) 141
II. Consigment of deposit (consignação em depósito) 141
III. Compensation (compensação) 142
IV. Novation (novação) 143
V. Remission (remissão) 143
VI. Confusion (confusão) 143
Chapter 6. Remedies 144
§ 1. INTRODUCTION 144
§ 2. COACTIVE ENFORCEMENT OF PERFORMANCE 144
§ 3. EXCEPTIO NON ADIMPLETI CONTRACTUS 146
§ 4. LIMITATION OF ACTIONS 146
§ 5. DAMAGES 147
Part II. Specific Contracts 150
Chapter 1. Agency 150
§ 1. INTRODUCTION 150
§ 2. VOLUNTARY REPRESENTATION AND PROXY 152
I. The regime of voluntary representation 152
II. Proxy (procuração) 153
§ 3. REPRESENTATION IN COMMERCIAL CONTRACTS 154
Chapter 2. Bailment 156
§ 1. GENERAL 156

§ 2. DEPOSITUM IN CIVIL LAW AS A BAILMENT 157
§ 3. BANK DEPOSIT 157
I. Bank deposit in general and money deposit 157
II. The deposit of securities 158
Chapter 3. Gaming and Betting 159
§ 1. NOTION AND CHARACTERISTICS 159
§ 2. EFFECTS 160
Chapter 4. Sale of Goods 163
§ 1. NOTION AND CHARACTERISTICS 163
§ 2. EFFECTS 164
I. Transfer of Ownership 165
II.Transfer of Risks 167
III. Obligation of the seller 168
IV. Obligation of the purchaser 169
§ 3. TYPICAL SITUATIONS OF DEFECTIVE FULFILLMENT OF SELLER 169
I. General 169
II. Sale of things of another's 170
III. Sale of things encumbered with burdens 171
IV. Sale of defective things 171
Chapter 5. Hire of Work and Services. Building Contracts 173
§ 1. GENERAL 173
§ 2. WORK CONTRACTS (INCLUDING BUILDING CONTRACTS) 174
§ 3. LABOR CONTRACTS 176
Chapter 6. Lease 177
§ 1. GENERAL 177
§ 2. FORM, TERM AND RIGHTS TO LEASE AN OBJECT 178
§ 3. RIGHTS AND OBLIGATIONS RESULTING FROM A CONTRACT OF LEASE 179
§ 4. RENT 179
§ 5. TRANSFER AND SUBLEASE 180
§ 6. TERMINATION OF LEASE 180
Chapter 7. Compromise Settlements 182
Chapter 8. Suretyship (Fiança) 183
§ 1. NOTION AND CHARACTERISTICS 183
§ 2. RELATIONS BETWEEN CREDITOR AND SURETY 184
§ 3. RELATIONS BETWEEN THE DEBTOR AND THE SURETY 185
§ 4. CO-SURETYSHIP AND EXTINGUISHMENT OF SURETYSHIP 185
Chapter 9. Pledges 186
Chapter 10. Loan 188
§ 1. General 188
§ 2. *Commodatum* 188
§ 3. *Mutuum* 189
Chapter 11. Government Contracts 190
§ 1. NOTION OF ADMINISTRATIVE CONTRACT 190
§ 2. THE PUBLIC ELEMENT OF ADMINISTRATIVE CONTRACTS 190

§ 3. FUNDAMENTAL TYPES OF ADMINISTRATIVE CONTRACTS 191
Chapter 12. Contract of Civil Partnership 193
Chapter 13. Quasi-Contracts 195
§ 1.UNJUST ENRICHMENT 195
§ 2. NEGOTIORUM GESTIO 196
Index 198

Table of Abbreviations

Ac.	Acórdão
AEFDM	Associação dos Estudantes da Faculdade de Direito da Universidade de Macau
APAPM	Administração. Revista da Administração Pública de Macau (billingual magazine in Portuguese and Chinese)
Art.	Article
BFDUM	Boletim da Faculdade de Direito da Universidade de Macau
BMJ	Boletim do Ministério da Justiça (Portugal)
FDUM	Faculdade de Direito da Universidade de Macau
CISG	Convention on the International Sale of Goods
C.Com	Macau Commercial Code
C.C.	Macau Civil Code
CPAM	Código de Procedimento Administrativo de Macau
CPACM	Código de Processo Administrativo Contencionso de Macau
ECUPL	East China University of Political Science and Law
JJS	Journal of Juridical Science
LBOJM	Lei de Bases da Organização Judiciária de Macau
MSAR	Macau Special Administrative Region
PRC	People's Republic of China
RLJ	Revista de Legislação e de Jurisprudência (Portugal)
ROA	Revista da Ordem dos Advogados (Portugal)
STJ	Supremo Tribunal de Justiça (Portugal)
TA	Administrative Court
TIC	Criminal Examining Magistracy
TJB	Court of First Instance
TSI	Court of Second Instance
TUI	Court of Final Appeal

Preface

This monograph is written for those who have an interest in Macau contract law, especially those who would like to do their reading in English. The purpose of this work is to provide the reader with a primary guide to the Macau contract law, therefore its nature basically introductory, rarely any topic is treated in full detail.

Since contract law is a sub-branch of Civil Law, and the latter a source of law embedded in a rigid system and encumbered with a heavy burden of tradition, it is difficult to explain a solution in positive law without going into a suitable background or historical description. On the other hand, in view of the status of Macau being an independent jurisdiction, we have paid special attention to the solutions which are particular in Macau Law. For the purpose, local discussions of related topics and local court decisions are frequently cited in this monograph.

In the writing of this book, Ms. Ng Lai Chan, my dear wife, has given me a lot of assistance. It is her who has taken care of the formatting of everything, and assisted in the preparation of the section on Lease contract. Without her help, this work shall not exist.

Although Chinese and Portuguese are both the official languages of Macau, in legal discourse, scholars and professionals using either one of the official languages hardly find a chance to communicate directly with one another. By this work, the author carries an extra wish: to show the jurists using only the Chinese language how Portuguese scholars think; and to show jurists using only the Portuguese language how the Chinese jurists interpret this same set of law.

Tong Io Cheng
Faculty of Law, University of Macau

General Introduction

§ 1.THE GENERAL BACKGROUND OF MACAU

I. Geography

1. Macau is a small city neighboring Hong Kong and Zhuhai. It covers an area of 27.3 square kilometers, more or less one-fortieth of Hong Kong and one twenty-third of Singapore. The broad concept Macau consists of the Macau peninsula and the two islands, Taipa and Coloane. Three bridges - Nobre de Carvalho Bridge, Friendship Bridge (Ponte da Amizade) and Sai Van Bridge - link the peninsula to Taipa, while the two islands are linked by the six-lane 2.2km Taipa-Coloane Causeway.

The population of Macau was estimated to be 482,000 as in September 2005. Population density is over 17,000/km2, and the northern part of the peninsula is one of the most densely populated areas in the world.[1]

II. Cultural Composition

2. Despite being a small city, Macau has been one of the most important hubs for Eastern and Western cultures for the last four centuries, making the Macau of today a unique heritage of cultural merge, reflected in its architectures, religious rituals, customs and cuisines.

The 2001 census puts Macau's population at 435,000, 95% of Chinese nationality, 2% Portuguese and 1% Filipinos.[2]

The official languages of Macau are Chinese and Portuguese, while English is generally used in the commercial sector.

III. Political System

3. The Government of the People's Republic of China resumed exercising sovereignty over Macau on 20th December 1999 when the Special Administrative Region of Macau was established in accordance with the Article 31 of the Constitution of the People's Republic of China. Since then, the political system of Macau SAR as well as the fundamental rights of Macau residents is guaranteed by the Basic Law.

The article 5 of the MSAR Basic Law provides: *"The socialist system and policy shall not be practiced in the MSAR, and previous capitalist system and way of life shall remain unchanged for 50 years".* According to the spirit of Basic Law (which reflects in numerous articles), Macau shall be governed by Macau people. For this reason, the

[1] See http://www.gov.mo; Fan Jianhong, A.D. Pereira, International Encyclopaedia of Law - Macau Commercial and Economic Law, Kluwer Law International, pg. 17.

[2] See http://www.gov.mo.

executive organs and the legislature of the Macau Special Administrative Region shall be composed of local residents of Macau. According to the Basic Law, the definition of Macau people refers to the permanent residents of the Macau Special Administrative Region, including the Chinese, Portuguese and other people who meet the qualifications of the Basic Law.

The Chief Executive, principal officials, members of the Executive Council and the Legislative Council, the President of the Court of Final Appeal and the Procurator-General of the Macau Special Administrative Region must be permanent residents of the Region. Some of these posts can only be assumed by the Chinese citizens among the permanent residents in Macau.

*4.*Under Basic Law, the Macau SAR enjoys a high degree of autonomy, and the Central Government will not interfere in the affairs that fall within the scope of autonomy of the Macau Special Administrative Region. The high degree of autonomy to be exercised by the Region includes the administrative power, legislative power and independent judicial power including the power of final adjudication. However, a high degree of autonomy does not mean complete autonomy. To safeguard China unification and uphold state sovereignty and territorial integrity, the Central government retains necessary power over the Macau Special Administrative Region. For instance, the Central People Government shall be responsible for the foreign affairs and defence relating to the Macau Special Administrative Region.

Executive Structure: The Government of the Macau Special Administrative Region is the executive authority of the Macau Special Administrative Region. The Chief Executive is the head of the Government, and General Secretariats, Directorates of Services, Departments and Divisions are established in the Government of MSAR. The principal officials of the Macau Special Administrative Region shall be Chinese citizens who are permanent residents of the Region and have ordinarily resided in Macau for a continuous period of not less than fifteen years. The Government of the Macau Special Administrative Region is responsible for formulating and implementing policies; conducting administrative affairs; conducting external affairs as authorised by the Central People's Government under the Basic Law; drawing up and introducing budgets and final accounts; introducing bills and motions and drafting administrative regulations; and designating officials to sit in on the meetings of the Legislative Council to hear opinions or to speak on behalf of the government. The Government of the Macau Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; and it shall answer questions raised by members of the Council. The Chief Executive of the Macau Special Administrative Region is the head of the Macau Special Administrative Region and is accountable to the Central People's Government and the Macau Special Administrative Region.

The Chief Executive of the Macau Special Administrative Region shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the Region and has ordinarily resided in Macau for a continuous period of not less than 20 years. The Chief Executive is selected by election or through consultations held locally and is appointed by the Central People's Government. The term of office of the Chief Executive is five years and may serve for not more than two consecutive terms. The Chief Executive is

responsible for leading the government of the Macau Special Administrative Region; implementing the Basic Law and other laws which apply in the Macau Special Administrative Region; signing bills passed by the Legislative Council and promulgating laws; signing budgets passed by the Legislative Council and report the budgets and final accounts to the Central People's Government for the record; deciding on government policies and issuing executive orders; formulating the administrative regulations and promulgating them for implementation; nominating and reporting to the Central People's Government for appointment the Secretaries, Commissioner against Corruption, the Director of Audit, the leading members of the Police and the Customs and Excise, and recommending to the Central People's Government the removal of the above-mentioned officials; appointing part of the members of the Legislative Council; appointing or removing members of the Executive Council; nominating and reporting to the Central People's Government for appointment of the Procurator-General and recommending to the Central People's Government the removal of the Procurator-General; appointing or removing presidents and judges of the courts at all levels, procurators, holders of public office and, under certain circumstances, dissolving the Legislative Council.

The Executive Council: The Executive Council of the Macau Special Administrative Region is an organ for assisting the Chief Executive in policy-making. The Executive Council is presided over by the Chief Executive and meets at least once a month. Its members are appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. The Executive Council is composed of seven to eleven persons. The Chief Executive may, as he or she deems necessary, invite other persons concerned to sit in on meetings of the Executive Council.

The Legislature: The majority of the members of the Legislative Council of the Macau Special Administrative Region, which is composed of permanent residents of the Region, are elected. The term of office of the Legislative Council of the Macau Special Administrative Region is four years, except for the first term. In the first term that was finished on September 2001, the Legislative Council consists of 23 members, 8 of who are returned through direct elections, 8 returned through indirect elections and 7 appointed by the Chief Executive. In the second term, which was initiated in October 2001 and last until the year 2005, the Legislative Council shall be composed of 27 members, of whom 10 are returned through direct elections, 10 are returned through indirect elections and 7 appointed by the Chief Executive. In the third and subsequent terms, the Legislative Council shall consist of 29 members of whom 12 shall be returned through direct elections, 10 returned through indirect elections and 7 appointed by the Chief Executive. The Legislative Council of Macau has a President and a Vice-President who are elected by and from among the members of the Legislative Council. The President and Vice-President of the Legislative Council are Chinese citizens who are permanent residents of the Macau Special Administrative Region and have ordinarily resided in Macau for a continuous period of not less than fifteen years. The Legislative Council has powers to enact, amend, suspend or repeal laws; to examine and approve budgets introduced by the government; and to examine the report on audit introduced by the government. The Legislative Council is also responsible for deciding on taxation according to government motions and approve debts to be undertaken by the government; and to receive and debate the policy addresses of the Chief Executive and to

debate any issue concerning the public interests. Under certain circumstances, the Legislative Council may pass a motion to impeach the Chief Executive by a two thirds majority of all its members and report it to the Central People's Government for decision.[3]

[3] Ibid.

§ 2. LEGAL FAMILY

5. Among comparative lawyers, there is a tendency of classifying certain legal system into different legal families. It is however worthwhile to notice that the concept of "legal family" itself is relative and susceptible of different definitions and interpretations.

Traditionally, continental legal systems are in turn classified into Latin Legal family and Germanic Legal Family in line with the characteristics of their respective Civil Code. Such a criterion is obviously insufficient and inadequate, since each legal system is composed by a bundle of legislations, being the main body compiled into Codes with different nature and classified into different Branches; and the heritage of any of such Codes or even a Chapter of those Codes may have its own path.

In the case of Macau, Article 8 of the Basic Law provides that: "*The laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, except for any that contravenes this law, or subject to any amendment by the legislature or other relevant organs of the MSAR in accordance with legal procedures.*[4]"

It was under such constitutional guarantees that the Macau legal system succeeded the majority of Portuguese law in force immediately before the transition of sovereignty, and the foundation of Portuguese legal system is therefore maintained. The process of succeeding Portuguese Law in the transition period is called the localization of Law. Till the fortnight of transition, i.e., the 20th December 1999, Macau has already elaborated its own Penal Code, Criminal Procedural Code, Civil Code, Civil Procedural Code and Commercial Code, collectively known as the "Five Codes", forming the authoritative framework of Macau's legal system. As to illustrate the relation between Portuguese Law and Macau Law after localization, we can take the Civil Code as example. After the process of localization, the Macau Civil Code retains almost 90% of the content of the original Portuguese Civil Code of 1966.

It is therefore fare to say that Macau legal system, at least in the area of civil law, and the Portuguese legal system remain substantially similar. As a member of the Civil Law family, the Portuguese Civil Code had formally adopted the model of the German Civil Code (the **Pandect System**), which contains a General Part, and specific parts with four divisions, namely, Things, Obligations, Family and Succession[5]. Some modern legal concepts and techniques, such as juridical person, juridical relationship, and juridical transaction etc., developed by German jurists were adopted in the Portuguese Code. However, if anyone concludes from the above formal aspects that the Portuguese Civil Code (or Macau Civil Code) is a true follower of the German Civil Code, it might be arguably an over simplification. Notwithstanding its formal and technical similarities with the German Civil Code, a famous scholar of comparative law, Konrad Zweigert, insists classifying the Portuguese Civil Code as a member of the Roman Law family and

[4] Macau basic law, article 8.

[5] For an introduction of the General Part of the Macau Civil Code, see Paula Nunes Correia, Temas de Direito Civil no Retorno de Macau à Soberania Chinesa – Questões Emergentes da Parte Geral do Código Civil: Breve Análise, in BFDUM, ano IX, n° 19, 2005, pp. 211 ss.

not the Germanic family[6].

6. In certain aspects, such an impression is not without ground. In the sector Real Rights (Direitos Reais), the Macau (Portuguese) Civil Code neither adopts the Principle of Abstraction - which is renowned as a characteristic of German Law - in the transfer of ownership; nor the objective concept of possession. In the sector of Obligations, the Portuguese Civil Code of 1966 stipulates in detail the regime of "preliminary contract", which is quite unknown in the German Civil Code. In the areas of Family and Succession, the Portuguese Civil Code preserves a number of conservative and traditional rules commonly found in Southern European jurisdictions. Microscopically, taking into consideration the overall and substantial content of the Macau (Portuguese) Civil Code, an attentive lawyer may easily recognize the trace of both the Italian Civil Code and the French Civil Code[7].

Without going into further detail, one may conclude that the Macau legal system belongs to the Civil Law Family, which legal rules are mainly made up of statutory law; its Civil Code has benefited from the modern legal science developed from the basis of Roman Law by the French, German, and Italian lawyers.

[6] Konrad Zweitgert und Hein Kötz, Einführung in die Rechtsvergleichung, auf dem Gebiete des Privatrechts, Band I: Grundlagen, Chinese Version, pg. 166-167, Law Press, 2003.

[7] This part mainly reproduced what we have said in Macau Civil Law, in "A New Study on Macau Law", Edited by Liu Gaolong/Zhao Guoqiang, Vol. I, Macau Foundation, 2005, pp.187-188.

§ 3. THE POSITION OF JUDICIARY

7. The Basic Law (article 82 to article 94) gives the MSAR independent judicial power, including the power of final adjudication. The courts of the MSAR exercise judicial power independently and are subordinated to nothing but the law. The MSAR has the Court of First Instance (TJB), the Court of Second Instance (TSI) and the Court of Final Appeal (TUI). The structure, powers and functions of the courts are established by law. The Court of First Instance is the basic court and includes the Criminal Examining Magistracy (TIC) and the Administrative Court (TA), which, if necessary, can be given special powers. The Basic Court has specialized, specific jurisdiction.

The judges of the courts of the MSAR at all levels are appointed by the Chief Executive, on the recommendation of an independent commission composed of local judges, lawyers and eminent persons. Judges are chosen on the basis of their professional qualifications and qualified judges of foreign nationality may also be employed. Hence, some Portuguese judges have remained working in the service of the territory.

The Presidents of the courts of the MSAR at all levels are appointed by the Chief Executive from amongst the judges of the courts: the President of the Court of Final Appeal must be a Chinese citizen who is a permanent resident of the MSAR.

The Procuratorate (Public Prosecutions Office) of the MSAR exercises its functions as vested by law, independently and free from any interference. The Procurator-General is nominated by the Chief Executive and appointed by the Central People's Government and must be a Chinese citizen who is a permanent resident of the MSAR. Procurators are nominated by the Procurator-General and appointed by the Chief Executive. The structure, powers and operation of the Procuratorate are prescribed by law.

In Macau, the decisions of courts are not source of law. In principle, courts are not required to follow previous decision, be it a decision of a court of the same instance or of the higher instance. Very recently, in a case of labor dispute, the Court of Second Instance of Macau has openly declared that it cannot concord with the different opinion of the Court of Final Appeal[8] on exactly the same issue.

The decisions of the Court of Second Instance and Court of Final Appeal shall be published into collections, but it generally takes one or two years after a decision is made. In order for the public to have early access to those decisions, the Macau Courts have made available the electronic consultation of their web page.

8. In case the parties in dispute have already inserted a clause of arbitration[9] in their contract or reached an agreement before or after the contract, they can submit their dispute to arbitration. In Macau, the law regulating the arbitration system is DL 29/96/M. According to that regime, an arbitration agreement can either appear in the form of an

---

[8] TSI Ac. 409/2008, dated 03-07-2008. In this decision, the divergence of opinion focus on the interpretation of the principle of "*favor laboratoris*". The original statement of the court is the following: "*não o pode concordar com toda a opinião diversa no assunto, mormente constante no recente douto Acórdão do Venerando Tribunal de Última Instância, de 11 de Junho de 2008 no seu processo nº 14/2008 (a propósito de uma declaração de teor idêntico à dos presentes autos)....*".

[9] About the nature and effect of an arbitration clause, see *infra*, Part I, Chapter 3.

independent agreement or as a clause inserted to a contract (article 4, 2). In any case, the agreement should be concluded in a writer form, otherwise it shall be null (article 6).

Although an arbitration clause or agreement is in principle valid according to Macau Law, and several organizations of arbitration (including the Arbitration Centre of the Lawyers Association, the Voluntary Arbitration Centre of the World Trade Centre, the Arbitration Centre set up under the Consumer Council, Arbitration Centre set up under the Works department etc.) were already established for years, in contract matters, the contracting parties rarely rely on the mechanism of arbitration.

The Macau judiciary organization has never created an independent structure for Arbitration Court. The enforcement of the arbitral award should be done in the Court of First Instance according to the normal procedure of execution provided by the Macau Code of Civil Procedure. The party being executed may also oppose the execution according to the Civil Procedure Law (article 36).

§ 4. DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW

9. For law students in Macau, the distinction of law into public and private law (and the hybrid cases which possess the characteristics of both) is the elementary and mandatory content of their program, either in the first year or in the second year of their studies. As to the criteria of distinction, there are a number of theories available, among those the most commonly used ones are the *theory of interests*, the *theory of supremacy and subordination*, and the *theory of the position of agents in the juristic relation*.[10]

From a systematical point of view, according to the above theories, civil law is considered as a branch of private law[11] and law of obligations a sub-branch of civil law, while contract is a source of obligations. From a historical point of view, the institute of contract first appeared in the private sector. Nevertheless, such an institute was later on adopted also by the public law in numerous sectors, namely, administrative contract, international conventions, collective bargaining etc.[12] At the beginning, the transplant of contract from private law to public law has attracted a wide range of debate, while nowadays, in line with the attitude of positive law, such debates gradually died out.

*10.*In relation to Macau law, the "Código de Procedimento Administrativo" explicitly regulates the regimen of Administrative Contract (article 157 ss of the "Código de Procedimento Administrativo"). Since the capacity of all legal entities (among them includes all public legal person) follows the principle of speciality, a public juridical person can only practice an act which corresponds to its purpose (the pursuance of public interests). It is obvious that all public juridical persons are bound to pursue public interest.

Whenever a contract concluded by public party is classified as administrative contract, the rules governing the contract will not be totally the same as those governing a contract made by two individuals. First of all, it is the administrative law that grants the competency for the public legal persons to decide whether they should contract or not; secondly, it is also the administrative law that determines the contracting terms and conditions; finally, in those cases, the general principles of administrative law shall apply[13].

An administrative contract shall in turn be distinguished from a contract concluded by the Government in the private sector. Whenever the Government practices an act in the private sector, it will lose its position of supremacy, and will stand in the equal base before the individual.

*11.*The critical question in the matter of contract in administrative law is about how to qualify a contract as an administrative contract. For this purpose, Macau administrative law (in article 157, point 2, of the "Código de Procedimento

---

[10] Details of these three theories please see Carlos Mota Pinto, Teoria Geral do Direito Civil, 4ª Edição por António Pinto Monteiro e Paulo Mota Pinto, Coimbra Editora, 2005, pg. 36-40.

[11] In accordance with the classification of José de Oliveira Ascensão, O Direito – Introdução e Teoria Geral, Almedina, 7ª Ediçao, 1993, pp.328-329.

[12] See Inocêncio Galvão Telles, Manual dos Contratos em Geral, 4ª Edição, Coimbra Editora, 2002, pg. 57.

[13] See Lino José Baptista Rodrigues Ribeiro/ José Cândido de Pinho, Código do Procedimento Administrativo de Macau Anotado e Comentato, Fundação de Macau e Direcção dos Serviços de Administração e Função Pública, 1998, pg. 904-905.

Administrativo") has done a good job by listing the most important types of administrative contracts, namely, contract for public works; contract for the granting public works; contract for granting of public services; contract for granting the operation of gaming; contract for providing services for immediate purpose of public utility. Nevertheless, such a list is not *numerus clausus*. One can always qualify a contract not listed here as administrative contract, as long as they meet the relevant criteria for the purpose[14].

In Macau, the jurisdiction of administrative contracts has been an object of discussion, and the law regulating this issue has changed its position for several times (Diploma Legislativo no. 43, of 17/8/27; DL no. 23 229, of 30/12/33; DL no. 129/84, of 26/4; and the Lei no. 112/91 of 29/8, Lei de Bases da Organização Judiciária de Macau).

It is the Lei de Bases da Organização Judiciária de Macau (LBOJM), still in force after 1999, which provides clearly that the Administrative Court has jurisdiction on "administrative juridical relations"[15](which includes administrative contracts).

[14] Details of those criteria (the subordination relation, object of the contract, pursuance of a purpose of immediate public utilities etc..), please see José Baptista Rodrigues Ribeiro/ José Cândido de Pinho, Código do Procedimento Administrativo de Macau Anotado e Comentato, Fundação de Macau e Direcção dos Serviços de Administração e Função Pública, 1998, pg. 910-915.

[15] Article 9, no. 1 and 2, point g, of the Lei de Bases da Organização Judiciária de Macau.

§ 5. DISTINCTION BETWEEN CIVIL LAW AND COMMERCIAL LAW

12. In Macau, the professional activities of commercial enterprises are in principle governed by rules found in the Commercial Code. The separation of commercial law from civil law has been controversial; it is hard to say whether the trend is to unify the legal issues of the private sector in a Civil Code or to have separately one Civil Code and one Commercial Code.

The separation of Commercial Law from Civil Law is a result of historical evolution, which can be traced back to the Middle Age. In Roman Law, there is no special law for trading or commerce, the legal rules of Roman private law both applied to general civic activities and to commercial activities. There were several reasons that the Roman Lawyers never felt the needs to develop a separate set of Commercial law: 1) the classical Roman Law is of case law nature, it has enough flexibility to satisfy the need of commercial exchange; 2) in the classical period, merchants did not have a high social rank, or in another word, they did not form a strong class in the way that the Government should consider their special interest.

Before the eleventh century, merchants in Europe had been an isolated group, and were largely itinerant peddlers. Starting from 1050, the urban population of Western Europe increased drastically. Along side the expansion of urban population is the expansion of the merchant team. According to the estimation of Harold J. Berman, the number of merchants expanded from a few thousand to a few hundred thousand[16]. In line with such a quick expansion, the surviving Roman civil law is not adequate to solve the kinds of domestic and international commercial problems that arose in Western Europe in the late eleventh and twelveth centuries. The learned Romanists in the European universities were then forced to develop a body of law, tailor-made for merchants and for commercial activities, out of the Roman texts. Such rules first appeared in the form of commercial customs; gradually, these customs were collected and circulated. For example, the collection of maritime laws (the Amalfitan Table) by the Republic of Amalfi on the Italian coast, in 1095; the adoption of the Laws of Wisby in 1350, etc. At the same time, a large body of law was created to govern overland trade. The Italian cities took the lead in collecting systematically and enacting the customary rules by which commercial activity was governed. A new branch of law was then created to govern a **special class** of people (the merchants) in special places (fairs, markets and seaports)[17]. However, in the whole period of Middle Age, the merchant law never managed to separate completely from the Civil Law and never formed a Code of itself in the modern sense. The real independence of commercial law (namely, the elaboration of a Commercial Code) happened in the modern time.

13. As you may see, the merchant law developed in the Middle Age was the law of a special class. This idea of class was suppressed during the French Revolution. In line

[16] See Harold J. Berman, Law and Revolution – the Formation of Western Legal Tradition, tenth print, 1999, Harvard University Press, pg. 335.

[17] See Harold J. Berman, Law and Revolution – the Formation of Western Legal Tradition, tenth print, 1999, Harvard University Press, pg. 339-340.

with the revolutionary spirit, the first Commercial Code (French Commercial Code of 1807) was created with the objectives to promote freedom of trade and to extinguish the monopoly of merchant communities. Different from the Lex Mercatoria developed in the Middle Age, the foundation of French Commercial Code now rests on the objective commercial acts. Instead of being a law mainly applicable to the class of merchant, the new French Commercial Code is applicable to anybody, as long as he practices an act which is objectively qualified as commercial. Therefore, the criterion of distinction between Civil Law and Commercial Law changed from the subject (the agent) of the acts to the acts itself, objectively considered. The defendants of the subjective concept of commercial will say: Commercial law governs the merchants and acts of merchants related to his business; while the defendant of the objective concept of commercial law may say: commercial law governs the acts of commerce, regardless of its agent being a merchant or not. Actually, there is no clear cut between the subjective concept and the objective concept. For the subjective one, it relies on the concept of merchant. However, someone only acquires the quality of merchant when he practices habitual and professionally the acts of commerce. On the other hand, not any acts practiced by merchants are ruled by the commercial law, but only those related to his profession. Therefore, on classifying which acts are related to the commercial profession, lawyers had already unconsciously admitted the objective concept of commercial law. For the objective concept, there are also critiques. First of all, it is difficult to define what the act of commerce is; there are acts (i.e., mandate, loan, warranty etc.) qualified as acts of commerce not because of their nature, but because of their subordination to some other principle acts of commerce. It is also not advisable to restrict the application of commercial law to the so called principle acts of commerce, since this strict criterion will rule out many important sectors – for example, banking and insurance - in the world of commerce, making the commercial law a specific law of commercial exchange. Secondly, it is also not true that any acts of commerce should be governed by commercial law; only professional acts of commerce should earn this special treatment.[18] On the other hand, there are cases where the acts of commerce is mitigated – being commercial only for one party of the contract.

14. As reactions to the critiques against the subjective and objective conception, there are mainly two orientations: 1) theories suggesting the abolishment of an independent commercial law and the unification of such rules into the Civil Code; 2) develop other orientations to overcome those difficulties.

The first of the above orientation presented as main arguments the following two points: 1) the concept of acts of commerce is not clear, there is no criterion to qualify an act as act of commerce; 2) the generalization of some legal institutes (such as bill of exchange, company etc.) originally used exclusively in commercial sectors, and the direct consequence of this phenomenon is the infiltration into Civil Law, of certain principles and values (such as protection of credit, protection of third parties, rapidness of transaction etc.) traditionally considered as characteristics of commercial law.

The second orientation insists to defend the autonomy of Commercial Law. Instead of relying on the concept of merchant, writers defending this new orientation observed that, as the development of economy goes on and on, commerce in massive dimension is generally practiced by organizations; these organizations are the real agent (subject) in

[18] See A. Ferrer Correia, Lições de Direito Comercial, Lex, 1994 (reprint of 1968), pgs. 13 – 18.

commercial relations. In line with this new concept, commercial law should also turn its direction; in the sense to provide legal mechanisms to solve the concrete problems of these organizations, namely, the commercial enterprises[19].

15. In view of the above, some writers suggest that the concept of commercial law should be substituted by the law of enterprises. However, such an orientation may lead to the conclusion to exclude many institutes (such as bill of exchange, stock exchange etc.) traditionally regulated by the commercial law. On the other hand, commercial law is typically a private law, while the laws related to the operations of enterprises are of different natures (includes at least labor law, administrative law, tax law etc.). Additionally, we cannot forget that not all enterprises are of commercial natures, and to those enterprises, the commercial law should not apply. Therefore, the author of the project of Macau Commercial Code, Augusto Garcia, reiterating the orientation of Orlando de Carvalho, affirms that the new commercial law is more than a law of the enterprises, but a law built around the enterprises[20]. Nevertheless, even though the formula "a law built around the enterprises" bears the intention to surpass the difficulties found in the classical distinction of subjective concept and objective concept, we cannot help admitting that this new concept absolved the essence of both.

Under this orientation (of Commercial Law being a law built around the enterprises), the Macau legislator decided to maintain a Commercial Code separated from its Civil Code. The starting point and foundation of this new system, unlike the previous system (Portuguese Commercial Code of 1888) which fluctuated between the subjective concept and objective concept, are the concept of "entrepreneur", "enterprises" and their relations with the acts of commerce, which definitions are as the following[21]:

> *Article 1 (Commercial entrepreneurs)*
>
> *Commercial entrepreneurs are: a) individuals and collective persons which, in their own name, themselves or through third parties, exercise a commercial enterprise; b) commercial companies.*
>
> *Article 2 (Commercial enterprise)*
>
> 1. *A commercial enterprise is any organization of productive factors for the exercise of an economic activity aimed at production for systematic and lucrative exchange, namely:*
>   a) *industrial activity for the production of goods or services;*
>   b) *activity of intermediation in the circulation of goods;*
>   c) *transport activity;*
>   d) *banking and insurance activity;*
>   e) *activities auxiliary to the above mentioned ones.*
> 2. *The organization of factors of production for the exercise of an economic activity which is not separable from the person exercising*

[19] See Augusto Teixeira Garcia, Nota Justificativa do Código Comercial de Macau, Imprensa Oficial, 2000, pg. IX-XI; Orlando de Carvalho, Critério e estrutura do estabelecimento comercial, Coimbra, 1967, pg. 120; A. Ferrer Correia, Lições de Direito Comercial, Lex, 1994 (reprint of 1968), pgs. 22.

[20] See Augusto Teixeira Garcia, Nota Justificativa do Código Comercial de Macau, Imprensa Oficial, 2000, pg. IX; Orlando de Carvalho, Critério e estrutura do estabelecimento comercial, Coimbra, 1967, pg. 120.

[21] The English translation of the cited articles (as well as the whole Commercial Code) was done by Jorge A. F. Godinho.

it is not considered a commercial enterprise.

Article 3 (Acts of commerce)

1. *The following are considered acts of commerce:*
   a) *acts especially regulated in the law as a result of the special needs of commercial enterprises, namely those mentioned in this Code, and analogous acts;*
   b) *acts practiced in the exercise of a commercial enterprise.*
2. *The acts practiced by a commercial entrepreneur are considered as being in the exercise of the respective enterprise, if from such acts or from the circumstances surrounding their practice the opposite does not emerge.*

16. Regardless of the separation of Commercial Code from the Civil Code, the latter always maintains as the subsidiary law, applicable when a case is not ruled by the Commercial Code and the application of legal rules from the Civil Code does not contradict the principles of Commercial Law (article 4 of the Macau Commercial Code of 1999).

As far as contract is concerned, many typical contracts of business life (such as commercial sale, supply contract, banking transactions, contract of carriage, commission contract, forwarding contract, agency contract, commercial concession contract, franchising contract, brokerage contracts, advertising contracts etc.) have been collected into the commercial code.

Doubtlessly, the importance of distinction between Civil law and Commercial law has diminished[22], but there are still substantial significance which can be found in the Macau law and thus worth our attention. For example, the law of bankruptcy applies exclusively to merchants (articles 1082-1194 of the Macau Civil Procedure Code); the joint and several liability of spouses resulted from professional commercial activities (article 1558, d) of the Macau Civil Code) etc.

The Swiss Law of Obligations of 1907 and the Italian Civil Code of 1942 set good examples of unifying the Civil and Commercial law; this orientation is followed by several Latin countries in their recent legislation (such as the new Argentine Civil Code). However, the debate of unification or separation is still far from being pacific.

[22] Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 37.

Introduction To The Law Of Contracts

Chapter 1. The Notion of Contract

§ 1. GENERAL CONCERNS

17. The Macau Civil Code does not define the notion of contract. In view of such a negative attitude of the positive law, legal doctrines have taken the initiative. The following notion given by a Portuguese professor is fairly comprehensive: *contract is a binding agreement, based on two or more declarations of will (normally appeared as offer by one party and acceptance by the other party or parties) that intersect at certain point, which produces legal effects between/among the parties according to the meaning of the agreement*[23].

In certain legal systems, the agreement by the parties, a lawful "*causa"*, the object, and the formal requirements are considered as the conditions of contract[24]. However, under the structure of Macau Civil Code, the regimen of contract is examined under another perspective.

§ 2. CONTRACT AS A JURIDICAL TRANSACTION AND A JURIDICAL FACT

18. In Macau Law, in order for us to find the notion of contract, we must start from a more general concept: juridical facts (regulated in articles 209 – 287 of the Macau Civil Code). In other words, the idea of contract has submerged into the larger concept of juridical facts.

Juridical facts are events (human acts or natural happenings) capable of producing legal effects; and under this concept (juridical facts), writers usually further distinguish voluntary juridical facts and non-voluntary juridical facts. The former refers to any facts (with juridical significance) which is resulted from the human will (therefore, it is also named juristic acts); while the latter refers to events on which the human will power exercises no control (those events may appear as natural events or even human acts, as long as the human acts do not depend on the will power of the agent).

Below the concept of juristic acts, we could further distinguish simple juristic acts and juridical transactions. Both simple juristic acts and juridical transactions are voluntary facts. In the former case, the act is practiced voluntarily, but there is no direct connection between the intention of the agent and the legal effects finally produced. In other words, the agent may not have predicted or wanted such effects. For example, someone who used material that does not belong to him to make a new thing has the right

---

[23] More or less in the direction of Carlos Ferreira de Almeida, Contratos I – Conceitos. Fontes. Formação, 3ª Edição, Almedina, 2005, pg. 37.

[24] Article 1325 of the Italian Civil Code; see P.G. Moateri, Alberto Musy and Filippo Andrea Chiaves, International Encyclopaedia of Law – Italian Law of Contracts, Kluwer Law International, 1999, pg. 29.

to acquire the ownership of the new thing by paying the owner of material an amount corresponding to the used materials. In the latter case, the legal effects attributed by law correspond to the content of will of the parties. Therefore, juridical transactions are voluntary facts. The nuclear of juridical transaction is formed by one or more **declaration of intent (will)**[25].

19. Contract is the most typical juridical transaction. Within a contract, there is always more than one declaration of will. However, only a plural number of declarations (of will) are not sufficient for the existence of a contract. For a contract to exist, the two declarations (of will) issued by two (or more) parties must intersect at certain point (forming a common will). Therefore, considering the case of purchase and sale, in case the purchaser issues a declaration to buy a telephone with the price of $500, but the vendor issues a declaration to sell it with the price of $600, there will be no contract, since there is no intersection between the two declarations.

In other legal systems, *causa* is considered as the condition for the existence of a contract; nevertheless, such is not the case of Macau law. Under the influence of Manual de Andrade, the concept of *causa* is abandoned in the area of juridical transaction (contract)[26]. Therefore, the only condition for a contract to exist is the intersection or harmonization of two or more opposite binding wills of the respective contracting parties. Such an orientation is denoted as the principle of voluntarism or *solus consensus*.

§ 3. CONTRACT AS A SOURCE OF OBLIGATIONS

20. As illustrated above, contract is a juridical fact, and juridical facts are events that produce legal effects. Among others, one of the most important effects that a contract (juridical fact) can produce is the establishment of obligations.

Institutionally, such a concept is reflected in the Macau Civil Code by stating that contract is a source of obligations (Chapter Two – Sources of Obligations; Section One - Contracts). An obligation is a legal bond, in virtue of which one person is obliged to *perform* in favor of the other (Macau Civil Code, article 391). The ***performance ("prestação")*** may consist of an act or an omission. The person who is obliged to perform is called the debtor, and the person who is entitled to demand the performance is called the creditor. There is no need for the performance to be in pecuniary terms, its content can be anything, as long as it consists of an interest of the creditor that deserves legal protection (Macau Civil Code, article 392).

Apart from contract, there are other sources of obligations recognized by the Macau Civil Code, namely, unilateral promise, *negotiorum gestio*, unjust enrichment and civil responsibility (*stricto sensu*).

---

[25] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 4ª Edição por António Pinto Monteiro e Paulo Mota Pinto, Coimbra Editora, 2005, pg. 355-356.

[26] See João de Castro Mendes, Teoria Geral do Direito Civil, Vol. II, AAFDL, 1995 (reprint of 1985 edition), pg. 267.

Chapter 2. Historical Background of the Macau Law of Contracts

§ 1. TERMINOLOGY AND ORIGIN

21. The term contract has originated from the Latin word *contractus*. However, there is no agreement about the exact meaning of *contractus* for primitive Roman lawyers. The vocabulary *contrahere* means setting up a long term relation. In this sense, contract has nothing to do with the will. Almost at the end of the classical period, some Roman lawyers tried to specify the meaning of the word *contractus* restricting it to the theory of obligations. However, up to this point, the idea of will or agreement was still not attached to the word contract yet. From the primitive Roman text, Perozzi observed that there are only two sources of obligation, namely, contract and tort. In the case of contract, Roman law did not require the existence of will, because many cases without the will or intent of the parties (such as *negotiorum gestio*), as long as they are not qualified as tort (*delictum*), are classified as *contractus*. [27]

22. In the pos-classical period, the concept of contract had changed; it was then restricted to multilateral agreements *capable of producing obligations*. By this definition, all the agreements which transfer ownerships[28] (such as mancipatio, in iure cessio, traditio etc.) are **not** qualified as **contract**, but **conventions**, since they do not produce obligations.

There are four types of nominate contracts recognized in the Institutes and Digest: *re*, a contract in which the obligation arises from the handing over of a thing (of which there were four types: *mutuum*, *commodatum*, *depositum*, and *pignus*); *verbis*, a contract in which the obligation depends upon a form of words (the stipulation); *litteris*, a contract in which the obligation depends upon a special kind of writing; and *consensu*, a contract in which the obligation rests upon agreement alone (there were only four cases: sale, hire, partnership and mandate). Besides the nominate contracts listed above, the *Corpus iuris civilis* also recognized a large number of innominate contracts, as well as some agreements (the *pactum*) which enforcement are doubtful. This background set forth by the *Corpus iuris civis* later on influenced the development of the law of contracts in Western Europe.[29]

§ 2. THE SIGNIFICANCE OF NAPOLEON CODE TOWARDS MACAU CONTRACT LAW

23. As mentioned before, Portuguese Civil Code was substantially influenced by the French Civil Code. In the area of contract, such influences are obvious and fundamental. Owing to the strong ruling of Napoleon and his determination to codify the civil law, the draftsmen of the French Civil Code made a clear cut with the past; the Roman law and

---

[27] See Inocêncio Galvão Telles, Manual dos Contratos em Geral, 4ª Edição, Coimbra Editora, 2002, pg. 35-45.

[28] More or less the idea of conveyance in Common Law.

[29] This section follows closely the description of Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 43.

the Ancient Régime were no longer considered burdens, but rather nutritious elements, for the further development of law. The triumph of liberalism reflected in legal area became the consensualism in civil law, which stresses on the free will power of human to control legal effects. Among others, contract law is the area in which the consensualism had exercised the strongest impact. In such a context, the draftsmen of the Code, under the influence of Domat and Pothier, deliberately expanded the concept of contract (at the point that conveyance is also included in the broad concept of contract), granting it a new content which is apparently quite different from the Roman law tradition. Nevertheless, such a change should not be exaggerated. The doctrines of Domat and Pothier, as well as the French Civil Code did not cut off their link with Roman law. Actually, both Domat and Pothier constructed most of their theories on the base of Roman law; even the structure and content of French Civil Code itself showed similarity with their Roman ancestors.

The French Civil Code is phenomenal. Through out the whole eighteenth century and the nineteenth century, this code became a model of codification, either imposed by the military conquest of Napoleon or through voluntary succession of other countries.

24. The Portuguese Civil Code of 1887 (Código de Seabra) is one of the case that voluntarily admitted the above mentioned French concept of contract (in the sense that conveyance is mergered into the broad concept of contract). And such a model was passed to the Portuguese Civil Code of 1966, even though this code has formally adopted the structure of German Civil Code.

25. As to Macau law, the law in force until 1999 was the Portuguese Civil Code of 1966. After the transition of sovereignty, the new Macau Civil Code still maintains the same structure and most of the content of the 1966 Civil Code. More particularly in the area of contract, almost no substantial change has been registered.

Chapter 3. Classification of Contracts

26. In Macau law, as well as in Portuguese law, contract is regarded as a sub-category of juridical transaction, therefore, writers most of the time made their classification at the level of juridical transaction, and not in the level of contract. Nevertheless, we must admit that in most of the cases, the apparent classification of juridical transaction in fact referred directly to contracts. For this reason, making the classification in the level of contracts is not redundant or superficial, but rather more practical and meaningful.

§ 1. PRELIMINARY AND DEFINITIVE CONTRACTS

27. The classification between preliminary contracts[30] ("*contratos promessa"*) and definitive contracts is fundamental in Portuguese and Macau Civil Law. Theoretically speaking, the existence of this classification is critical or constitutes a challenge for the whole concept of contract under the principle of consensualism; practically speaking, it alters the process or itinerary of property transfer (reasons will be discussed in detail in Chapter 6).

According to the definition of Macau Civil Code article 404.(1), a preliminary contract "is a convention by which someone is obliged to enter into a certain contract" while a definitive contract is that "certain contract" at which the fulfillment of a preliminary contract is aimed.

§ 2. CONSENSUAL CONTRACTS VS. SOLEMN OR FORMAL CONTRACTS

28. By the principle of Freedom of Contract (this principle is manifested in article 399 of the Macau Civil Code), contracting parties can enter freely into a contract. Writers usually would describe the freedom of contract from three aspects: 1) the freedom to decide whether entering into a contract or not, and with whom one concludes a contract; 2) the freedom to decide the content of a contract; 3) the freedom of form.

Consensual contract comes from the principle of consensualism, which is derived from the principle of Freedom of Contract. The word "consensual" stress on the common will of the parties, thus a contract is consensual when it produces effect just by the will of the parties alone. When we say by the will of the parties alone, we mean besides the declaration of will of the parties, no other condition is required for the validity of the contract.

A contrario sensu, there must be some contracts which validities depend on one or

[30] Structural analysis of this figure in Macau Law see Tong Io Cheng, O Regime Jurídico do Contrato-Promessa, 2004, Faculdade de Direito da Universidade de Macau; about the situation of Portuguese Law, see Ana Prata, o Contrato-Promessa e o seu Regime Civil, Almedina, 1999; also João Calvão da Silva, Sinal e Contrato-Promessa, Almedina, 1988; João de Matos Antunes Varela, Sobre o Contrato-Promessa, Coimbra, 1989; Mário Júlio de Almeida Costa, Contrato-Promessa (uma Síntese do Regime Vigente), Almedina, 2001.

more conditions. In legal discourse, there are generally two types of contracts mentioned in contrast of consensual contract, namely, formal contract and real contract. In both cases, as the condition of validity, the law imposes something more than the will of the parties. In case of formal contract, the law requires the declaration of will to be made in a special form (for example, written form, document drawn by a notary, declarations testified by an authority etc.). When there is no special provision from law, the principle is the freedom of form, i.e., consensualism (article 211 of the Macau Civil Code). However, like any other principles in law, the principle of consensualism often subject to restrictions imposed by law itself (for example, according to article 866 of Macau Civil Code, the contract of purchase and sale of immovable must be drawn in a public document, i.e. a notarized document). Whenever the law imposes a special form as the requirement of validity of a contract, and the contracting parties fail to observe the form, the contract shall be void (article 212 of Macau Civil Code).

When the formal condition refers to certain type of document, the law itself has graded the documents by solemnity. In principle, public document (drawn by a notary or competent authority) is more solemn then private document; and within the category of private documents, a document verified by a notary is more solemn then one which is not verified. When the law imposes the usage of a document, contracting parties can always adopt a form which more solemn than the required one.

§ 3. CONSENSUAL CONTRACTS VS. REAL CONTRACTS

29. In the previous Section, we have mentioned that there are two types of contracts in contrast of the consensual contract, and we have already introduced the formal contract, here we shall continue with the real contracts[31].

The word "real" comes from the Latin *re*, which means "thing". In modern languages with Latin roots, the term "real contract" *(contrato real)* can cause confusion, since it can mean a contract which causes the modification of real rights (for example, the constitution of Usufruct, the transfer of ownership), or a contract which validity depends on the delivery or handing over of the object. In order to avoid confusion, Latin writers sometimes add the suffix *quoad effectum* for the first case, and another suffix *quoad constitutionem* for the second case.

The concept of real contract originated from Roman law. Gaius in his Institutes first distinguished four types of contracts: *re*, *verbis*, *litteris*, and *consensus*. In the classification of Gaius, the category *re* includes only *mutuum* and *indebitum solutum* (payment mistakenly made by someone who is not in debt). The Institutes of Justinian took away the case of *indebitum solutum* and added three more items into this category, namely *commodatum*, *depositum*, and *pignus*. However, when the Justinian law expanded the category by adding three more items, he had in fact changed the nature of real contract. The reason is, in Gaius, either in the case of *mutuum* or *indebitum solutum*, the delivery of a thing represented the transfer of ownership; while in Justinian, either in *commodatum, depositum* or *pignus*, the delivery would transfer, not the ownership, but the possession or detention of the thing. The category of real contract developed by the

[31] Details about this category see Tong Io Cheng, A Discussion on Real Contract, in Journal of Macau Studies, number 28, Macau Foundation, 2005, pg. 18-25.

Justinian law is generally adopted by several modern civil codes, namely, the Italian Civil Code, the Austrian Civil Codes and Portugal Civil Code.

Putting aside the historical factor, we may anatomize this category more reasonably. And for this purpose, we do not hesitate to cite the concise statements of Prof. Jacques Herbot as the following: "*The real contract came into existence when the thing was delivered to the borrower, who then came under an obligation to return it at the appointed time. This is an unilateral contract, the borrower having a duty (to return the money) and the lender a correlative right, but not vice-versa. Until the delivery of the property there is no contract, because even if there were an agreement which preceded the delivery, this agreement cannot under Roman law be a contract." "the real contracts are an anachronism"*.[32]

Most Portuguese writers affirmed that the category of real contract had been adopted by the Civil Code of 1966, namely in its articles 1129 (*commodatum*), 1142 *(mutuum)*, and 1185 (*depositum*). However, the literal expression of those articles is not as clear as the legal literature. By accepting the presence of real contract in Portuguese law, Portuguese writers are not unanimous on the consequence of not fulfilling the requirement of delivery at the moment of entering into the contract. Some suggested that it should be conversed to a preliminary contract (contrato promessa)[33]; others suggested that it should be conversed to a non-nominate contract with the same content[34].

As to the case of Macau, at this point, the Portuguese formula on those contracts has totally maintained, therefore, what has been discussed for Portuguese law shall also be valid for Macau law.

It should be noted that, the historical discussion on real contract was a mile stone in the development of civil law; it directly or indirectly inspired the emergence of several fundamental juridical figures in modern civil law, for example, the case of preliminary contract and the case of *dingliche vertrag*[35].

§ 4. SYNALLAGMATIC AND UNILATERAL CONTRACTS

30. From the perspective of "juridical transaction" (*negócio jurídicos*), whenever there is a contract, there must be more than one declaration of will. Therefore, contracts are always bilateral juridical transaction. However, within the concept of contract itself, it is usual to distinguish unilateral and bilateral (or synallagmatic) contract.

Traditionally, writers used to describe the two concepts as the following: unilateral contracts create obligations (or duties) to one party alone, while bilateral or synallagmatic contracts create obligations for both parties. The agreement to make a donation is a typical unilateral contract, since only the donor has obligation (or duty) to deliver the object; in case the category of real contract is admitted, then the case of *mutuum* and

---

[32] See Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 47-48.

[33] See Pires de Lima, Antunes Varela, Código Civil Anotado, Vol. II, 4ª Edição, pp. 741, 762, 834.

[34] See Carlos mota Pinto, Teoria Geral do Direito Civil, 3ª Edição, Coimbra, 1993, pp. 398-399; Almeida Costa, Direito das Obrigações, Almedina, 1998, pp 238-242.

[35] See Tong Io Cheng, O Regime Jurídico do Contrato-Promessa, 2004, Faculdade de Direito da Universidade de Macau, pp. 149-154.

commodatum are also unilateral contracts. On the contrary, purchase and sale, lease, works contract etc. are bilateral contracts[36].

However, such a description may cause confusion, since under the principle of good faith, there are always some duties for both the parties. For example, in the case of gift or donation, although the donor alone has the duty to deliver the object, we can never conclude that the receiver has no duty, because under the principle of good faith, the creditor (receiver) at least has the duty to receive the thing at the place and time stipulated by the contract, or when there is no agreement, at the place and time determined by the supplementary norms of the civil code. Nevertheless, this argument in no way overthrows the distinction between unilateral and bilateral contracts, because what is in stake is not the description itself, but the function of distinction. Like any other distinction made in law, the distinction of unilateral and bilateral contract has its own function or purpose.

In a bilateral contract, the obligations of each party is interdependent or reciprocal, therefore, when one party fails to perform, the other party has the right to refuse his corresponding performance (this is called *exceptio non adimpleti contractus*). In certain legal systems, the *causa* ("the cause") is an element of a contract; in this case, a bilateral contract is special at the point that the duty of one party constitutes "the cause" of another party's duty, and vice versa.

In Portuguese and Macau civil law, *causa* is not an element of a contract.

In order to avoid ambiguity, when describing the difference of unilateral and bilateral contract, the following formula may be better: unilateral contracts create obligations (or duties) **of performance** to one party alone, while bilateral or synallagmatic contracts creates obligations (or duties) **of performance** for both parties.

31. Portuguese writers sometimes discuss also the category of *imperfect bilateral contracts*. In this case, although the contract creates obligations for both parties, the obligations of each of them are not interdependent. Examples of this category are the gratuitous mandate and custody of movable things contract, in which at the beginning, only the mandatory and the depositary has obligations to perform; while during the process, both the mandatory and the depositary may incur certain expenses on fulfilling their duties. In this case, they have the right to claim the expenses from the principal and the depositor, that is to say, also the principal and depositor may have duties. Nevertheless, unlike the normal cases of bilateral contract, the mandatory and depositary here have no right of *exceptio non adimpleti contractus*, or the rights to resolve the contract, since the duties of the two parties are not interdependent[37].

§ 5. ONEROUS AND GRATUITOUS CONTRACTS[38]

32. The classification of onerous and gratuitous contracts is similar to the previous distinction, unilateral and bilateral contracts. While the distinction of onerous and gratuitous contract looks into the content and purpose of the contracts, the previous

[36] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 4ª Edição por António Pinto Monteiro e Paulo Mota Pinto, Coimbra Editora, 2005, pg. 388.
[37] Ibid, pg. 389.
[38] Ibid, pp 400-402.

distinction tends to detect whether the obligations are created for both parties and whether there is a reciprocal relation between those obligations.

The onerous contracts presuppose the patrimonial attributions of both parties, and the correlation between those attributions. In an onerous contract, each party performs a patrimonial attribution in return of another patrimonial attribution of the other party. For example, in the cases of purchase and sale, lease, contract of works, contact of service etc.

The gratuitous contracts are characterized by the *animus donandi, animus beneficiandi* or simply a will of generosity, which is, an intention to give out a patrimonial attribution without any return. Therefore, the donation contract is the best example for gratuitous contract.

At the point of correlation between the performances, the two distinctions show no difference. Therefore, most of the time, the two distinctions overlap with each other (most of the bilateral contracts are onerous, and unilateral contracts are gratuitous). The main differences lie on the following: 1) it is not necessary for the performances of a bilateral contract to be of patrimonial nature (for example, A and B are neighbors, their houses located in such a way that it is easier for A to walk across B's garden to office, and for B to walk across A's garden to school, for this reason, they signed a contract letting each other walks across the garden of the counterpart, the permission of each of them is given in exchange of the permission of the other, obviously, there is no patrimonial attribution for both of them); 2) in case the category of real contract is admitted, like in the Macau Civil Code, there are also cases when a unilateral contract is onerous (for example, in the case of onerous loan, the contract only exists when the lender deliver the money to the borrower, afterwards, the only party that has an obligation - to return the money and pay the interests - is the borrower; as explained above, the contract is unilateral, while both parties have performed a patrimonial attribution, which means, onerous).

In Macau Civil Code, the importance of the classification of onerous and gratuitous contracts is shown in a number of occasions: such as the case of reduction of the generous contracts (article 2005 to article 2015), protection of third parties (article 284, point 1), Paulian action (article 605 ss) etc. In these cases, the Civil Code choose to protect the validity of an onerous contract to the maximum extent, while gratuitous contract does not enjoy the same protection.

§ 6. COMMUTATIVE AND ALEATORY CONTRACTS

33. For Macau Civil law, the classification between commutative and aleatory contracts has fundamental importance, because more than a half of the GDP of this city came from the gaming (gambling) industry, and the classification and description of aleatory contracts help clarifying the nature of gambling activities.

Commutative contracts are contracts which the parties know from the beginning which mutually equivalent performances are due. Aleatory contracts are contracts which the existence and extent of one party's performance depend on some future

uncertain event and the other party's performance does not vary correspondingly.[39] Typical cases of aleatory contracts include of insurance contract and gambling itself (also appear in the form of a contract) etc.; less typical and rarely mentioned by writers are the purchase and sale contract of future things, which is always an aleatory contract.

This classification is a sub-classification of onerous contracts. The onerosity of a commutative contract is obvious, while the onerosity of an aleatory contract lies in the fact that both parties are subject to the risks of losing, and only one party will win at the end.

As far as gambling is concerned, we must distinguish three different cases: 1) people violating the prohibition of law, gambling in public or in venues without obtaining the necessary license, the contract is void (article 273 of the Macau Civil Code); 2) gambling inside the venues of a casinos where the license is granted, the contract between the player and banker is valid, it creates civil obligation for both parties; 3) when the law does not prohibit, and the parties are not gambling in a licensed venue, for example, family members playing poker of "majhong" at home, the obligations generated will be a natural obligation, which means the creditor has no right to claim the debts in court, but if the debtor willingly paid the debts, it shall be deemed as an act of generosity, and the debtor (or other creditors of the same debtor) has no right to restitute what has been paid[40].

§ 7. OTHER CLASSIFICATIONS OF CONTRACTS

34. Apart from the classifications listed in the previous sections, there are also other classifications developed by the doctrine according to different criteria and for different purposes, which are important for the understanding of contract phenomenon. Owing to the limitation on the dimension of this work, only a brief introduction shall be given to the following classifications:

a) Nominate and non-nominate contracts: nominate contracts are also called typical contracts; they are the type of contracts expressly regulated by the law with *"nomen iuris*" and a typical structure. Under the principle of freedom of contracts, the parties are free to form any type of contracts regardless of it being regulated expressly by law or not. The contracts concluded under the principle of freedom of contract and without corresponding to any particular type regulated by the law are non-nominate contracts or atypical contracts. The main sources of law regulating nominate contracts in Macau are the Macau Civil Code (articles 865 -1174), and Macau Commercial Code (articles 578 - 1063), yet it is not impossible for an avulse legislation to create a new type of contract (see the case of Lei 15/2001).

b) *Intuitu personae* contracts: When a contract creates an obligation which has taken into consideration the personal quality of the debtor, this contract shall be considered "*intuitu personae*". Normally, an obligation "intuitu personae" is not fungible, therefore,

[39] See Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 50.

[40] See Tong Io Cheng (Edited by Liu/Zhao/Luo/Fan), A New Study of Macau Law, Vol.1, Fundação de Macau, 2005, pg. 228, note 52; more discussion on gambling contract will be done in Part II of this monograph.

in the fulfillment, the debtor cannot be substituted by another person.

Chapter 4. Contracts and Torts

35. The term "torts" has no direct correspondence in Macau civil law, here the legal regimen governing very similar issues is called civil responsibility in the strict sense, and it constitutes a source of obligation. Actually, among the five types of sources of obligations (namely, contract, unilateral promise, *negotiorum gestio*, unjust enrichment, and civil responsibility in strict sense) recognized in the Macau Civil Code, contract and civil responsibility are the two main stems which have most practical and theoretical importance.

Traditionally, contract and torts (civil responsibility; hereinafter, whenever the word torts is used, it refers to civil responsibility in Macau law) are regarded as two separate areas which are governed by different rules and subject to different orientations. For example, it is general to hear affirmations like contractual liability results from the violation of relative subjective rights, while liability of torts results from the violation of absolute subjective rights; the presuppositions of contractual liability is the non-fulfillment of contract, while the presuppositions of torts are more complicated (generally presumes voluntary action, the act being illicit, fault, damages, relation between the act and the damages); the burden of proof being different (in case of non-fulfillment of contractual liability, it is the debtor, in another word, the one who caused the damage, who is required to prove that he has no fault in the non-fulfillment[41]; while in case of torts, it applies the general rule of burden of proof, by which the one who makes a claim need to present proofs, in this case, it is the victim or the one suffering from the damages who needs to prove that the defendant has fault in causing the damages) etc.

Nevertheless, legal writers nowadays gradually discover that the boundary between these two areas is becoming ambiguous; they have too many *facetas* in common. For example, in relation to the consequences – namely, indemnity - of the two forms of liabilities; in relation to their sources, one simple event can give birth to both forms of liabilities (the case of a taxi diver crashed a pedestrian and hurt his passenger in an accident where he has fault)[42]. Besides, in many new topics, like *culpa en contrahendo*, product liability, third party infringement of contract, pure economic loss etc., contractual liability and torts are barely distinguishable. In fact, both tort law and contract law imply the violation of duties. Perhaps from the perspective of duties, we may somehow find the key to unify the two areas; however, such a change implies a restructuring inside the system of obligation, and such a big operation may eventually lead to the skepticism of the concept of obligation itself.

36. Like the Portuguese Civil Code, the normative structure by which the Macau Civil Code deals with these two sources of obligation is quite special. First of all, the formation of contract is regulated in the General part of the Code (articles 209-287); then, there is a general part of contract within the book of Obligations, specifically inside the section of sources of obligation (articles 399-450), dealing with some principles and effects of contracts, the separation of preliminary contract and definitive contracts, the

[41] See article 788 item 1 of Macau Civil Code.

[42] See João de Matos Antunes Varela, Das Obrigações em Geral, Vol.I, 10ª Edição, Almedina, 2000, pg. 520.

vicissitudes of contracts like the transfer of contractual position, *exceptio non adimpleti contractus,* termination of contract etc.; afterwards, the fulfillment or non-fulfillment contract is embedded in the general problem of fulfillment of obligations (articles 752 - 864), while a bundle of nominate contract is regulated after the section of fulfillment (articles 865-1174); secondly, the regulations of torts are also special: it is divided into two parts; the first part inside the sources of obligation (articles 477-503), includes the various type of torts, however, this part deals mainly with the presuppositions of each type of illicit acts, while the consequences of torts, namely, the indemnity or compensation, are regulated in a section called "classification of obligations"(articles 556-566).

In relation to the above normative structure, there are two parts which deserve our special attention. One is the fulfillment and non-fulfillment, the other is the obligation of indemnity of damages. In both cases, the legislator used the technique of abstraction, expanding the matter of fulfillment - which traditionally is exclusive for contract - and the matter of indemnity and compensation – which has a close link with torts. This shows that the legislator was to a certain extent aware of the common genes of these two sources (as well as all the other sources) of obligations.

37. As far as the regulatory system of torts is concerned, the Macau Civil Code is not content with just establishing general principles. Instead, it is a combination of principles and exemplification of individual types. First of all, the Code has distinguished three types of torts according to the criterion of fault, namely: **liabilities caused by unlawful facts** which implies fault of the defendant (articles 477-483); **liabilities where the fault of defendant is presumed** (articles 484-486); **liabilities by risk** (articles492-503).

By the provision of article 477[43], we can see that liabilities caused by unlawful facts are considered as the general case and responsibility by risk as exception. The code goes on by delimiting the extension of the presuppositions set fort in article 477, clarifying that mere advice, recommendation or information does not confer liability on whoever gives it, unless behind the advice recommendation or in formation, there is a legal duty (article 478). The significance and limits of concepts like omissions, fault, person not accountable for damages, compensation to be paid by person not accountable, are defined by subsequent articles.

In the second types of torts (where the fault of defendant is presumed), the Macau Civil Code explicitly regulated three situations, namely: liability of a person obliged to take care of another person, liability cause by buildings or other works, liability caused by things, animals or activities.

In the third types of torts, the Code also identifies a number of typical situations: liability of employers, liability of public juridical person[44], liability caused by animals and circulation of vehicles.

Macroscopically speaking, the chapter of torts in Macau Civil Code maintained the

[43] According to article 477, (1): "Whoever, whether by willful misconduct (dolus) or by negligence unlawfully infringes the rights or another person or any legal provision intended to safeguard the interests of others must compensate the injured party for damage arising from such violation." (2) "Duty to compensate not depending on fault shall only exist in cases specified by law."

[44] There is a discussion about whether the judiciary can also be considered a public juridical person. For the development of this topic, see Fong Man Chong, Inspirações emergentes de dois acórdãos: Quem sera (deverá ser) o Réu? in JJS, N° 2, Faculdade de Direito, Universidade de Macau, 2006, pp. 81 ss.

structure of Portuguese Civil Code, and is basically differentiated from the law of contract.

Chapter 5. Contract and Quasi Contracts

38. Traditionally, the category of quasi-contracts (*obligations quasi ex contractu*) covers *indebitum solutum*, *negotium gestum*, *tutela*, *communio* and *legatum per damnationem* (i.e. obligations arising from unjustified enrichment, from unauthorized management of anohter's affairs, from the tutor's conduct of his ward's affairs, from the relationship between co-owners and from specific instructions contained in a will)[45].

The reason for them to be classified as quasi-contracts because they were thought to have conceptual proximity with contracts. As the will theory of contract developed, the distinction between contract and other legal institutions turned clear. In a contract, it is the will or the intent of the parties (together with law, but the intent is the first move) that determines the legal effect; while in *negotiorum gestio* and unjust enrichment, the legal effects arise independent to the will of the persons performing the acts.

In modern law, obligations arising from the tutor's conduct of his ward's affairs, from the relationship between co-owners and from specific instructions contained in a will found their place in Law of Person, Law of Family and Succession and Law of Things; while the *negotiorum gestio* and unjust enrichment were inserted to the general part of obligation constituting two independent sources. This is also the situation of Macau Civil Code.

The conceptual system of Macau Civl law does not recognize such a category of quasi-contract. For Macau Law, *negotiorum gestio* and unjust enrichment are both sources of obligation. The regime of *negotiorum gestio* is regulated in articles 458- 466 of the Macau Civil Code, and that of unjust enrichment is in articles 467-476.

A more detail description of *negotiorum gestio* and unjust enrichment shall be found in Chapter 13 of Part II.

[45] Inst. III, 27; see Reinhard Zimmermann, The Law of Obligations – Roman Foundations of the Civilian Tradition, Oxford University Press, 1990, pp. 15-16.

Chapter 6. Contract and the Law of Property

§ 1. GENERAL CONSIDERATIONS

39. The distinction of obligatory rights and real rights, which directly gives way to the structural distinction of Law of Obligations and Law of Things (Law of Property), is an antithesis developed by the so called Pandect School of Law out of the roman distinction of rights *in rem* and rights *in personam*, and adopted by a number of positive legal systems (which include the Macau Civil Code). Traditionally, it is said that real right is a right towards "things", in another word, a power which a person exercises directly upon things (normally movables and immovable things), while obligatory right is a right towards performance, or the action or omission of the debtor; real right is absolute, which means it can be opposed to anyone who is not a holder of analogous right to the same object (in more concrete terms, the absolute effect reflects in the effects of pursuit or tracing, which is to say, when the object falls into the hand of another person, the right holder can always claim it back, and the effect of preference over any obligatory rights and over other real rights established posterior), while obligatory right is relative, it only produces the right to claim towards the debtor.[46] Nevertheless, the aforesaid theoretical distinction is not free from criticisms[47]. Critics generally stress that the "concept" of real rights is not given a clear definition, nor is it possible to give a comprehensive one; and the so called characteristics of real rights such as the tracing effect are not exclusive to real rights. Despite criticisms, the category of real rights as well as the positive distinction of Law of Obligations and Law of Things adopted is by a number of codifications which include ours. Therefore, qualifying certain legal institutes into the category of obligatory rights or real rights determines approximately the physiognomic distribution of the matter and the consequent application of certain principles inherent to each category[48].

40. According to article 1230 of the Macau Civil Code, real rights are subject to the so called **principles of taxonomy** (or *numerus clausus*)[49]. This principle restricts the creation of real rights to the types explicitly stipulated by law, thus represents a severe limitation to the private autonomy. The real rights stipulated by law and recognized by legal literatures[50] are divided into three groups[51], namely:

---

[46] For a detail analysis of the traditional distinction, see Antunes Varela, Das Obrigações em Geral, Vol.I, 10ª Edição, Almedina, 2001, pg. 164 – 190.

[47] In relation to the criticisms of the concept of real rights, see Manuel Henrique Mesquita, Obrigações Reais e Ónus Reais, Almedina, 1990, pp. 41 ss.

[48] José de Oliveira Ascensão, Direito Civil – Reais, 5ª Edição, Coimbra Editora, 1993, pg. 16.

[49] Regarding this principle and the detail analysis of its implications, see José de Oliveira Ascensão, A Tipicidade dos Direitos Reias, Lisboa, 1968; for an analysis directly referring to the Macau Law, see Tong Io Cheng, On the Principle of Taxonomy of Real Rights – as well as the source and limits of article 1230 of the Macau Civil Code, in Journal of Juridical Sciences, Vol. 2, Faculty of Law, University of Macau, 2006.

[50] Being stipulated by legislation does not mean that the law must declare whether a particular right is a real right; the process to make known which stipulation refers to a real right is a process of interpretation.

[51] About the description of those groups, see M. Henrique Mesquita, Direitos Reais, Sumários das Lições ao Curso de 1966-67, Coimbra, pg. 53 e segs.;C.A. Mota Pinto, Direitos Reais (lições recolhidas por

41. Real rights of use and enjoyment (direitos reais de gozo) – in which the holder of the rights is entitled to use and enjoy fruits from an object belonging to other person. Under the formal system of the Macau Civil Code, ownership is regulated together with other types of real rights of use and enjoyment. Yet is is not without doubt to classify ownership into this catergory, because in Roman Law or in the *ius comune*, ownership always possessed a special status, the perfect real right or *plena in re potestas*. It is not merely outstanding among real rights, but also deemed as the foundation of all rights. Second to the ownership comes the *usufruct*, by which the right holder is empowered to the full usage and enjoyment of fruits of the respective object within a period of time, as long as such usage and enjoyment do not change the physiognomic form as well as the substance of the object (article 1373 of the Macau Civil Code). Besides the right of usufruct, the Civil Code of Macau further regulated the *right of use (*article 1411 of the Macau Civil Code), which confers powers similar to usufruct but with a more restricted content (e.g. only restricted to the right holder and his family members); the *habitatio*, which is a right of use referring to a dwelling (article 1411, item 2, Macau Civil Code), both the right of use and the *habitatio* are not transferable (article 1414, Macau Civil Code); the *superficies*, which enables the holder to construct and conserve constructions on the surface of a land belonging to another (article 1417, Macau Civil Code); the *predial servitudes*, which is always constituted for the benefit of an adjoining land, and by which the holder is entitled use the land of neighbor for a special purpose (article 1434, Macau Civil Code; it should be noted that the Macau law has made an innovation to admit servitudes constituted upon two piece of lands belonging to one person).

42. Real rights of guarantee or security (direitos reais de garantia) – by which the holder is entitled to be reimbursed from the value of the object, with preference to others, when the owner or a third person fails to fulfill an obligation secured by the object. The *real rights of guarantee* identified by doctrines are *hypothec, pledge, consignative rents (consignação de rendimentos), privileges of claims (privilégios creditórios) and right of retention. A Hypothec* grants the creditor a right to be paid by the value of certain *immovable things* (or alike) belonging to the debtor or a third person, with preference over other creditors which do not have a special privilege or whose privilege do not have priority according to the registration (article 682, Macau Civil Code). A *Pledge* grants the creditor a right to satisfy his credit plus interests with preference over other creditors by the value of certain *movable things* (or alike) belonging to the debtor or a third person (aricle 662). *Consignative rent* is an old figure in civil law; its primitive form is the *censos* which refers only to land. In Macau Civil Code, the *consignative rent* can occur in any immovable as well as other movables susceptible of registration. It guarantees the holder the right to receive his credit and the respective interest from the rents of a particular "thing"(article 652, Macau Civil Code). *Privileges of claims* is a power granted by the law to certain creditors, in consideration of the cause of the credit, so that they shall be paid with preference over others (article 728, Macau Civil Code). The privileges can involve movables or immovable; and depending on the way how its objects are described, the privileges over movables can be general or specific. Similar figures can also be found in the Italian Civil Code (article 2751 onwards), nevertheless, it is in the Portuguese literatures that the specific privileges are clearly classified as real right of

---

Álvaro Moreira e Carlos Fraga), Coimbra, 1975, pg 125 e segs.; Rui Pinto Duarte, Curso de Direitos Reais, Princípia, 2002, pg. 18-19.

guarantee. Regarding the nature of the *right of retention*, there used to have strong debates among legal literatures. In Portuguese law, such debate has died out after the promulgation of the Civil Code of 1966. Since then, the right of retention is generally recognized as a type of real rights of security. In Macau Civil Code, the right of retention is described as a right for a debtor (who is obliged to restitute a thing, but vested with the right to claim a credit aroused from expenses related to the thing) to retain the thing he possesses when the creditor (of the restitution) fails to pay the expenses (article 744, Macau Civil Code).

43. Real rights of acquisition (direitos reais de aquisição) – by which the holder is entitled to acquire another real right (normally the ownership) with preference to others. The real rights of acquisition identified by doctrines are the *right of the beneficiary of a preliminary contract vested with real effects (*article 402, Macau Civil Code), and *the rights of preference vested with real effects (*article 415, Macau Civil Code).

It should be noted that among the three groups of real rights, only the *real rights of use and enjoyment* are regulated within the book "Law of Things", other groups of real rights are identified by doctrines through the process of interpretation, therefore, it is naturally predictable that there are different opinions regarding each of the above groupings (for example, there are opinions to qualify the rights of a lessee as real right of use and enjoyment[52], as well as opinions to qualify judicial seizure or "*penhora*" and judicial apprehension "arresto" as real rights of guarantee[53] etc.).

44. Under this system, contracts, as a source of obligation, are naturally supposed to be strictly distinguished from the law of property (law of things). Nonetheless, such an impression should only be approximately correct. In fact, the distribution of legal norms within the Civil Code does not necessarily depend on one criterion; there are a complex of interests and criteria considered behind the so called external system of the Code. Undoubtedly, the figure of contract within the Civil Code has a closer relation with the law of obligations (e.g., we can find a large number of nominated contracts listed within the law of obligations, as well as the regime of preliminary contract, the modification and resolution of contracts etc. regulated therein); it does not mean that it has a clear cut with the law of property. Actually, apart from being the source of obligation, contract can also be regarded as "the source" of real right (in the sense that contract is also a "fact" which gives rise to a real right). In Macau Civil law, contract is an important mean for the constitution and the transfer (which is denoted as conveyance in English legal term) of a great number of real rights.

§ 2. NO DISTINCTION BETWEEN LEGAL AND EQUITABLE OWNERSHIP

45. Macau law belongs to the Civil Law system. Influenced by the Roman Law tradition, ownership in Macau Civil law is considered as an absolute (exclusive) right to use and dispose a thing as well as to enjoy the fruits produced by it (article 1229, Macau Civil Code). Such a concept of ownership is not compatible with the distinction

[52] A. Menezes Cordeiro, Direitos Reais, Lisboa, Lex, 1993 (reprint de 1979), pg. 346 e segs.
[53] Rui Pinto Duarte, Curso de Direitos Reais, Princípia, 2002, pg. 19.

between legal and equitable ownership, since for being exclusive, a person is either the owner or not. Undoubtedly, there are persons other then the owner which are allowed to manage the thing or benefit from the thing; nevertheless, in all those cases, the rights to manage the thing or to benefit from the thing, regardless their nature being "real" or "obligational", are derived from the ownership itself or representing a restriction to the ownership.

§ 3. CONVEYANCING

46. Conveyance is a legal term used in common law jurisdictions, which means the act that creates rights *in rem*.[54] of transferring the ownership of a property from one person to another. In Civil Law jurisdictions, similar realities are dealt with under a variety of institutional arrangements depending on the tradition of each positive legal system. A presentation of the various legal systems in this particular matter shall oblige us to look at the phenomenon of transfer of real rights as a whole before math. From a Civil Law perspective and without going into further detail, we can approximately conclude that real rights are constituted or transferred either by juridical transactions or by other juridical facts[55]. In the case of transfer by juridical facts other than juridical transactions, the divergence among the various legal systems inside the Civil Law family is not very significant. It is in the case of transfer by juridical transactions that the tension became acute. In Latin legal systems, the act of transfer is usually merged into the concept of contract, so that whenever the purpose of a contract involves the transfer of certain real rights, the real rights are seen to be transferred by the same contract and the contract alone (since a contract is the agreement of the parties, such a system of transfer is also called the ***system of consensualism*** or ***solus consensus***); while in Germanic legal systems, the act of transfer is considered as an independent juridical transaction with special nature.

47. Macau Civil law belongs to the Latin legal family; its Civil Code, influenced by the French Civil Code, and by a rule established in article 402 (The constitution or transference of real rights upon specific thing is achieved by the mere effect of contract, unless otherwise is provided by law), **admits explicitly the *principle of consensus*** (in Macau Law, this principle applies both to movables and immovable)[56].

The admission of this principle has a lot of implications. First of all, the contract of

---

[54] S. J. Whittaker, Chitty on Contracts, Vol I (General Principles), 27th ed. London Sweet & Maxwell, 1994, p. 81.

[55] Ownership is acquired by contract, inheritance, usucaption, occupation, accession and other ways stipulated by law (article 1241, Macau Civil Code).

[56] About the implication os this principle in Portuguese law, there are a number of recent studies published in the Themis – Revista da Faculdade de Direito da UNL, Almedina, 2005, number 11(Carlos Ferreira de Almeida, Transmissão contratual da propriedade – entre o mito da consensualidade e a realidade de múltiplos regimre, pg. 5 e segs; Jorge Morais Carvalho, Transmissão da Propriedade e Transferência do Risco na Compra e Venda de Coisas Genéricas, pg. 19; Gustavo Ramos Perissinotto, Compra e Venda com Reserva de domínio/propriedade – comparação dos direitos brasileiros e português, pg. 65 e segs; Yara Miranda, Venda de coisa alheia, pg. 111 e segs).

purchase and sale is always ***self executory*** for conveyancing purpose, in another word, it is always capable of producing real effects (article 869, a) Macau Civil Code), and this effect shall produce right at the moment when the contract is concluded. As a consequence, it is impossible to have a purchase and sale contract with mere obligational effect. In case the parties intend to separate the obligational effect and the transfer of ownership, they must resort to the scheme of preliminary contract[57] and definitive contract. On the other hand, the role of **registration** in the case of real right transfer of immovable is reduced to an opposing effect, which is to say, the registration is not a condition for the transfer of ownership, but a condition to oppose third persons, and the interesting parties are not obliged to file for the registration (articles 2 and 5, Code of Predial Registration of Macau). Secondly, the rule for the ***distribution of risk*** should be adjusted in accordance with the various situations (in principle, after concluding the contract, the risk of damage or deterioration of the object is borne by the purchaser, while there are several exceptions provided by law; see article 785 of the Macau Civil Code).

It should however be noted that the so called consensual transfer of right *in rem* consecrated in Macau law is only fully applicable when the "object" involved is a "specific thing". In case the thing involved is not specific, the rules are different : 1) in the sale of future things (not yet exists or not belonging to the seller), which the ownership shall only transfer when the seller acquires the thing[58]; 2) in the sale of things generically described or described in alternatives, which the ownership shall only transfer when the things are specified (Articles 402, 2); 3) in the sale of a thing which is an integrant part of another thing or the sale of fruits not harvested, which the ownership shall only transfer when the part is separated or when the fruits are harvested (Articles 402, 2). On the other hand, in purchase and sale by installments, the parties may agree that the ownership shall only be transferred when the last installment is paid (article 927, Macau Civil Code); and a purchase and sale may also subject to conditions (article 263, Macau Civil Code), etc. In all these cases, the transfer of ownership does not occur at the moment when the contract is concluded, but a later moment. However, we should also notice that even in these cases, the **principle of consensus** is not totally given up, since theoretically, the juridical transactions which cause the transfer of ownership are always the same contracts concluded between the parties; the contracting parties do not have the opportunities to declare their wills one more time.

As far as the formal requirements are concerned, even in the case of conveyancing, there is no mandatory form for all types of contracts. According to the principle of freedom of form, the parties can transfer the ownership of chattel by verbal agreements. Nevertheless, in the transfer of real rights of immovable, contracts are required to be concluded under notarial act (article 866 of Macau Civil Code; article 94, 1, of the Notarial Code of Macau). In those cases, the consequence for a transaction not observing a form required by law is nullity (article 212, Macau Civil Code).

---

[57] See Tong Io Cheng, O Contrato Promessa e a Modificação de Direitos Reais, in APAPM, Direcção dos Serviços de Administração e Função Pública, 2004, número 66, pg.1181-1224.

[58] Articles 402, 2 and 870 of the Macau Civil Code; for a better description of the concept of future thing and its legal regimen, see Tong Io Cheng, Future Thing and the Purchase and Sale of Future Thing in Macau Civil Code, in Journal of Political Science and Law, Shandong Politico-legality Management Cadre Institute, number 110, 2006, pg. 35 ss.

Chapter 7. Contract and Trust

48. In general terms, trust is a "fiduciary relationship with respect to property, in which one person (the trustee) holds property (the trust res) for the benefit of another person (the beneficiary), with specific duties attaching to the manner in which the trustee deals with the property."[59]

The legal structure of a trust could be described objectively and subjectively. In the objective aspect, a trust is composed of three elements, namely, a declaration of intent (the expression of an intention to set up a trust), the transfer of goods or rights to the trustee, and the existence of the subject matter or principle. Subjectively, the relation of a trust involves three parties: the *settlor or trustor*, who transfers the goods or rights to the trustee; and the *trustee*, who is entrusted to administrate the goods or rights in favor of the *beneficiary*[60].

In common law, the trustee is the legal owner of the trusted goods or rights - which means he is empowered to freely dispose the goods or rights. However, if the rights he owned is conceived under a continental law perspective, we may find it difficult to accept the trustee as an owner, since the direct benefits of the administration or disposition of the things does not belong to him, but the beneficiary. When the trustee violates the trust, the beneficiary is entitled to file an action against him for the fulfillment of his duties. On the other hand, if the goods under trusts are disposed without *valuable consideration*, or the third party acquirer knows that the goods are disposed in violation of the trust (doctrine of *notice*), the beneficiary is entitled to trace back the goods from the third acquirer.

In common law jurisdictions, trust is a legal instrument commonly used in many areas of law (e.g., property, company law, family law etc.). Nevertheless, the idea of trust is generalized in most civil law jurisdictions. After analysis, a lawyer trained by civil law jurisdiction may tentatively conclude that the so called trust relation is actually a contract. However, owing to the hybrid nature of the juridical position of the trustee and beneficiary, it is very difficult to reduce the trust relation into a contract.

Subsequent to the trend of economic globalization, contacts among different jurisdictions are becoming more and more frequent; and in international trade, the choices of law in a particular transaction are usually determined by the bargaining power of a party. The idea of trust is therefore gradually ramified to Civil Law jurisdictions. Anyway, in the process of transplanting the idea of trust to Civil Law Jurisdiction, there are at least three obstacles to be faced by continental lawyers, namely, the unity concept of ownership, the taxonomy principle in real rights and the registration of real rights to produce opposing effect against third parties.

Despite all those difficulties in the theoretical level, legislative measures (or to introduce a trust law in general, or bringing in some limited forms of trusts) have been taken in various jurisdictions with Civil Law tradition: for example, in France, Quebec, Sri Lanka, South Africa, Mexico, Argentine, Colombia, Taiwan etc.

---

[59] M. Reutlinger, Wills, Trusts, and Estates, Essential Terms and Concepts, Boston, New York, Toronto, London, Little, Brown and Company, 1993, p. 143.

[60] Maria João Romão Carreiro Vaz Tomé/ Diogo Leite de Campos, A Propriedade Fiduciária (Trust) – Estudo para a sua consagração no direito português, Almedina, 1999, pg. 36-48.

49. In Macau, the establishment of a general institute of trust has never been proposed to the agenda of the legislator. Nevertheless, especially in relation to the financial sector, some isolated legislative moves of the Macau legislator do attract our attention. For example, in 1999, a decree law titled "Regula a constituição e funcionamento dos fundos de investimento e das sociedades gestoras de fundos de investimento" (DL. nº. 83/99/M, of the 22nd of November), which intents to regulate the establishment of investment fund and the administrative company of those fund, has defined in its article 2, item 1t), that a SGF (Administrating Company of Investment Fund) is "a company which exclusive objective is to administrate one or more investment fund, on account and in the interest of the respective participants." Now, without the concept of trust, is it possible to configure reasonably the relation between the administrating company and the participants? In our opinion, such a legislation presupposes a general institute of trust, but unfortunately, this institute is absent in Macau law.

Chapter 8. Good Faith and Fair Dealing

50. Being or not in good faith (which links to the idea of fair dealing[61]) is an ethical evaluation of the conduct of the parties in civic legal affairs. Good faith is therefore regarded as one of the core or fundamental values which constitute the pillar stones of the internal system of Civil Law[62].

In Portuguese legal doctrines, good faith is seen both as a legal principle guiding the conducts of the parties in civic legal affairs (good faith in the objective sense), specifically in transactions, and a constitutive element of the presupposition of a legal norm (good faith in the subjective sense).

51. In the **objective sense**, in another word, acting as a legal principle – here it has a remote history tracing back to the Roman law -, good faith evaluates whether the conduct of the parties are honest, correct and faithful. A decision of the Macsau Court of Second Instance has stated the objective good faith in the following way: "*uma regra de conduta: o exercício dos direitos e o cumprimento dos deveres devem respeitar toda uma série de regras implícitas na ordem jurídica, que são impostas pela consciência social e correspondem a um determinado conjunto de valores éticos dominantemente aceites na sociedade."*[63]

Needless to say, such a standard of evaluation could not be described by a predetermined concept, and if it is used as a criteria like any other concrete legal rules is used normally, it cannot avoid the critics of being vague and diffuse. Instead, it is an area deliberately left blank for the ethical judgment of the judge. Therefore, the meaning of good faith could be adjusted from time to time according to the value system observed by the judge for the time being. However, if the judge recourses too often to the mechanism of good faith without draining out other concrete and technical rules provided by the Civil Code and other legislations, the legal system itself, or more specifically, the legal traffic, may suffer from instability and insecurity. These are exactly the risks created by the principle of good faith.

Despite its contents being vague, good faith being a legal principle is manifested in numerous occasions in the Civil Code and other legislations by certain legislative techniques. In this sense, the Macau Civil Code as well as the Portuguese Civil Code, has employed the technique of ***undefined concept*** whenever good faith is being referred as a legal principle (in those cases, the legal provisions normally stipulates that the parties shall act in accordance with good faith, without at the same time defining what kind of conduct shall be regarded as of good faith, or simply, without telling us what does it mean by good faith). These occasions are abundant not only in contract law but the whole Civil Code, but it is in the area of obligation that this principle is most frequently and

---

[61] "The broad notion of good faith as an element of mutual cooperation and loyalty includes the idea of fair dealing in the area of contracts". See Alejandro M. Garro, International Encyclopaedia of of Law – Argentina Law of Contracts, Kluwer Law International, 1995, pg. 53.

[62] For an extensive analysis of Good Faith in Civil Law, see A. M. Menezes Cordeiro, Da Boa Fé no Direito Civil, Almedina, 2001 (reprint).

[63] The English translation of the above paragraph is: "*a rule of conduct: the exercise of rights and the fulfillment of duties should respect a whole series of implicit rules within the legal order, which are imposed by the social conscience and correspond to a certain set of etical values dominantly accepted by the society*. " See Ac. 143/2001, TSI, RAEM, dated 25/9/2003.

systematically employed. As far as the Macau Civil Code is concerned, we can easily detect the presence of this principle in the whole life span of contract and in other obligations[64]. For example, in the sector of the formation of contract, under article 219, regulating the pre-contractual liability, and article 231, regulating the integration of declaration of will, as well as article 286, regulating the conversion of juridical transactions, although not "*expressis verbis*"; in the general provisions of obligations, namely, article 399, stating that the parties must observe the principle of good faith; in the stage of resolution of contract, namely, article 431; in the sector of fulfillment of obligations, article 752; and areas other than contracts, namely, the rules about conditions (article 265), about unjust enrichment (article 468), and the last but not least, the most general and residual rule of article 326, applicable to the whole universe of Civil Law, which provides that: "*The exercise of a right is illegitimate if the holder manifestly exceeds the limits imposed by good faith, by good mores or by the social or economic purpose of such right*"[65].

52. In the **subjective sense**, good faith, although still a product developed from the ethnical ideology identical to its objective counterpart, is usually described as a presupposition or a condition (which content already explicitly defined by law) for the production of certain legal consequences. In this sense, the state of mind required to obtain the *non-opposable position of third parties*, against the contracting parties under simulation (article 235) and against those whose rights are transferred by an invalid transaction (article 284), which both define good faith as the ignorance of certain facts; the qualification of a possession (article 1184), which defines good faith as no knowledge of harming the right of others etc. [66]

[64] The principle of good faith as well as the distinction between subjective good faith and objective good faith is frequently adopted by the courts of Macau. For the application of this principle, see Ac. 768/2007, TSI, RAEM, dated 8/5/2008; Ac. 93/2006, TSI, RAEM, dated 23/3/2006; Ac. 2/2002, TUI, RAEM, dated 19/7/2002; and Ac. 143/2001, TSI, RAEM, dated 25/9/2003.

[65] The English translation of the above provision is adopted from the contribution of Jorge AF Godinho, Macau Business Law & Legal System, LExisNexis, 2007, pg.216

[66] Many ideas presented in this chapter are inspired by the comprehensive work of Rui Alarcão, Direito das Obrigações, Coimbra, 1983, versão policopiada, pg. 107 -124.

Chapter 9. Style of Drafting

53. In most of the Civil Law jurisdictions, the Civil Code (and also the Commercial Code in some cases, like the case of Macau) has provided the contract draftsman with a set of supplementary rules. That is to say, in case the draftsman deliberately or undeliberately omits certain important aspects in a contract, the rules set forth in the Civil Code shall automatically fill the gap. On the contrary, whenever the contracting parties have agreed on a clause contradictory to the supplementary provisions of the Code, the wills of the parties shall prevail.

It is exactly because of this that the contracts drafted by Civil Lawyers are usually more precise. Especially in individual civil contracts, since many issues common to all contracts or common to a specific type of contract are already regulated by law, the contracting parties do not need to repeat them all.

54. Nevertheless, in the international trade sector, since business transactions nowadays in principle have no geographical boundary and English being almost the international language in trade matters, common law style of draftsmanship gradually transfuses to civil law countries. Being an open economy, the Macau SAR has always attracted quite a number of foreign investments, especially when the gambling license is liberalized in the past years; the presence of multinational enterprise in the region is not insignificant. At the mean time, contracts drafted in English with a different drafting style appear more and more frequent. This may represent a new challenge to local practitioners.

Chapter 10. Sources of the Law of Contracts

55. In legal writings, the expression "sources of law" may be used to refer to a number of realities. Here it is used to denote the way how legal norms are presented in certain national jurisdiction, in another word, the formal meaning [67] of sources of law. From this aspect, writers usually study whether "law" (here refers to its strict sense) customs (or usage), equity and legal doctrines are sources of law.

In view of the various possible meanings attributed to the expression, Macau Civil Code has chosen to define the formal sources of law in its very beginning. Article one of the Macau Civil Code has provided that: "Laws are the immediate source of law"[68]. Here the term "laws" first appear in the definition refers to all generic provisions enacted by competent organs of the Macau Special Administrative Region. In addition to "laws" in the strict sense, when usage or customs are not contrary to the principle of good faith, they are also admissible as sources of law if the law so determines (article 2). Equity is a criterion for court decisions only when there is a legal provision allowing so (article 3). In modern day, doctrines are no longer considered as a source of law.

As far as the immediate sources of contract law are concerned, even if we focus our attention on the private law level, we must say that they are formed by a complicated network of legislations. For expository purpose, the following discussion shall divide the sources of contract law into two groups: 1) codified rules; 2) non-codified rules.

§ 1. CODIFIED SOURCE

56. The Macau Civil Code is the place where the sources of contract law are most densely found. However, the effort to identify from the Macau Civil Code which rules are considered as sources of contract may seem unwise, since in broad sense, a large number of the rules contained in Book I and Book II as well as a considerable amount of rules contained in Book III and Book IV can be seen as the sources of contract law; among them, some apply exclusively to contracts while others apply also to other institutes; some are the most fundamental and general rules applicable to all contracts, while others are the specific rules applicable to certain types of contracts. Therefore, by using different criteria, writers may come to different conclusions as to which are the sources of contract. In order to cover all the rules to be dealt with in the forthcoming chapters, we hereby adopted a more generous approach, thus including the rules related to the capacity of the parties and the general rules of obligations. For this purpose, and according to the institutional order of the Macau Civil Code, the following are considered as the sources of law of contract:

I. rules in Book I of the Macau Civil Code, namely, from article 111 to article 139, relating to the capacity of a person, since capacity is

[67] About what are the philosophical meaning, political meaning, technical-juridical or formal meanning and the functional or material meaning of "sources of law", see A. Castanheira Neves, Fontes de Direito – Contributo para a revisão do seu problema, in Boletim da Faculdade de Direito, Vol. LVIII, Estudos em Homenagem aos Profs. Doutores M. Paulo Merêa e G. Braga da Cruz, II, Coimbra, 1982, pg. 169 e segs.

[68] Article 1, Macau Civil Code.

considered as the presupposition of validity of a contract;

II. rules in Book I of the Macau Civil Code, from article 209 to article 288, for juridical transactions (including the formation and conclusion of juridical transaction, the form of juridical transaction, the interpretation and integration of juridical transaction, the defects and omission of wills, representation, conditions etc.), since contract is regarded as a bilateral juridical transaction;

III. rules in Book II of the Macau Civil Code, from article 391 to article 395 (the content of an obligation), article 399 to article 450 (including the general provisions of contract, preliminary contract, agreement of preemption, the transfer of contractual position, *exceptio non adimpleti contractus*, resolution of contract, delivery of earnest, etc.), article 504 to article 1174 (regarding the types of obligation, the transmission of credits and debts, the guarantees of obligations, the fulfillment and non-fulfillment of obligation, the various types of nominate contracts), since contract itself is considered as a source of obligation;

IV. rules in Book III of the Macau Civil Code, namely, rules about the constitution and transfer of real rights (including article 1241, 1374, 1421 and 1438);

V. rules in Book IV of the Macau Civil Code, especially the articles about marriage (1462), agreement to marry (1473 – 1477), ante-nuptial and pos-nuptial agreement (1566 -1578), the marriage property system (1579-1611), and donations between spouse (1612-1623).

57. Besides the Civil Code, the Macau Commercial Code also constitutes an important source of contract law. The types of contracts contained in the Commercial Code used to be seen as contracts entered into by merchants, but since the Macau Commercial Code has put aside the concept of merchants and acts of commerce, and employed as core concept the *commercial enterprises*, contracts contained in this code must also be examined from another angle: as the main **tool for the external activities of the enterprises**. Under this orientation, the Macau Commercial Code has regulated the following types of contract: contract for sale or return (578-577); Supply contract (581-592); Commission contract (593-615); Forwarding contract (616-621); Agency contract (622-656); Commercial Concession contract (657-678); Franchising contract (679-707); Brokerage contract (708-719); Advertising contracts (720-748); Carriage contract (749-778); Deposit in General Warehouses (779-797); Lodging contract (798-819); Current Account contract (820-830); Securities Lending contract [*reporte*] (831-839); Banking contracts (840-910); Guarantee contracts (911-961); Insurance contract (962-1063).

§ 2. NON-CODIFIED SOURCE

58. The most important source of contract law not codified (namely, not included in the Macau Civil Code or the Macau Commercial Code) shall be the law that regulates the institution of **General Contractual Clauses** or better, Standard Contract Clauses (Lei nº

17/92/M, of the 28th of September). By definition, Standard Contract Clauses are a set of pre-set clauses prepared by one contracting party and to be used in an undetermined number of contracts[69]. This law has 28 articles, divided into six chapters, namely, "General Provisions", "Inclusion of General Contractual Clauses in Particular Contracts", "Inexistent General Contractual Clauses", "General Contractual Clauses Prohibited", "Special Procedure" and "Final and Transitional Provisions". The ambit of application of this law is large, and closely related to the protection of consumers.

Finally, it may also be useful to mention that Macau law has created a unique type of nominate contract: the Tri-partite Contract, by Law n° 15/2001, which deals mainly with the real estate transactions[70].

[69] These clauses are frequently inserted into contracts involving massive transactions by the party with stronger bargaining power, so that the other party is left with little possibility to negotiate the clauses, but only with the alternative to accept or not accept. For a thorough dogmatic study of this figure, see Joaquim de Sousa Ribeiro, O Problema do Contrato – As Cláusulas Contratuais Gerais e o Princípio da Liberdade Contratual, Almedina, 1999; for a brief yet comprehensive introduction of the same matter, see M. Almeida Costa & A. Menezes Cordeiro, Cláusulas Contratuais Gerais. Anotação ao Decreto-Lei no 446/85, de 25 de Outubro, Almedina, Coimbra, 1986.

[70] See Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, pgs. 348-349; Tong Io Cheng, Tri-partite Contract – The Macau Experience of Legal Implantation, paper presented to the Conference celebrating the 200 years of French Civil Code, organized by the CFJJ of Macau, City University and the French Consulate of Hong Kong and Macau.

SELECTED BIBLIOGRAPHY

- 1º Versão do Trabalho – Proposta de Localização da Parte Geral do Código Civil, como data de 19 de Março de 1996
- Abrantes, José João, A Execpção de Não Cumprimento do Contrato no Direito Civil Português, Almedina, 1986
- Alarcão, Rui, Direito das Obrigações, Coimbra, 1983, versão policopiada
- Albuquerque, Pedro de, A Representação Voluntária em Direito Civil (Ensaio de reconstrução dogmática), Almedina, 2004
- Albuquerque, Pedro de, Direito das Obrigações, Vol. III (Contrato de Compra e Venda. Introdução. Efeitos Essenciais e Modalidades), 2ª Ed., Lisboa, 1991
- Almeida, Carlos Ferreira de, Contratos I – Conceitos. Fontes. Formação, 3ª Edição, Almedina, 2005
- Almeida, Carlos Ferreira de, Transmissão contratual da propriedade – entre o mito da consensualidade e a realidade de múltiplos regimre, Revista da Faculdade de Direito da UNL, Almedina, 2005, number 11
- Amaral, Diogo Freitas do, Curso de Direito Administrativo, Vol. II, Almedina, 2001
- Andrade, Manuel de, Teoria Geral da Relação Jurídica, Coimbra, 7ª Reimpressão, 1992
- Ascensão, José de Oliveira, A Tipicidade dos Direitos Reias, Lisboa, 1968
- Ascensão, José de Oliveira, Direito Civil – Reais, 5ª Edição, Coimbra Editora, 1993
- Ascensão, José de Oliveira, O Direito – Introdução e Teoria Geral, Almedina, 7ª Ediçao, 1993
- Ascensão, José de Oliveira, Direito Civil – Teoria Geral, Vol. III, Coimbra, 1999
- Ascensão, José de Oliveira, Direito Civil. Teoria Geral, II, Acções e factos jurídicos, 2ª Ed., Coimbra, 2003,
- Berman, Harold J., Law and Revolution – the Formation of Western Legal Tradition, tenth print, Harvard University Press, 1999
- Carvalho, Jorge Morais, Transmissão da Propriedade e Transferência do Risco na Compra e Venda de Coisas Genéricas, Revista da Faculdade de Direito da UNL, Almedina, 2005, number 11
- Carvalho, Orlando de, Critério e estrutura do estabelecimento comercial, Coimbra, 1967
- Carvalho, Orlando de, Teoria Geral do Direito Civil, versão policopiada, Coimbra, 1981
- Cordeiro, António Menezes, A representação: Sistema e Perspectivas de Reforma, in

Da Modernização do Direito Civil – I Aspectos Gerais, Almedina, 2004

- Cordeiro, António Menezes, Estudos de Direito Civil, Coimbra, Almedina, 1987
- Cordeiro, Menezes, Da Boa Fé no Direito Civil, Almedina, 2001 (reprint).
- Cordeiro, Menezes, Direitos Reais, Lisboa, Lex, 1993 (reprint de 1979)
- Cordeiro, Menezes, Tratado de Direito Civil Português, I, Parte Geral, tomo I, Introdução. Doutrina Geral. Negócio Jurídico, 3ª ed., Coimbra, 2005
- Correia, Ferrer, A procuração na teoria da representação voluntária, in Estudos Jurídicos, II, Coimbra, 1969
- Correia, Ferrer, Erro e interpretação na teoria do negócio jurídico, Coimbra, 1939.
- Correia, Ferrer, Lições de Direito Comercial, Lex, 1994 (reprint of 1968)
- Correia, Paula Nunes Temas de Direito Civil no Retorno de Macau à Soberania Chinesa – Questões Emergentes da Parte Geral do Código Civil: Breve Análise, in BFDUM, ano IX, n° 19, 2005
- Correia, Paula Nunes, APONTAMENTOS DE TEORIA GERAL DO DIREITO CIVIL - Adaptação das Lições do Professor Pinto, Carlos Alberto da Mota "Teoria Geral do Direito Civil" ao Sistema Jurídico vigente em Macau, Policopiada, MACAU, 2005,
- Costa, J. M. de Almeida, Direito das Obrigações, 9ª Ed., Almedina 2001
- Costa, J. M. de Almeida, Direito das Obrigações, Almedina, 1998
- Costa, J. M. de Almeida & Cordeiro, A. Menezes, Cláusulas Contratuais Gerais. Anotação ao Decreto-Lei no 446/85, de 25 de Outubro, Almedina, Coimbra, 1986.
- Costa, J. M. de Almeida, Contrato-Promessa (uma Síntese do Regime Vigente), Almedina, 2001.
- Cristas, Maria de Assunção Oliveira, Transmissão Contratual do Direito de Crédito – do Carácter Real do Direito de Crédito, Almedina, 2005
- Cura, António A. Viera, O Fundamento Romanístico da Eficácia Obrigacional e da Eficácia Real da Compra e Venda nos Códigos Civis Espanhol e Português, in Jornadas Romanísticas, Coimbra, 2003,
- Dias, José Eduardo Figueiredo, Manual de Formação de Direito Administrativo de Macau, Centro de Formação Jurídica e Judiciária, 2006
- Duarte, Rui Pinto, Curso de Direitos Reais, Princípia, 2002
- Eörsi, G., Open-price contracts, in Commentary on the International Sales Law, Bianca & Bonell
- Fagella, Gabrielle, Dei Periodi Precontrattuali e Della Lor Vera ed Esatta Costruzione Scientifica, in StudiGiuridici in Onore de Carlo Fadda, Tomo III, 1906
- Fan Jianhong, A.D. Pereira, International Encyclopaedia of Law - Macau Commercial and Economic Law, Kluwer Law International

- Faria, Ribeiro de, Obrigações, II, Almedina, 2001 (reimpressão)
- Fernandes, Luís A. Carvalho, Teoria Geral do Direito Civil – II, 3ª Edição, Universidade Católica Editora, 2001in the line of Castro Mendes.
- Flume, Werner, El negocio jurídico, translated by José María González/Esther Gómez Calle, Fundación Cultural del Notariado, 1998
- Fong Man Chong, Inspirações emergentes de dois acórdãos: Quem sera (deverá ser) o Réu? in JJS, N° 2, Faculdade de Direito, Universidade de Macau, 2006
- Garcia, Augusto Teixeira, Lições de Direito do Trabalho, versão policopiada, Faculdade de Direito da Universidade de Macau, 1992/1993
- Garcia, Augusto Teixeira, Nota Justificativa do Código Comercial de Macau, Imprensa Oficial, 2000
- Garcia, Augusto Teixeira, Set-off in Portugal, paper presented to the Conference of the Common Core of European Private Law, Torino,
- Garro, Alejandro M., International Encyclopaedia of of Law – Argentina Law of Contracts, Kluwer Law International, 1995
- Godinho, Jorge A.F., Macau Business Law & Legal System, LExisNexis, 2007
- Gomes, Júlio, A Gestão de Negócios. Um instituto jurídico numa encruzilada, Coimbra, Separata do BFD Suplemento 39, 1983.
- Herbots, Jacques, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993
- Hörster, Heinrich Ewald, A Parte Geral do Código Civil Portuguese – Teoria Geral do Direito Civil, Almedina, 1992
- Jahrbücher für die Dogmatik der heutigen römischen und detschen privatrechts, 1865
- Júnior, E. Santos, Da Responsabilidade Civil de Terceiro por Lesão do Direito de Crédito, Almedina, 2003
- Justo, A. Santos, Direitos Reais, Coimbra, 2007
- Kaser, Max (translation by Rolf Dannenbring), Roman Private Law, 4th Edition, 1984, University of South Africa
- Kaser, Max, Compraventa y transmission de la propriedad en el derecho Romano y en la dogmatica moderna, Valladolid, 1962,
- Kötz, Konrad Zweitgert und Hein, Einführung in die Rechtsvergleichung, auf dem Gebiete des Privatrechts, Band I: Grundlagen, Chinese Version, Law Press
- Leitão, Luís Manuel Teles de Menezes, A Responsabilidade do Gestor perante o Dono do Negócio no Direito Civil Português, Lisboa, C.E.F., 1991
- Leitão, Luís Manuel Teles de Menezes, Direito das Obrigações, Vol. II, Almedina, 2002
- Leitão, Luís Manuel Teles de Menezes, Direito das Obrigações, Vol. III, Almedina,

2002

- Leitão, Luís Manuel Teles de Menezes, Direito das Obrigações, Vol. I, 2a Edição, Almedina, 2002.
- Leitão, Luís Manuel Teles de Menezes, O Enriquecimento Sem Causa no Direito Civil, Centro de Estudos Fiscais-Direcção Geral das Contribuições e Impostos – Ministério das Finaças, 1996.
- Leite, Jorge, Direito do Trabalho, Vol. I, Serviços de Acção Social da U.C., Seriços de Texto, Coimbra, 1998
- Lima, Pires de / Varela, Antunes, Código Civil Anotado, Vol. I, 4ª Ed., Coimbra, 1987
- Lima, Pires de / Varela, Antunes, Código Civil Anotado, Vol. II, 4ª Edição, Coimbra, 1987
- Machado, J. Baptista, Tutela da Confiança e "venire contra factum propium", in Obra Dispersa, I, Braga, 1991
- Machado, João Baptista Acordo negocial e erro na venda de coisas defeituosas, in BMJ, n° 215, 1972
- Mancuso, Salvatore, Some Keynotes on Gaming Law in Macau, Journal of Juridical Science, Vol.
- Marques, José Gonçalves, Direitos Reais, versão policopiada, Faculdade de Direito, Universidade de Macau, 2000
- Martinez, Pedro Romano, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000
- Martinez, Pedro Romano,Cumprimento Defeituoso – Em Especial na Compra e Venda e na Empreitada, Almedina, 1994
- Medicus, Dieter, Allgemeiner Teil des BGB, translated by Shao Jiandong, Law Press, 2000
- Mendes, Castro, Teoria Geral do Direito Civil, II, AAFDL, 1979
- Mendes, João de Castro, Teoria Geral do Direito Civil, Vol. II, Associação Acadêmica da Faculdade de Direito de Lisboa, 1995
- Menezes Cordeiro, Tratado de Direito Civil Portuguese, I Parte Geral, Tomo IV, Almedina, 2005
- Mesquita, José Andrade, Direitos Pessoais de Gozo, Almedina, 1999.
- Mesquita, M. Henrique, Direitos Reais, Sumários das Lições ao Curso de 1966-67, Coimbra
- Miranda, Yara, Venda de coisa alheia, Revista da Faculdade de Direito da UNL, Almedina, 2005, number 11
- Monateri, P. G., Musy, Alberto, Chiaves, Philipo Andrea, International Encyclopaedia of Law – Italian Law of Contracts, Kluwer Law International, 1999

- Monteiro, António Pinto, Cláusula Penal e Indemnização, Almedina, 1999
- Monteiro, António Pinto, Cláusulas Limitativas e de Exclusão de Responsabilidade Civil, Coimbra, 1985
- Monteiro, Pinto, Cláusulas Limitativas e de Exclusão de Responsabilidade Civil, Coimbra, 1985
- Nascimento, Paulo Fernando Modesto Sobral do, A Responsabilidade Pré-Contratual pela Ruptura das Negociações, in Estudos em Homenagem ao Professor Doutor Telles, Inocência Galvão, Vol. IV, Almedina, 2003
- Neves, A. Castanheira, Fontes de Direito – Contributo para a revisão do seu problema, in Boletim da Faculdade de Direito, Vol. LVIII, Estudos em Homenagem aos Profs. Doutores M. Paulo Merêa e G. Braga da Cruz, II, Coimbra, 1982
- Ng Lai Chan, On the Rights and Duties of the Tenant, master thesis, Faculty of Law, University of Macau, 2008
- Peralta, Ana, A posição juridical do comprador na venda com reserve de propriedade, Coimbra, Almedina, 1990
- Perissinotto, Gustavo Ramos, Compra e Venda com Reserva de domínio/propriedade – comparação dos direitos brasileiros e português, Revista da Faculdade de Direito da UNL, Almedina, 2005, number 11
- Pessanha, Luís, Os jogos de fortuna e azar e a promoção do investimento em Macau, in Seminário de reflexão sobre a promoção e protecção do investimento estrangeiro à luz da legislação moçambicana e macaense, Faculty of Law of the University of Eduardo Mondalane, 2007.
- Pietronbon, Vittorino: Errore, Volontá e Affidamento nel Negozio Giuridico, Cedam, 1990
- Pinto, Carlos Mota, Monteiro, A. Pinto & Silva, J. Calvão da, Jogo e Aposta. Subsídios de fundamentação ética e histórico-jurídica, Coimbra, 1982
- Pinto, Carlos Mota, Direitos Reais (lições recolhidas por Álvaro Moreira e Carlos Fraga), Coimbra, 1975
- Pinto,Carlos Mota, A responsabilidade pré-negocial pela não conclusão dos contratos, Boletim da Faculdade de Direito, Coimbra, 1966
- Pinto, Carlos Mota, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993
- Pinto, Carlos Mota, Teoria Geral do Direito Civil, 4ª Edição (updated and revised by Monteiro, António Pinto and Pinto, Paulo Mota), Coimbra Editora, 2005
- Pinto, Paulo Mota, Declaração Tácita e comportamento concludente no negócio jurídico, Almedina, 1995
- Pires, Cândida da Silva Antunes, Cláusula Compromissória e Compromisso Arbitral. Da Sua Natureza Jurídica, in BFDUM, Ano IX, n° 20, FDUM, 2005
- Prata, Ana, o Contrato-Promessa e o seu Regime Civil, Almedina, 1999
- Reggi, Robberto, Presunzione (diritto romano), ED XXXV (1986)

- Reutlinger, M., Wills, Trusts, and Estates, Essential Terms and Concepts, Boston, New York, Toronto, London, Little, Brown and Company, 1993
- Ribeiro, Joaquim de Sousa, Cláusulas Contratuais Gerais e o Paradigma do Contrato, Coimbra, 1990,
- Ribeiro, Joaquim de Sousa, O Problema do Contrato – As Cláusulas Contratuais Gerais e o Princípio da Liberdade Contratual, Almedina, 1999
- Ribeiro, José Baptista Rodrigues / Pinho, José Cândido de, Código do Procedimento Administrativo de Macau Anotado e Comentato, Fundação de Macau e Direcção dos Serviços de Administração e Função Pública, 1998
- Ribeiro, Lino José Baptista Rodrigues / Pinho, José Cândido de, Código do Procedimento Administrativo de Macau Anotado e Comentato, Fundação de Macau e Direcção dos Serviços de Administração e Função Pública, 1998
- Santos, Beleza dos, A Simulação em Direito Civil, I, Coimbra, 1921
- Savigny, F.C. v., Sistema del Derecho Romano Actual(Spanish version), translated by Jacinto Mesía Y Manuel Poley, Tomo II, Analecta Editorial, 2004(reprint),
- Serra, Adriano Paes da Silva Vaz, Efeitos dos Contratos (Princípios Gerais), BMJ, (74), Lisboa, 1958
- Serra, Adriano Paes da Silva Vaz, Anotação ao acórdão do S.T.J. de 12 de Fevereiro de 1970, in R.L.J., n.º 105, Coimbra, 1972-73
- Serra, Adriano Paes da Silva Vaz, Anotação ao acórdão do S.T.J. de 5 de Julho de 1968, in R.L.J, n.º 102, Coimbra, 1968-69
- Serra, Adriano Paes da Silva Vaz, Culpa do deverdor ou do agente, Boletim do Ministério da Justiça, n.º 68, 1957
- Shi Shangkuan, Obligations in Special, CUPL Press, 2000 (reprint)
- Silva, João Calvão da, Cumprimento e Sanção Pecuniária Compulsória, Coimbra, 1997 (2ª Reimpressão)
- Silva, João Calvão da, Cumprimento e Sanção Pecuniária Compulsória, Coimbra, 1997
- Silva, João Calvão da, Responsabilidade Civil do Produtor, Coimbra, 1990
- Silva, João Calvão da, Sinal e Contrato-Promessa, Almedina, 1988
- Silva, José Carlos Bento da / Quental, Miguel P. A., Manual de Formação de Direito do Trabalho em Macau, Centro de Formação Jurídica e Judiciária, 2006
- Sze, Ping-fat, International Encyclopaedia of Law – Hong Kong Law of Contracts, Kluwer Law International, 2001
- Telles, Inocêncio Galvão, Manual dos Contratos em Geral, 4ª Edição, Coimbra Editora, 2002
- Tomé, Maria João Romão Carreiro Vaz / Campos, Diogo Leite de, A Propriedade Fiduciária (Trust) – Estudo para a sua consagração no direito português, Almedina,

1999

- Tong Io Cheng, "The polemics about the function and nature of possession as well as the constitutum possessorium", in Journal of Juridical Science, number 6, Faculty of Law of University of Macau, 2007.
- Tong Io Cheng, A Discussion on Real Contract, in Journal of Macau Studies, number 28, Macau Foundation, 2005
- Tong Io Cheng, Future Thing and the Purchase and Sale of Future Thing in Macau Civil Code, in Journal of Political Science and Law, Shandong Politico-legality Management Cadre Institute, number 110, 2006
- Tong Io Cheng, Macau Civil Law, in "A New Study on Macau Law", Edited by Liu Gaolong/Zhao Guoqiang, Vol. I, Macau Foundation, 2005
- Tong Io Cheng, O Contrato Promessa e a Modificação de Direitos Reais, in Revista de Administração Pública de Macau, Direcção dos Serviços de Administração e Função Pública, 2004, número 66
- Tong Io Cheng, O Regime Jurídico do Contrato-Promessa, 2004, Faculdade de Direito da Universidade de Macau
- Tong Io Cheng, On the Principle of Taxonomy of Real Rights – as well as the source and limits of article 1230 of the Macau Civil Code, in Journal of Juridical Sciences, Vol. 2, Faculty of Law, University of Macau, 2006.
- Tong Io Cheng, Studies on the Fundamental Theories of Civil Law and Macau Civil Law, Sun Yat-Sen University Press
- Tong Io Cheng, Theoretical and Institutional Sources of Error in Declaration of Intent, in Journal of the East China University of Political Science and Law, number 2 (General Serial No. 57), March 2008
- Tong Io Cheng, Tri-partite Contract – The Macau Experience of Legal Implantation, paper presented to the Conference celebrating the 200 years of French Civil Code, organized by the CFJJ of Macau, City University and the French Consulate of Hong Kong and Macau.
- Torres, José Pinheiro, Do Contrato de Trabalho a Termo na Lei Portuguesa e de Macau, in BFDUM, no. 4, Faculdade de Direito da Universidade de Macau, 1997
- Torres, José Pinheiro, Notas dispersas sobre o regime jurídico das relações laborais – Oportunidade e necessidade da sua remodelação, in BFDUM, no. 7, Faculdade de Direito da Universidade de Macau, 1999
- Trigo, Manuel, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007
- Trigo, Manuel, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998
- Varela, João de Matos Antunes, Das Obrigações em Geral, Vol. I, 10ª Ed., Almedina,

2000

- Varela, João de Matos Antunes, Das Obrigações em Geral, Vol. I, 8ª Ed., Almedina, 1994
- Varela, João de Matos Antunes, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995
- Varela, João de Matos Antunes, Das Obrigações em Geral, Vol.I, 10ª Edição, Almedina, 2001
- Varela, João de Matos Antunes, Das Obrigações em Geral, Vol.I, 10ª Edição, Almedina, 2000
- Varela, João de Matos Antunes, Sobre o Contrato-Promessa, Coimbra, 1989;
- Vasconcelos, Pedro Pais de, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003
- Ventura, Raúl, Apontamentos sobre Sociedade Civis, Almedina, 2006
- Ventura, Raul, O Contrato de compra e venda no Código Civil, in ROA 43 (1983)
- Whittaker, S. J., Chitty on Contracts, Vol I (General Principles), 27th ed. London Sweet & Maxwell, 1994
- Zimmermann, Reinhard, The Law of Obligations – Roman Foundations of the Civilian Tradition, Oxford University Press, 1990

Part I. General Principles of the Law of Contract

Chapter 1. Formation of Contract

§ 1. GENERAL CONSIDERATIONS

59. Before entering into the discussion of the formation of contract, it is of great importance to reiterate that the Macau Civil Code has externally adopted the structure of German Civil Code. Regardless of the fact that the Macau Civil Code has retained substantially the characteristics of the Code of Seabra, the mere adoption of external structure still has its reflections in contract law: the concept of contract has been submerged into the concept of juridical transaction. Therefore, unlike the exposition of contract law in other Latin family jurisdictions, in the exposition of the formation of contract, we have no other choice but to relate at the first place the declaration of will or intent, which is the basic element of juridical transaction.

§ 2. DECLARATION OF INTENT

60. The concept of declaration of intent came together with the concept of juridical transaction, which was created by the XVIIIth Century German Jurists, of the *usus modernus pandectarum*, and later adopted by F. C. v. Savigny, whose authority and prestige was decisive for the general acceptance of this theory in modern Civil Law. Savigny pronounced that declaration of intent is composed of two elements: *intent (will)* and *declaration*, while "*intent* is the only element important and effective, just because the intent is an internal and invisible happening, we need a signal to make it known to the others, and the signal by which the intent is externalized is the *declaration*.[71]" The above statement of Savigny was then regarded as the most important support of the so called "Will Theory".

Starting from this point, **juridical transaction** and **declaration of intent** are designed as the technical expression of the freedom of will (or the most important instrument to accomplish **private autonomy**). By the creation of such an abstract concept, a number of traditional institutions (including contracts and many other acts of free will, such as transfer of ownership, the making of a will, etc.) find a common point of reference.

The Savignian theory of juridical transaction and declaration of intent was received by the Portuguese Private Law during the first quarter of the XXth Century through the Italian translation of the works of writers like Windscheid and Dernburg as well as the original writings of Italian lawyers. However, at the very outset, Portuguese lawyers had considered the concept of juridical transaction (negócio jurídico) only a synonym of

[71] F.C. v. Savigny, Sistema del Derecho Romano Actual(Spanish version), translated by Jacinto Mesía Y Manuel Poley, Tomo II, Analecta Editorial, 2004(reprint), pg. 301; Werner Flume, El negocio jurídico, translated by José María González/Esther Gómez Calle, Fundación Cultural del Notariado, 1998, pg. 78.

juristic act (acto jurídico). It was not until the logical decomposition of the internal element "intent" into "intent of action" (Handlungswille), intent of decaration" (Erklärungswille) and "intent of transaction" (Geschäftswille), done by H. Lehmann, that the theory of declaration of intent came to its present form [72]. The model developed by H. Lehmann in 1933 was introduced to the Portuguese legal community by Ferrer Correia and Manuel de Andrade[73], and is still accepted (though with reserve or modification) by many legal textbooks of the modern days[74].

61. The reception of the theory of declaration of intent by Portuguese academic community in the early twentieth century had its immediate reflection in the positive law level. In 1966, when the new Portuguese Civil Code was elaborated, juridical transaction and declaration of intent were employed as the key concepts for the systematic construction of its general parts. Obviously, such a model adopted by the 1966 Portuguese Civil Code was completed succeeded by the Macau Civil Code of 1999. Nevertheless, the reception of the German system of civil law in the formal aspect as well as the theory of declaration of intent should not be over exaggerated. At least, the sharp distinction between *auflassung* and *vertrag* is not adopted by the Portuguese Civil Code nor its successor, the Macau Civil Code).

62. Therefore, under the Macau Civil Code, **a contract is normally formed by two or more declarations of intent**, whether a contract is valid or not depends on the validity of each of those declarations. However, it should be noted that the theoretical construction of declaration of intent is a technical category too abstract and in fact, not a perfect construction. First of all, for purpose of interpretation, it is not easy for non-professionals or even professionals to establish an immediate link from declaration of intent and juridical transaction to contract (in fact, contract is only a subcategory of juridical transaction). Secondly, even from a logical and structural point of view, in some situations (like the so-called *hauptvertrag*), the concept of declaration of intent and juridical transaction also find difficulty in explaining the reality, especially at the point of identifying when and how the declaration of intent was made.

Since the emergence of the above legal categories (*juridical transaction* and *declaration of intent*[75]), there has been constant disputes on the concrete meaning of *intent* and *declaration*. Depending on the inclination to the element of intent or declaration, legal theories of declaration of intent had been classified as *subjective* and *objective*.

In order to avoid the aforesaid theoretical dispute, and influenced by the most recent development of German Doctrines, the legislator of the 1966 Portuguese Civil Code has

---

[72] About the development and the problems of this distinction, see Paulo Mota Pinto, Declaração Tácita e comportamento concludente no negócio jurídico, Almedina, 1995, pgs. 10-15, 222 ss.

[73] Ibid, pg 222.

[74] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 4ª Edição (updated and revised by António Pinto Monteiro and Paulo Mota Pinto), Coimbra Editora, 2005, pg. 419; also in João de Castro Mendes, Teoria Geral do Direito Civil, Vol. II, Associação Acadêmica da Faculdade de Direito de Lisboa, 1995, pg. 24-25, with some modifications, namely, using the term *functional intent(vontade funcional)*; and in Luís A. Carvalho Fernandes, Teoria Geral do Direito Civil – II, 3ª Edição, Universidade Católica Editora, 2001, pg. 135, in the line of Castro Mendes.

[75] For a precise analysis of the differences between the two concepts (juridical transaction and declaration of intent), see Dieter Medicus, Allgemeiner Teil des BGB, translated by Shao Jiandong, Law Press, 2000, pgs. 190-195.

decided to give up the traditional term "declaration of intent", and use a neutral term: *Business declaration* (declaração negocial)[76], which is used as the heading of Section 1 under the Chapter of Juridical transaction (Negócio Jurídico). The aforesaid formula of ***Business Declaration*** **(declaração negocial)** of the 1966 Portuguese Civil Code is obviously inherited by the Macau Civil Code.

63. In rigorous terms, the Macau Civil Code does not define what is a business declaration, nor the broader concept of juridical transaction. Instead, in article 209 (1), the Code states that: "*A business declaration can be expressed or implied; it is express when made by words, in writing, or by any other direct means of expressing intention; it is implied when it is deducted from facts that reveal it with all probability*."[77]

Nevertheless, an implied business declaration should never be confused with silence or inactivity. An implied declaration, although most probably not expressed by language, is revealed through certain facts that can deduct without doubt the intention of a person. On the contrary, silence or inactivity is a negative fact; the person does not actively send a message. According to our law, silence is only valid as business declaration if such value is given to it by law, usage or convention (article 210, Macau Civil Code.

§ 3. OFFER AND ACCEPTANCE

64. This part of material is regulated in the General Part of the Macau Civil Code under the heading "Perfection of Business Transaction" (Perfeição da declaração negocial).

Like many other European legal systems had done, the Macau Civil Code has adopted the process of **offer** and **acceptance** as the paradigmatic process - if not the only possible process[78] - for the formation of contract. Since the Macau Law has adopted the theory of *business declaration*, the traditional debate of whether an offer produces its binding effect from unilateral intent is automatically surpassed. In our law, either an offer or an acceptance is a *business declaration*, and thus produces the due effect of a business declaration.

The idea of offer and acceptance used as a paradigm to describe the process of contract formation is in fact elucidating; it shows figuratively how negotiations are conducted, especially negotiations done in a face-to-face context or through correspondence. Nevertheless, it is also true that this stereotype in many ways fails to

---

[76] Carlos Mota Pinto, Teoria Geral do Direito Civil, 4ª Edição (por António Pinto Monteiro e Paulo Mota Pinto), Coimbra, 2005, pg. 416.

[77] For the English translation of the cited article, see Jorge AF Godinho, Macau Business Law & Legal System, LExisNexis, 2007, pg.216.

[78] Some writers indeed suggested that the structure and content of the general part of the Code, especially the section under the heading of "Perfection of Business Transaction" (in this part there is no difference between the Macau and Portuguese Code) induce a reader to think that the **only possible way** to form a contract is an offer followed by its acceptance (here we are referring to Carlos Ferreira de Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg.95). In fact, there are other rules not related to offer and acceptance, such as "the effectiveness of business declaration" (article 216), the "public announcement of declaration" (article 217) and the "fault in the formation of contract"(article 219); yet it is also clear that those rules are general rules applicable to all types of business declarations, not exclusively for contracts.

reflect the conclusion of contracts with a formal requirement (for example, contracts concluded in the form of a public deed). In those cases, the process of negotiation is hidden in a series of preparatory activities (in another word, the whole process of negotiation is integrated into the so called precontractual phase) which leads to the drafting of all the terms of a contract in advance, either by one of the party or by legal professionals; therefore, the declarations of all the parties are integrated in one only document, which is then turned effective by the signatures of the parties.

Despite some academic efforts to distinguish the various modes of formation of contract[79], *in iure consituido*, what we can conclude is that although offer and acceptance is the only process described by the Code, our law does not exclude other modes of formation.

I. The Offer

65. In principle, people involving in a negotiation process can freely change their mind, but nothing can be changed without legal consequences after a promise is made. However, in legal sense, it is really difficult to delimit the phase of negotiation and the phase where promises are made. The process of offer and acceptance is originally an abstraction of the daily negotiation process, but the law describes it as a binding promise. Once an offer is made, it is irrevocable (article 222 of the Macau Civil Code).

An offer (sometimes also called proposal) in itself is a *business declaration* (a *unilateral* one) made by a party to another party, if accepted, concludes the contract. In most of the cases, an offer is a declaration made to somebody (another party), it is then classified theoretically as "*unilateral transaction recipiendo"*, or in terms of law, business declaration with an addressee. According to our law (article 216 of the Macau Civil Code), "*a business declaration which has an addressee shall take effect as soon as it reaches the control of or is known to the addressee*."[80] Here, our law seems to have employed mixed criteria to determine the effectiveness of a declaration: both by **arrival** and by **acknowledgement**. In fact, the two criteria could be interpreted as acknowledgement and presumption of acknowledgement. When the law says "reaches the control of the addressee", it means the addressee is in such a condition that he would normally know the declaration, if he fails to notice, the law presumes he knows, because the failure of notice is normally his own fault. Therefore, the real criteria behind this rule are the acknowledgement of the addressee and the presumption of acknowledgement, or a test of fault (*culpa*).

Nevertheless, our law also admits the chance of an offer made to the public; in this case, it is difficult to apply the rule of business declaration with an addressee (but we also have some reserve in qualifying such a declaration as one without addressee).

66. The main legal problem in this stage is to identify or qualify an act of declaration made in the negotiation process as offer. According to a widely accepted explanation, in order for us to qualify any act as an offer, it has to bear the following characteristics: *completeness*, *firmness* and *formally adequate*. Nevertheless, it is not always easy to evaluate the fulfillment of these characteristics.

For the characteristic of **completeness** (containing the minimum content of a

[79] About the criticism of the offer and acceptance stereotype and the suggestion of a heterogeneous modes of conclusion of contract, see Carlos Ferreira de Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg. 95 -98.

[80] Translation adopted from Jorge Godinho, Ibid, pg. 216.

contract), the difficulty lies in the range. In principle, each contract has its minimum content, without which a contract is not complete. However, it is very difficult to determine whether an offer is complete. Firstly, under a Codified system, the minimum content of a contract is not always directly shown in the declarations of the parties; rather, it can be integrated through application of supplementary legal provisions or other legal criteria. On the other hand, in concrete case, contracting parties can also determine to add some clauses not typical to a contract type, but considered indispensable to their business. For this reason, the Macau Civil Code has provided us a fundamental guideline (article 224, which is more extensive then its Portuguese predecessor) to test the completeness of an offer: "*1. A contract is not concluded as long as the parties have not agreed on all the clauses upon which any of them has judged necessary an agreement." "2. In case the parties have left the negotiation of certain secondary points pending, but revealed, through the commencement of execution or any other way, that a clear intent of being bound to the contract in the terms negotiated, the contract is considered concluded, and the rules of integration apply to the points omitted."*

Eventually, it is still the intention or the presumed intention of the parties that determines the completeness of an offer.

67. In concrete case, there is the traditional debate on whether an offer without indicating the price is complete, and thus producing the due effect of an offer. For this question, either the Vienna Convention (United Nations Convention on Contracts for the International Sale of Goods), in the international level, or the Macau Civil Code, in the domestic level, has provided us with some elements for solution, though not all the way unequivocal. The Vienna Convention first indicates the price as an element to determine the preciseness of an offer (article 14), which easily leads to a conclusion that the indication of price is necessary for a valid offer. However, in its article 55, the same Convention provides that, "*Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.*" A similar expression can also be found in article 873 of the Macau Civil Code, fully inherited the formula of the 1966 Portuguese Civil Code, which source can be traced to article 1474 of the Italian Civil Code.

First of all, we would like to point out that although the discussion of the validity of offer is not necessarily identical to the discussion of the validity of a contract, at this particular point (whether the determination of price is essential), arguments can be shared by both. Secondly, owing to the apparent contradiction of legal text and the furious debate on the issue in international and domestic level[81], it is still early to conclude that there is a unanimous solution.

68. For our part, we believe that a systematic analysis of the Macau Civil Code shall incline to the second solution, therefore, the validity of a contract without indicating a

[81] In Macau, Jorge Godinho has considered the price essential for the completeness of an offer, see Ibid, pg. 55; while many other opinions have chosen to admit the validness of an offer without mentioning the price (for the case of Portugual, see Carlos Ferreira de Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg. 101; for a comparative study of the various solutions, see G. Eörsi, Open-price contracts, in Commentary on the International Sales Law, Bianca & Bonell, pg. 406 ss).

price shall be determined by the whole circumstances on which the declaration was made; this rule extends to the evaluation of the completeness of an offer.

It should however be admitted that offers or contracts without mentioning the price are exceptional cases; and of course, the burden of proof rest on the party who argues for the validity of the offer.

69. The characteristic of **firmness** implies a serious, definite and unambiguous intention to conclude a contract. It is normal to say that an offer "has to be in a way so that the other party simply say yes, then the contract is concluded."[82] However, it must be noted that an offer, expressed in the form of a declaration, coexist with the ambiguity of language. In fact, the clarity required for an offer is no more than that of any business declaration. Actually, this characteristic has to do with both the characteristic of completeness and the characteristic of formal adequacy, since there is hardly any declaration that meets the requirement of completeness and formal adequacy and at the same time not firm.

70. The characteristic of being **formally adequate** has to do with the formal requirement imposed by law. Obviously, it is the offer that determines and carries the content (although part of it may result from law) of a particular contract, therefore, a formal legal contract could only be concluded when an offer is done according to the form imposed by law.

71. Finally, although an offer is by itself a business declaration and thus independently produces effect, it is important to remember that it derived from the abstraction of the negotiation process. In such a process, it is impossible to keep the offeror bound indefinitely. The Macau Civil Code has provided the criteria to determine for how long an offer shall remain open for acceptance.

In article 220 of the Macau Civil Code, it is regulated that: "*1. A contract offer binds the offeror in the following manner: a) If a time limit for acceptance has been set by the offeror or agreed by the parties, the offer shall remain open until the expiry of such time limit; b) If no time limit was set, but the offeror has requested an immediate answer, the offer shall remain open until, in normal conditions, the offer and the acceptance reach their destinations; c) If no time limit was set and the offer has been made orally to a person who is present, the offer lapses if the acceptance is not done at once; d) If no time limit was set and the offer has been made to a person who is not present, or has been made in writing to a person who is present, the offer shall remain open until five days subsequent to the time limit arising from the provision of line b).*"[83]

From this article, we can easily notice that the law has distinguished between the case of offer made to person at present and to person not present (derived from the traditional classification of contract *inter praesentes* and *inter absentes*). When an offer is addressed to a person who would be able to communicate immediately and directly with the offeror, it is said to be an offer made to a person who is present. On the contrary, it is an offer made to a person who is not present. In the first case, the addressee has all the possibility to make an immediate response; therefore, normally there is no time gap between the two declarations, unless the offeror predetermines a time limit for acceptance. In the second case, since there is no direct and immediate contact, the law determines that if nothing is said about the time limit of acceptance, the offer shall

[82] Jorge Godinho, Ibid, pg. 54.
[83] The translation of this article owes to Jorge Godinho, Ibid, pg. 217.

remain open for five days. Contract by correspondence are the typical contract *inter absentes*.

72. According to the Macau Civil Code, an offer can be made to one or more particular persons or to a circle of undetermined persons. In the second case, it is called an ***offer addressed to the public*** (article 222, clause 3). In this kind of offer, the objective of the offeror could be one contract (for example, the sale of a used car) or a number of contracts. The most important characteristic of this kind of offer is the fungibility of its addressee, therefore, any contract celebrated through this method are incompatible with the idea *intuitu personae*. Public announcement is a necessary condition of an offer addressed to public, yet it is not a sufficient indicator, since other type of offers can also be announced publicly when the identity of the only possible addressee is not known. In our law, comparing to an offer made to a particular person, the only peculiarity of an offer addressed to public is that it is revocable in general, while other offers are generally irrevocable. The requirements for an act to be qualified as an offer addressed to public is the same as those for the qualification of a normal offer (made to particular person). Using the above mentioned criteria, recent Portuguese literature tends to qualify the following as *offers addressed to public*: a) announcements made in the programs of television sale, in electronic text or in internet page, as long as it contains the minimum elements required; b) the mailing of catalogs; the demonstration of goods in windows or stands in a commercial store, in an auto-sale system or in a virtual store; c) notice about the conditions of using public transport, other public services, parking slots, as well as some entertainment spots.[84]

73. Whenever a declaration made in the process of contractual negotiation fails to fulfill the requirements of an offer or the declarant expressly announces that his message should not be considered as an offer, it is usually considered as an ***invitation to treat*** *(*an invitation to treat is not without any effect, it just does not produce the due effect of an offer). Nevertheless, the line between an offer and *invitation to treat* is never clear; the admission of *offer addressed to public* as offer just made the distinction more difficult. In the traditional case of *auction*, whether the auctioneer's request for bids is an offer or an invitation to treat is controversial since a long time ago[85]. Even at present day, its qualification is still the object of debate[86]. In line with Carlos Ferreira de Almeida, we are of the opinion that whether the request of the auctioneer be considered as offer addressed to public or invitation to treat mainly depends on its content; whenever it contains the minimum element of an offer, it is an offer addressed to the public; whenever the minimum elements are not fulfilled, it is an invitation to treat.

74. When an offer produces its effect, the offeror immediately falls into the "state of submission" (estado de sujeição); that is to say, submits to the decision and declaration of the other party as to accept or reject the proposal. In principle, an offer is irrevocable; however, if the revocation of the offeror is received or known to the offeree before or at

---

[84] See Carlos Ferreira de Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg. 105-106.

[85] In the nineteenth century, there was already a debate between Kindervater and Ihering, see Jahrbücher für die Dogmatik der heutigen römischen und detschen privatrechts, 1865.

[86] Like what Ihering had done in the past, some modern writers continue to consider it an invitation to treat (as an example, we refer to the case of Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 37), while others are hesitate or directly qualify it as offer addressed to the public (as an example, we refer to the case of Carlos Ferreira Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg. 107).

the same time of the offer, it shall be valid. An offer can also be revoked if the offeror expressly reserves the right to do so (article 222 of the Macau Civil Code).[87]

II. The acceptance

75. An acceptance is a positive answer to an offer made; therefore, being conform to the offer is the characteristic of an acceptance. In principle, the acceptant should simply say yes to the offer, but in reality, the content of an acceptance is not that rigid. It is valid as long as it does not add, modify or eliminate the terms of an offer. Despite the purity of its content, as long as its legal nature is concerned, an acceptance is a *business declaration*, and most probably a declaration with addressee (the only exception is the case set forth by article 226, which admits the cases where the conduct of a person be considered as acceptance). Acceptance causes the extinction of the offer, since the two of them merge to become a contract.[88]

An acceptance which amends, limits or modifies the offer is deemed as rejection to the offer (article 225, Macau Civil Code). However, if the offeree add a condition to its own acceptance and this condition does not contradict the time limit set by the offer (for example, the offeror left his offer open for one month, and the offeree accepts by fixing its effectiveness at the 28th day) such an acceptance is still valid.

76. In case an acceptance modifies the offer in such a precise way that there is no doubt about the meanings of the declaration, the acceptance is equivalent to a new offer or so called ***counter-offer*** (article 225, Macau Civil Code).

In case the offeree first reject an offer or proposal, and then change his mind by issuing an acceptance, the latter prevail, as long as the acceptance reaches or is known by the offeror before or at the same time as the rejection. An acceptance can also be revoked, as long as the revocation reaches or is known to the offeror before or at the same time of the acceptance (article 227, Macau Civil Code). Since it is not difficult to subsume the concept of acceptance into the broader concept of business declaration, it seems that the above rules about the effectiveness of acceptance is a little bit redundant, it is no more than a repetition or development of the rule set forth in the section of business declaration.

Like an offer, the acceptance must also be adequate in form (the form required for the potential contract).

III. Consideration

A. Consideration and causa are not requirements in Macau Law

77. As a member of the Continental or Civil Law family, Macau Law does not recognize the concept of "*consideration*".

Although we recognize some characteristics of the French or Latin tradition in the Macau legal system, it is quite clear that unlike most of its Latin counterparts, Macau Law refuses to consider "*causa*" an essential element for the formation of a contract. This has to do with the reception of the doctrine of declaration of intent. According to the Savigny, the will or intent is the only important element that matters for the validity of a juridical transaction; a declaration is needed only because an internal and invisible

[87] See Jorge Godinho, Ibid, pg. 56.
[88] See Jorge Godinho, Ibid, pg. 65.

intent require a signal for expression.[89]

B. Gratuitous Promises

78. As long as a gratuitous promise fulfills the requirement of business declaration, it is valid.

Under Macau Law, the fundamental type of gratuitous promise, *donation*, is typified as a nominate contract (article 934 ff, Macau Civil Code). Being a contract, it has to be formed with at least two declarations of intent. In other words, for a donation to bind, the acceptance of the *donee* is required, even though only one party (which is the donor) bears the duty of performance (thus classified as *unilateral contract*). The object of donation may consist in the transfer of property or a right, an assumption of debt etc., but the *donation of future thing* (things not exist or not under the disposition of the donor at the moment of conclusion of the contract) is prohibited (article 936, Macau Civil Code). It should be noted that although donation has been classified as a contract in the Macau Civil Code, our law admits that this contract can be revoked for ingratitude or other reasons (article 964, Macau Civil Code).

79. Under the list of nominate contract in the Macau Civil Code, donation is not the only gratuitous one, there is at least one more gratuitous contract by nature: *commodatum* (article 1057, Macau Civil Code). Besides, according to the will of the contracting parties, *mandatum(article 1083, Macau Civil Code)* and *depositum* (article 1111, Macau Civil Code) can also be gratuitous.

Macau Civil Code has established a special principle in its general part for the interpretation of all gratuitous transactions, either contract or not. In case there are doubts about the meaning of a declaration, for gratuitous transactions, the declaration should be construed in a sense which is less burdensome to the promisor (in case of donation, the donor)[90].

C. Natural Obligations

80. According to the Macau Civil Code (article 396), "an obligation is said to be natural when it is based on a mere moral or social duty, the performance of which represents an imperative of justice but cannot be judicially enforced." However, "an amount spontaneously paid in performance of a natural obligation must not be refunded, except if the debtor lacks capacity to execute the performance."[91]

[89] See Savigny: Sistema del Derecho Romano Actual, traducida por Jacinto Mesía Y Manuel Poley, Tomo II, Analecta Editorial, 2004, p. 301.
[90] Article 229 of the Macau Civil Code.
[91] Article 397, 1, Macau Civil Code.

§ 4. FORMAL AND EVIDENTIAL REQUIREMENTS

I. Formal requirements

81. The problem of form is dealt with by the Macau Civil Code in the general part, since under the structure of business declaration, it is not only a problem of contract, but a problem common to all declarations.

The principle regulating these matters is the *freedom of form,* expressly consecrated in article 211 of the Macau Civil Code: *"the validity of a business declaration does not depend on the observance of a special form, unless when the law required so."*

Since contracts are theorized as business declaration, and declaration must be externalized somehow, we can freely call the external device through which the intention is express a ***form***. Therefore, all contracts have form, either it be verbal, written or solemn. In case the law or the contracting parties specify a particular form or a minimum form for a contract, this contract is said to be ***formal***.

Macau Civil Code has made a very detail stipulation about the form of a business declaration. First of all, it distinguishes three types: *legal form (forma legal), voluntary form (forma voluntária)* and *conventional form (forma conventional)*. Legal form is the type of form prescribed by law, which in-observation determines a contract null. According to article 212 of the Macau Civil Code, a declaration of will (which includes the case of contract) which lacks the legally required form is null, unless a different sanction is especially prescribed by law. Voluntary form is the type of form not prescribed by law but adopted by the parties voluntarily. The identification of a voluntary form is important because in this kind of declarations, the verbal stipulations added to the contract are also valid (article 214, Macau Civil Code). Finally, the conventional form is a form determined by the parties in a previous agreement. In case a conventional form exists, the law presumes that the parties only intents to be bound under such a form (article 215, Macau Civil Code).

A. Solemn contract

82. The concept of *contract under seal* is not known to Macau Law. Being sealed or not has nothing to do with the validity and effectiveness of a contract, unless the sealing is adopted as a condition of validity by a previous convention.

The concept of solemn contract is sometimes used in contrast with consensual contract, which form is not prescribed by law. Therefore, when a contract has a legally required form, its validity depends on the observation of the form.

Yet most of the time, when people refers to solemn contract, they are not just thinking about a contract which form is prescribed by law, but those contract with a specific form: contracts written in document drafted by a public or private notary, which is sometimes called an "authentic document" or "notarial document" or "public deed".

B. Kinds of legally required form

83. In Macau Law, there are different types of form that the law could prescribe, for example, the form of a written document, the form of a written document with the signatures of the parties verified by public authorities, the form of a document drawn by

notary etc.:

a). written form

In case a promissory contract (sometimes also called preliminary contract) refers to a contract that requires a solemn form, then the promissory one must be in drawn in a written document with the signature of the party which is bounded.

b). solemn form

Article 866 of the Macau Civil Code determines that the purchase and sale contract of immovable is only valid when concluded according to the formal requirement prescribed by the notary law (article 94 of the Código Notariado), which in turn prescribes the form of a public deed.

c). other legally required forms

The law may impose other formal requirements, such as the formal requirements that impose the presence of some words in a document, like the word "Cheque" or "Livrança" in negotiable instruments. The law may also impose certain type of declaration to be made in front of an official (the case of marriage being done in front of the registrar).

84. There are many reasons for the legislator to impose a specific form: sometimes it may be intended to facilitate the production of evidence in the litigation (*ad probationem*); other times, it may be intended to assure the publicitation of the contract, which has to do with the safety and stability of transactions (*ab substantium*). Macau law has paid special attention to the reason behind which a form is imposed by the legislator; at least, different reasons may determine different legal effect in the field of interpretation of business transaction (article 230, Macau Civil Code) and in the case of simulation (article 233, 3, Macau Civil Code).

C. Function of the notary

85. In Macau, the function of notary is shared by the Government officials and Lawyers (The Notary Code, article 2). In general, notaries are legal professionals who carry out a public duty; nevertheless, in our law, such duty can either be performed by a government official (notário público) or by a lawyer who is attributed with this function (notário privado)[92].

The function of notary consists mainly in providing the legally required form and to establish public faith to the extra-judiciary acts (The Notary Code, article 1). In concrete, a notary may elaborate public deeds, legalize private documents, issue certificates of identity and professions, issued certificates of other verified facts, issue certificates of translation, legalize the books of company, etc. (The Notary Code, article 6). Since quite a number of commercial and civil activities require the form of public deed, the function of the notary is therefore very important. Real estate conveyance, the making of wills, mortgages, power of attorney, protest of negotiable instruments etc., are the most common business of a notary. Nevertheless, among those activities, the elaboration of acts that repudiate a heritage, notarial habilitations and justifications, the

[92] According to the Statute of Private Notaries (Estatuto dos Notários Privados, D.L. 66/99/M, article 1), a lawyer who would like to practice as a private notary has to take a special course and pass the respective examination. The nomination is done by the Chief Executive. A lawyer who applies to the nomination of private notary is required to pay a guarantee of one million and a half patacas (currency of Macau).

matrimonial conventions, the protests of negotiable instruments, as well as acts to be perform by persons without capacity and not duly represented are reserved to public notaries (The Notary Code, article 7). At the past, the formation of company is also subject to notarial act, but as the Macau Commercial Code came into force, the parties can choose to form a company by private document.

86. The Notary Code has a complete set of rules regulating the formal requirements of each type of notarial instruments. Each notary must strictly follow each detail of the formal requirement set forth by the Code, especially on checking and expressing the identity and the capacity of each party. The fees of notary for advice and preparation of formal documents are established in special schedule (Tabela de Emolumentos de Notariado, 522/99/M), but since the function of private notary is performed by lawyers, it is sometimes difficult to distinguish fees of the lawyer and notary fees.

a). Organization of Notaries

In Macau, both public notaries and private notaries are organized under the justice department. They are not liberal professionals by nature, but public officers in a sense. Therefore, there is no independent professional organization among notaries. For public notaries, their trainning and knowledge background as well as salary scale is basically equivalent to a registrar; therefore the position of a public notary and a registrar is exchangeable.

B). Social position

The notary plays a very important role in civil and commercial life. In the public sector, notaries are not merely leading government officials; they enjoy also a quasi-judiciary status (in certain aspect, comparable to a judge) because of the professionalism of their function.

As far as private notaries are concerned, since there is only a very limited number of lawyers nominated as private notaries, those who got this status are normally deemed as a prestige.

II. Contracts and the law of Evidence

87. According to the principle of freedom of form (article 212 of the Macau Civil Code), contracting parties are free to express their declaration by any form they intended. The problem is, when disputes arise and the parties present their disputes to the court, the problem of evidence appear, since the court has to decide according to a series of **facts**. That is why our law provides that, "the function of *evidence (prova)* is to demonstrate the reality of facts" (article 334, Macau Civil Code).

Under the conceptual system of Macau Law, contract is at the first place a business transaction, which is, a sub-category of juridical fact. The existence and the "reality" of such a fact require the demonstration of the parties. Therefore, law of evidence is of course applicable to contract matters but at the same time not limited to contract matters.

Law of evidence in Macau is complicated mainly because its predecessor, the Portuguese legal system, had undergone a multiple receptions in this issue.

At the first place, the detail treatment of rules of evidence in the *Código de Seabra* of 1867 had in fact formed the infrastructure of an independent tradition. This first systematic Civil Code of Portugal had dedicated more than a hundred articles (from

article 2404 – article 2534) to evidence in its Book II under the heading "*Da prova dos direitos e da restituição d'elles*", covering the topics of confession, witness, the various types of documentary evidence, the probative effect of documents, presumptions, the various types of oath etc. Although a different systematic approach had been adopted by the Civil Code of 1966, it is quite obvious that many rules about evidence established in the Code of Seabra had been preserved.

88. Starting from the beginning of the twentieth century, due to the influence of German law, for a long time, the continental Law of Evidence is deemed as an exclusive area of procedural law. This vision only changed after the famous monograph of Carnelutti appeared in Italy, upon which the topic started to attract the attention of civilists. According to this orientation, the Italian Law of Evidence is divided into material probative law which is regulated by the Italian Civil Code (articles 2697- 2739), and formal probative law, which is regulated in the Code of Civil Procedure (articles 202-262). This model of regulation has exercised great influence to the Portuguese Law[93], which in turn affects the physiognomy of the current Macau law.

Therefore, at present, we can easily find the law of evidence distributed mainly in the Macau Civil Code and the Macau Civil Procedural Code under the following arrangement:

Macau Civil Code:
General Part
Title III (Juridical facts)
Subtitle IV (The exercise and protection of rights)
Chapter III (Evidence)
Section I – General Provisions (article 334 – 341)
Section II – Presumptions (342-344)
Section III – Confession (345-354)
Section IV – Documentary Evidence
Subsection I – general provisions (355-362)
Subsection II – Authentic Documents (363-366)
Subsection III – Private Documents (367- 373)
Subsection IV – Special provisions (374-381)
Section V – Proof of Expert (382-383)
Section VI – Proof by Inspection (384-385)
Section VII – Witness (386-390)

Macau Civil Procedural Code:
Book III (Common Process of Declaration)
Title II (Ordinary Process)
Chapter III (Investigation of the process)
Section I General Provisions (433-449)
Section II Proof by Documents (450-476)

[93] About the situation of Italian law of evidence, see P. G. Monateri, Alberto Musy, Philipo Andrea Chiaves, International Encyclopaedia of Law – Italian Law of Contracts, Kluwer Law International, 1999, pg. 78; about the influence of Italian probative law to Portuguese law and the situation of Portuguese probative law in general, see A. Menezes Cordeiro, Tratado de Direito Civil Portuguese, I Parte Geral, Tomo IV, Almedina, 2005, pgs. 460-462.

Section III Proof by Statement of the Parties (477-489)
Section IV Proof by Expert (490 -512)
Section V Judicial Inspection (513-516)
Section VI Proof of witness (517-548)

For the sake of an introductory exposition on contract law, we shall only address some specific topics (in both the material law and procedural law) which frequently attract the attention of practitioners, therefore, less attention shall be paid to the theoretical coherence and systematization of our exposition.

A. Documentary Evidence

89. Within the scope of evidence, documentary evidence played a fundamental role; in many cases, documentary evidence is the main source of evidence that provide the court with a solid base to make a decision acceptable to the society. Especially in the area of contract, since the law itself has formal requirements and the most important form is document (even if the law does not require a contract to be drafted in a document, the contracting parties would like to do it voluntarily in this form, for the sake of stability), the problem of how such a document on which a contract is incorporated can be used to demonstrate the juridical facts is the main concern.

90. In our law, the first provision established for documentary evidence is the concept of document itself: "*document is any object elaborated by human with the objective to reproduce or represent a person, a thing or a fact*." (art. 355, Macau Civil Code)

With this definition, the concept of document is capable of capturing a large amount of realities, photocopies, photographs, video etc.[94], even including the recently developed idea of electronic documents (nonetheless, we must admit that the rules of documentary evidence contained in the Civil Code is not tailor made for electronic documents, that is why the draftsmen of the Code had left out a blank check in article 362, stating that the rules about documentary evidence found in the Civil Code shall not prejudice the application of special legislations related to electronic commerce. This blank check has been filled in 2005 by the promulgation of two legislative acts: Law 5/2005 and Administrative Regulations 14/2005[95]). Adopting different criteria, documents can be classified into many different categories, for example, in function to its means of production, documents can be distinguished into written documents and documents of machinery reproduction; in function to the nature of the entities producing them, documents can be classified into official documents and private documents; in function to the country of origin, documents can be classified into national documents and foreign documents etc.

91. Despite the establishment of such a broad concept of document, the Macau Civil Code hardly intended to provide a thorough treatment of all possible types of documents. What it really concerns and dedicates an effort is the so-called **written documents** (all provisions in the rest of this section only deal with written documents). Hence,

[94] See Pires de Lima/Antunes Varela, Código Civil Anotado, I, 4ª Ed., Coimbra, 1987, p. 321.
[95] For an analysis of the law of electronic commerce in Macau, see Chou Kam Chon, A Study on the Legislation of Electronic Commerce, Electronic Contract and Electronic Authentication, master dissertation, Faculty of Law, University of Macau, 2006.

according to our law, written documents are divided to **authentic documents** and **private documents**.

1. **Authentic documents:**

Authentic documents are documents prepared by notaries, or public officials entrusted with public faith, according to the formalities prescribed by law and within the scope of their authority (Therefore, a payment slip issued by the public authority is an authentic document). All other written documents are private documents (Article 356, Macau Civil Code).

The excellent and paradigm model of authentic documents are documents elaborated by notaries, either registered in its book or presented as an avulse instruments. The most common example of documents elaborated by notaries and registered in its book is public deed (*escritura publica*); this is also the type of document most directly related to the form of contract. In many occasions, when the law requires a solemn form, this form refers to public deed. Or, the law simple refers to public deed as its formal requirement. According to article 94 of the Notarial Code, the acts that involve the recognition, establishment, acquisition, modification, division or extinction of ownership, usufruct, *usus* and *habitatio*, *superficie* and servitudes of immovable are subject to the form of public deed.

A document is presumed to be issued by the authority when it contains the signature of the one who prepares it, and at the same time, when the signature is recognized by a notary. Yet this presumption could be rebutted by producing evidence on the contrary. As to the documents elaborated before the 18th Century, its authenticity shall be established by a special entity indicated by law or by court (in our opinion, this rule should be the general principle for the test of authenticity of the so called "deed of silk paper"[96]).

The most important functional privilege of an authentic document is its probative effect. According to our law, an authentic document produces is an "establishing proof" or has "full probative effect" (*prova plena*) in relation to the facts referred to as practiced by the authorities or notaries, as well as to the facts attested in the document according to the perceptions of the entity elaborating it (article 365, Macau Civil Code).

By the terms "establishing proof", it means that the probative effect of authentic documents can only be questioned by alleging forgery of the document. In general, a case of forgery should be raised by the party who questions the documents in the form of a special proceeding regulated in the Civil Procedural Code, and in many cases, a forgery of document in civil case can lead to criminal results. Nevertheless, if the falsification of the document is very obvious, the court could also declare it as false *ex officio*. (article 366, Macau Civil Code).

2. **Private Documents:**

Private documents are written documents not prepared by any notaries or public entities according to their authority. As a matter of fact, we can consider it a residual concept of written document, since a written document is either an authentic document or a private document. The text of a private document can be prepared by any means and

[96] For a better explanation of this concept, see Tong Io Cheng, Boundaries of Property Rights, regional report of Macau presented to the XVII th Congress of the International Academy of Comparative Law, July 2006, Utrecht, the Netherlands, published in Journal of Juridical Science, Number 5, 2007, Faculty of Law, University of Macau.

by any persons, but signature of the grantor (the one who perform the act) is a general requirement. In exceptional cases, the signature can be done by a representative or by mechanical reproduction. In case the signature is done by a representative, it must be done in front of a notary (article 367, Macau Civil Code). An anonymous document shall not have any significant probative effect.

In case the signature of a private document is recognized by a notary, this signature is deemed to be true. A document with a signature recognized by notary has "full probative effect" (*prova plena*) for the business declaration made by the grantor. Therefore, in the case of a private document which signature is not recognized by the notary, when being used in a trial, it shall be the party who presented it to prove it is true; in case of a private document which signature is recognized by a notary, the burden of proof inverts, it shall be the party to whom the document is presented to prove its forgery.

A private document can also be authenticated (*documentos autenticados*) by observing special formalities: the involving parties confirm in front of a notary that they know the content of the document, and that the content of the document correspond to their will (Article 155, Natarial Code of Macau). The probative effect of an authenticated private document is equivalent to a authentic document. Nevertheless, an authenticated private document can not substitute the formal requirement of an authentic document (article 371, Macau Civil Code).

In case a document has been signed in blank, it looses its probative valor if the party questioning its veracity in court manages to prove that the content registered in the document was not corresponding to the will of the signatory, or that the document was taken away from the signatory (article 372, Macau Civil Code).

B. Expertise

92. In a proceeding, the understanding or appreciation of certain facts may require specific knowledge of science, technology or art. In these circumstances, an expert can be appointed to undergo inspection and give advice. The result of inspection shall be presented in the form of a report.

The procedure of presenting expertise evidence is regulated in the Code of Civil Procedure of Macau (article 490 ff). According to this law, the nomination of expert is under the direct control of the court, while the litigating parties are normally asked to give opinion about who shall be nominated. Once nominated, the experts are free to give advice in favor or against one party or both parties.

The court is free to appreciate the probative effect of expertise evidence (article 383, Macau Civil Code).

C. Judicial Inspection

93. In case the court deems not necessary to appoint an expert, but important to have a direct perception of the facts, a judicial inspection judicial shall be carried out by the judge. The litigating parties can also request such inspections. Normally, the judge will go personally to the location where the facts occurs and in case of necessity, order for a reconstruction of the facts.

The court is also free to appreciate the probative effect of the result of inspection (article 385, Macau Civil Code).

D. Testimony

94. As a general rule, testimonial evidence is admitted in our law. There are only a few cases which the law excludes the possibility of testimonial evidence (when a business declaration must be done in a written document; when the facts are proven with full probative effect etc.; even in these cases, testimonial evidence can also be used for the interpretation of the text).

Since there are always some doubts not clarify by documentary evidence, almost in all cases, the use of testimonial evidence is inevitable. In a hearing, the main activity of the court is to question and hear the statements of the testimony. Therefore, for the case of Macau Law, it may be incorrect to regard testimonial evidence a secondary means of proof.

The probative effect of testimonial evidence is also freely appreciated by the court.

E. Presumptions

95. Presumptions are conclusions drawn by the law or by the judge from a known fact to determine an unknown fact (article 342, Macau Civil Code). When a party benefits from a presumption, his duty of proof about that particular fact is exempted. The notion of presumption in law has a roman origin[97], and ever since the concept was created, it was mainly used to balance the burden of proof between the litigating parties. Therefore, there is a close relation between presumptions and the rule of evidence. The concept of presumption is similar to the concept of fiction, yet they different from each other by the fact that presumptions must be drawn from one existing fact to another, while fictions are facts newly established by law out of nothing existing.

96. The Macau Civil Code expressly regulated two types of presumption: **legal presumption** and **judicial (factual) presumption**. In the first case, the conclusion to be drawn is prescribed by law; in the second case, the conclusion is an inference to be drawn directly by the court from one fact to another. Legal presumptions can in turn be subdivided into relative presumptions (*iuris tantum*) and absolute presumptions *(iris et de iure*). Relative presumptions can be rebutted by producing proof on the contrary; therefore, they just shift (or invert) the burden of proof. Absolute presumptions cannot be rebutted, since they do not admit proof on the contrary. It should be noted that most of the presumptions established by the Civil Code are relative presumptions. Like many other Civil Code, the Code of Macau (article 344) provides that judicial presumptions are only admitted in the cases where testimonial evidence is admissible.

Examples of legal presumptions can easily be found in all parts of the Macau Civil Code. For purpose of illustration, we shall try to demonstrate in the following list some commonly seen presumptions found in the General Part and Law of Obligation of the Macau Civil Code, considering that those are the rules most related with contracts:

In the General Part:

- Article 8, clause 3: in determining the meaning and scope of a legal provision, the interpreter should presume that the legislator has consecrated the best suited solution and that the legislator knows to express his ideas with suitable

[97] About the concept of presumption in Roman Law, see Robberto Reggi, Presunzione (diritto romano), ED XXXV (1986), 255-261.

wordings;

- Article 65, clause 2: when certain legal effect depend on whether one person survives while another person dies, in case of doubts, the two of them are presumed to be deceased at the same time;
- Article 114 ff: when a person is missing for more than seven years and certain other requirements are met, interesting parties can invoke the presumption of death of the missing person;
- Articles 305 – 310: the presumptive prescriptions;
- Article 364, clause 1: if a written document is signed by its author and this signature is recognized by the notary, or affixed with the respective stamp, presumes that the document is issued by the respective public authority or official;

In the Law of Obligation:

- Article 435: In promissory contract of purchase and sale, all payments made by the promissory purchaser in advance are presumed to be earnest money;
- Article 445: In a contract in favor of third person, if the performance ought to be done after the death of the promissee, it is presumed that the third person only acquire the right after the death of the promissee;
- Article 452: If anyone made a promise of to perform or recognized a debt, it is presumed that a fundamental relation exist;
- Article 481: Presumes to be unaccountable the minors of 7 years old and person declared insane for psychical abnormality;
- Article 509: In joint and several obligations, the creditors or debtors are presumed to have equal participation;
- Article 773: In case there is no other way to determine the object of fulfillment made by a debtor, it is presumed that the fulfillment is made to all his debts by proportion;
- Article 774: Apart from capital, in case the debtor is required to pay expenditure and interests, or required to indemnify the creditor because of his delay, and the performance made by the debtor is not sufficient for all, it is presumed that the payment is first for expenditure, then indemnity, then interests and finally, capital;
- Article 775: In case the creditor issues a certificate of reception of capital without reserves on the payment of interest or other accessory performance, it is presumed that the debt as a whole is fulfilled;
- Article 788: The debtor is presumed to have fault in his fulfillment;
- Article 831: In the case of "*datio pro solvendo*" having as object a transmission of credit, the *datio* is presumed to be for payment (*pro solvendo*);
- Article 946: In a donation made to unborn child, it is presumed that the donor reserves for himself a right of usufruct until the donee is born;
- Article 993: In a leasing contract, if the rent is to be paid at the domicile of the tenant, in case the payment is not made, it is presumed that the landlord fails to collect the money at the day of maturity of the debt;
- Article 1025: Still in a leasing contract, the thing delivered to the tenant is presumed to be in good condition;

- Article 1072: In case of doubt, a contract of *mutuum* is presumed to be onerous;
- Article 1145: In a contract of work, it is presumed that the apparent defects of the work are known to the creditor, with or without inspection.

F. Statements under Oath and confession

In a civil procedure, the judge may order the parties to give a statement in court at any stage and about any facts that he thinks important for his decision. At the meantime, the litigating parties may also request the other party to give statement in court.

97. According to the Code of Civil Procedure (article 484), the party which is to give a statement in court is required to make an Oath with the following context: "I swear, under my honor, to tell all the truth and only the truth." The refusal of making an Oath is equivalent to refuse the making of statement.

The rule of sworn statement is also applicable to the testimony (article 536 of the Code of Civil Procedure of Macau). Besides, in case an interpreter is used in a hearing, the interpreter is also required to give an oath about his fidelity (article 89 of the Code of Civil Procedure of Macau).

Confessions take place whenever one party recognized the facts which are unfavorable to him and favorable to the counter party (article 346 of the Macau Civil Code). Confession can be expressed judicially or extra-judicially. When it is judicial, it can be inserted in the articulation of the petition or other judicial acts. A valid judicial confession has the full probative effect. In order to check whether a confession is valid, the capacity and legitimacy of the party to make a confession in such a particular fact must be examined. A confession only produces effect when it is clear.

III. Burden of Proof

98. When a judge was presented with a case, he does not know how the dispute would happen, nor is he supposed to know every detail of the case. The perception of the judge comes from the evidence submitted by the parties.

The problem is, in most cases, the evidence presented by one litigating party is contradictory to the one presented by the other. As an outsider of the dispute, the judge may find difficulty making a decision, since it is natural that each party only present evidence favorable to their claims. In another word, the judge may never be able to see a complete picture of the matters in dispute, but according to law, he can never refuse to make a decision. In view of such a common situation, the solution given by law is: the allocation of the **burden of proof** (*onus probandi*).

A. The fundamental rules of burden of proof established by the Macau Civil Code are in article 335: 1. One who invokes a right is responsible to give evidence on the facts that establish the alleged right.
B. The one against whom the invocation of right was done is responsible to prove the facts that impede, modify or extinct the rights invoked.
C. In case of doubt, the facts should be considered as establishing a right.

Therefore, it is the plaintiff at the first place, in case he pretends to invoke a right, who has the duty to produce evidence on the grounds of his claim. After that, the other

party (the defendant) could object the grounds of facts produced by the plaintiff; by doing so, the latter has the duty to produce evidence on the objection. If the judge is persuaded by the evidence produced by either party, the decision is easy: he simply decides in favor of the party whose evidence is more persuasive. Most of the time, both parties would produce a mass of documents supporting their reasoning, yet the judge may still be confused about the reality. In these cases, the Code of Civil Procedure of Macau has made the question more explicit: who benefits from a fact should prove it (article 437).

99. Despite the existence of the above rules regarding the allocation of burden of proof, obviously, the judgment of whether a particular fact is establishing a right or objecting a right, whether the evidence given by one party is sufficient to support his invocation of right or not, as well as whether there is doubt on the burden of proof depends a lot on the perception and conviction of the judge.

The regulation on the burden of proof deals with the allocation of burden, yet it does not prohibit a party to produce proof on a fact that he has no burden at all. And the court should attend all evidence produced by the parties, with or without burden. In our law, this is called the *principle of procedural acquisition* (article 436, Code of Civil Procedure of Macau). On the other hand, in those cases when a fact is so notorious that it becomes a general knowledge, or in cases when the court knows the facts through exercising its function, the rules of burden of proof are not necessary (article 434, Code of Civil Procedure of Macau), because the parties are not required to produce evidence.

100. In the material law level, the Macau Civil Code (article 336) also regulated some special cases on which the fundamental rules of burden of proof are not applicable: 1) In a case of simple negative appreciation (by which the court is asked to declare that the defendant does not have right), it is the defendant who has the burden of proof; 2) In a case which is required to submit within a certain period counting from the date the plaintiff knows about certain fact, it is the defendant who should prove the period is over; 3) If the right invoked by the plaintiff is subject to a suspending condition or a term of commencement, it is the plaintiff that has to prove the condition is fulfilled or the term is completed.

101. Just like what we have mentioned in the paragraph of presumptions, relative legal presumptions shift the burden of proof. Besides, if the party which has burden of proof is obstructed by the other party in a way that the production of proof is impossible, and the latter has fault, the burden of proof is also shifted[98]. In some cases, the burden of proof can also be shifted by the agreement of the parties (article 338, Macau Civil Code).

102. Finally, the law also provides that a party without burden of proof is legitimate to produce counter evidence in order to turn a fact doubtful (article 339, Macau Civil Code). In case the counter evidence produced manages to convince the court, the decision shall be made against the party who has the burden of proof.

§ 5. PRE-CONTRACTUAL LIABILITY AND NEGOTIATIONS

[98] For this two situations of shift of burden, see article 337 of the Macau Civil Code.

I. Introduction

103. Until nineteenth century, it was almost a common sense among jurists that in the period of negotiation, there will not be any liability. The reason given by them was that there had been no intent to be bind yet. In this stage, the contracting parties could of course withdraw from the negotiation or change the negotiation terms as they like. The withdrawal was seen as an exercise of a right: the freedom of contract. Therefore, no liability shall be incurred from the withdrawal in a negotiation process.[99]

104. It was Rudolf Von Ihering who, in 1861, first sensed the unjustness for the breaking off of a contractual negotiation abruptly by one party without any liability, and developed his famous theory of *culpa in contrahendo*. According to his idea, even before the formation stage of a contract, duties already exist between the contracting parties: they already act in a loyal and honest way. A party who violates this duty, though in a form of negative duty, is liable to the loss suffered by the other party owing to his misconduct. The primitive idea of Ihering was not all the way clear. Although European jurists of the latter day find his theory enlightening, a lot of difficulties are encountered when this theory is put into practice. At least, it never ceased to be polemic on questions like: What is the theoretical foundation of this liability? What kinds of duties are required in the negotiation? How to distinguish the negotiating stage and the stage of formation of contract?

The primitive construction of Ihering was then fine tuned by many Italian jurists and finally institutionalized into the Italian Civil Code of 1942, in its articles 1337 and 1338[100]. The legal recognition of *culpa in contrahendo* by the Italian Civil Code has later inspired the Portuguese Civil Code of 1966 in establishing a specific rule (article 227) for the issue. This rule was inherited by the Macau Civil Code of 1999, in its article 219, which provides: *"1. Whoever negotiates with another for the conclusion of a contract shall proceed in accordance with the rules of good faith, both in the preliminaries as well as in its formation, under penalty of being liable for the damage caused with fault to the other party." "2. Actions for liability shall be barred as stated in article 491."*[101]

II. Theoretical foundation of pre-contractual liability

105. The draftsmen of the Portuguese Civil Code as well as its Macau successor had shown us clearly how they think about the theoretical foundation of pre-contractual liability: **the rules of good faith**. The expression good faith here is used in its objective sense, i.e., a legal principle, an instrument left blank for the courts to correct the rigidness of statutory law. In this case, it is normally the job of legal writers and the courts to develop a more precise content of good faith according to the social change of its time.

From the legal provision of Civil Code and out of the idea of good faith, Portuguese jurists have developed a more concrete criterion, using the idea of **reliance** (confiança) suggested by Bähr and Hartmann in the late nineteenth century[102]and updated by C.W.

---

[99] See Gabrielle Fagella, Dei Periodi Precontrattuali e Della Lor Vera ed Esatta Costruzione Scientifica, in StudiGiuridici in Onore de Carlo Fadda, Tomo III, 1906, p. 297.

[100] It should be noted that although the theory of Ihering arouse the general interest of European lawyers, not all Continental Law countries adopted it into the codified rules. The German Civil Code only consecrated this theory in its 2002 reform, after more than a hundred years of silence.

[101] Translation from Jorge Godinho, Ibid, pg. 217.

[102] See Vittorino Pietronbon: Errore, Volontá e Affidamento nel Negozio Giuridico, Cedam, 1990, p. 66.

Canaris, for the application of pre-contractual liability. According to some of them, reliance is a bridge between subjective and objective good faith[103]. Reliance in this case must have four elements[104]: there must be a situation of reliance created by the particular person (other party with fault or third persons); there must be a reason for reliance supported by creditable objective facts; there must be an investment of reliance reflected in financial terms; the one who rely on the situation must be in good faith.

III. Paradigmatic cases of pre-contractual liability

106. When Ihering construct his theory, he parted from a group of cases, namely, the cases of null and annullable contracts. This methodology of grouping similar cases into types is still adopted in the recent discussions of *culpa in contrahendo*, since the legal rule and the legal theory behind it was formulated in such an abstract way that it is difficult to apply without suitable concretization. The grouping of cases into types can be seen as an effort of concretization. Nowadays, in Portugal and in Macau, there are generally three types of cases identified as paradigmatic for the application of pre-contractual liability. Of course, we are not suggesting that the three groups of cases are the only situations where the theory of pre-contractual liability can apply; in fact, there has been always a tendency to expend the tendency of its range of application.

A. In the cases of invalid or ineffective contracts

107. When a contract is declared null or annulled, or simply not effective to certain parties (for lacking some legal requirements or lack of power), there may be a chance to bar an action based on *culpa in contrahendo* (possible or not totally depends on the fulfillment of other requirements set forth by law). The nullity or annulment of a contract in principle determines the restitution of performance done (article 282 of the Macau Civil Code), but in many cases, a simple restitution is obviously not covering the expenditures made by the parties. In this type of circumstances, the party who suffered damages owing to the fault of the other party may invoke article 219 of the Macau Civil Code as his legal foundation of claim.

B. In the cases of valid and effective contracts

108. When a contract concluded meets the conditions for annulment, yet the legitimate party did not invoke his right (to annul it), after certain period of time, the contratual declarations are no longer annullable. In this case, the party who suffered from damages caused by the other party with fault has still the chance to claim in terms of *culpa in contrahendo* (in Macau, according to article 219 of the Macau Civil Code).

C. In the cases when contracts are not concluded

109. Finally, the breaking off of negotiation is also a source of liability if a party violates certain duties in the process of negotiation and caused damages to the other party.

---

[103] Menezes Cordeiro, Da Boa Fé, II, p. 1238.

[104] See J. Baptista Machado, Tutela da Confiança e "venire contra factum propium", in Obra Dispersa, I, Braga, 1991, p.345 ss; Carlos Ferreira de Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg. 200; Paulo Fernando Modesto Sobral do Nascimento, A Responsabilidade Pré-Contratual pela Ruptura das Negociações, in Estudos em Homenagem ao Professor Doutor Inocência Galvão Telles, Vol. IV, Almedina, 2003, p. 242-246.

IV. Concretization of pre-contractual duties

110. In Macau Law, the issue of pre-contractual liability is clearly consecrated as a statutory provision, and the legal concept chosen to establish a criterion to measure the conduct of the contracting parties is the traditional concept of good faith. To certain extent, this is a signal of the draftsmen to delegate powers to the court to fill in, case by case, a blank check, i.e., the meaning of good faith and subsequently, the range of application of this legal norm. Such a delegation may result in the expansion of discretionary powers and thus turn the judgment of the court casuistic. Therefore, when such a blank check is issued, generally both the practical interpreter of law and the scholars would like to venture certain attempts of theorization (i.e., to abstract and draw conclusion) from their own practices and researches. The first level of concretization of the idea of is of course the identification of similar cases into types. This level of concretization, although constituting a good path for the decision making process, is not sufficient to establish logical criteria. Therefore, a second level of concretization of the concept of good faith and at the same time a process of abstraction from the experiences of practice is required. As a result of this process of theorization, parting from the traditional perspective of right and duties, scholars have achieved to deduct from the idea of good faith in pre-contractual liability and abstract from the experience of practice a group of duties. In Portugal, the duty to inform, duty of loyalty, duty of secret and duty of diligence are sometimes identified as the pre-contractual duties[105].

A. The pre-contractual duty to inform

111. The decision making process of concluding a contract is depending on many factors, and the knowledge of sufficient information shall facilitate the contracting party to make a decision corresponding to his own will. The enumeration of all information relevant for the decision making of both parties is impossible, since on one hand, some factors are subjective or personal, and on the other hand, the exchange of limited information is the nature of business.

Therefore, when we refer to duty to inform in the pre-contractual stage, we are referring to those cases of extreme or cases where there is institutional disequilibrium of the access of information among the various parties. In many of those cases, the positive law itself (for example, the various parts of the Civil Code of Macau) has provided for its establishing elements and for its legal consequences.

112. The duty to inform can either be violated by positive action or by omission. Cases in which a pre-contractual duty to inform exists are abundant: for example, when a person provides information that induce another into mistake or, on the contrary, fails to provides information that is crucial for another person not to mistaken in a declaration of intent, he violate the duty to inform in the negative or positive sense respectively (see article 246 of the Macau Civil Code); in contract of purchase and sale, the seller has all the conditions to know that the thing being sold does not belong to him, and yet fails to

[105] The description of these three types of duties are inspired by the work of Carlos Ferreira de Almeida, Contratos I, 3ª Ed., Almedina, 2005, pg. 191-199; in fact, the pre-contractual duties identified by this writer amount to four, including on the other hand the duty of diligence, yet we decided not to follow the last type because situations covered by them are not common and the regulations of these matters in the Macau Civil Code are a little bit different from those of the Portuguese one.

inform other party of this fact (article 882 of the Macau Civil Code).

B. The pre-contractual duty of loyalty

113. The duty of loyalty in the pre-contractual stage has to do with the concept of honesty; traditionally, it is also a concept without accurate definition. The violation of this duty is often seen in the cases where one party issuing an offer without the intention to conclude a contract, or in the cases where one party breaches some intermediate agreement to conclude a contract.

C. The pre-contractual duty of secret

114. The duty of secret in the pre-contractual stage can also be seen as an expansion of the duty of loyalty, yet it has its own physiognomy. In the process of negotiation, certain technical data or facts may be reveal to the counter party; in principle, those facts or data could not be used for other purpose or be revealed to third parties, otherwise, the duty of secret is violated, especially when those facts or data revealed could not be obtained through other channel.

V. Damages

115. In relation to the question of range of damages covered by the claims of pre-contractual liability, a majority of the Portuguese legal literature and judiciary practices incline to the solution of reliance damages resulted from the infringement of "negative interests"[106]; that is to say, the expenditures made for the purpose of negotiation and conclusion of contract, as well as the so called "lost of chance" (the refusal of alternative business because of the contractual negotiation).

There are also other voices[107] as to defend a full range of damage in the case of pre-contractual liability, since the text of the legal provision in this matter does not establish any special restriction to the general rule.

In relation to Macau, the legal community seems to remain open on this issue, and the discussion of Portuguese lawyers inherited in general; neither the scarcely existing local literature[108] nor the court[109] has taken a specific position which is alien to the

[106] For legal literature, we are referring to: Vaz Serra, Culpa do deverdor ou do agente, Boletim do Ministério da Justiça, n.° 68, 1957, p. 133 ss; Carlos Mota Pinto, A responsabilidade pré-negocial pela não conclusão dos contratos, Boletim da Faculdade de Direito, Coimbra, 1966, p. 216, 244; Antunes Varela, Das obrigações em geral, Vol. I, 10ª Ed., Coimbra, 2000, p.278; Oliveira Ascensão, Direito Civil. Teoria Geral, II, Acções e factos jurídicos, 2ª Ed., Coimbra, 2003, p.449. For court decisions, we are referring to the recent sentences like: Ac. STJ, 09.02.99; Ac. STJ, 16.03.99; Ac. Rel. Coimbra, 10.10.00 and Ac. STJ, 27.03.01.

[107] See Menezes Cordeiro, Tratado de Direito Civil Português, I, Parte Geral, tomo I, Introdução. Doutrina Geral. Negócio Jurídico, 3ª ed., Coimbra, 2005, p. 517.

[108] See Paula Nunes Correia, APONTAMENTOS DE TEORIA GERAL DO DIREITO CIVIL - Adaptação das Lições do Professor Carlos Alberto da Mota Pinto "Teoria Geral do Direito Civil" ao Sistema Jurídico vigente em Macau, Policopiada, MACAU, 2005, p. 39, 40; in this work, the author affirms that the damages arising from precontractual liability is limited to the damages of reliance, with reference to negative interests.

[109] A recent decision of the court of second instance (TSI. AC. 225/2001, dated 24, July, 2003) has addressed the issue of damages of reliance and negative interests in the termination of an administrative contract. In this decision, the judges reviewed the position of Portuguese academics like Antunes Varela, Vaz Serra, Almeida Costa and others. Although the sentence did not address directly the issue of pre-contractual liability (and the provision of article 219 of the Macau Civil Code), the discussion of

established ones in Portugal.

damages of reliance in contract law contained therein would still be useful to serve as our reference on the specific issue of damages, since the concept of damages here has a natural link with the general part of the law of obligations.

Chapter 2. Conditions of Substantive Validity

§ 1. CAPACITY OF THE PARTIES

I. Introduction

116. Capacity is the susceptibility of a juristic person to enter into a juristic situation or position; very often, when the juristic situation appears in a form of juristic relation, the above formula transforms into the following: the susceptibility of a juristic person to hold rights and/or assume duties (in a broad sense, as counter-pole of rights).

In Portuguese and Macau Law, the expression juridical "capacity" (capacidade jurídica) is equivalent to the concept of **"capacity of enjoyment"(capacidade de gozo)**. It should be distinguished from the **"capacity to act" (capacidade de agir)**, which is the susceptibility of a juristic person to exercise rights or assume obligations, particularly entering into a juridical transaction (in a more concrete way, to make a business declaration, through this declaration, he may acquire rights and/or assume obligations), with freedom and by himself[110].

The importance of the discussion of capacity is better revealed by the reverse side of this concept: incapacity (only "incapacity" and not "capacity" is used as a heading of the Macau Civil Code). For a juridical transaction, the test of capacity/incapacity is a presupposition; a lack of capacity shall affect the substantive validity of a juridical transaction. Lacking the capacity of enjoyment shall lead to the nullity of the juridical transaction, which is irreparable; while lacking the capacity to act shall determine the annulment of a juridical transaction, which is reparable. The reparation of annullable transaction is either done through representation (the law appoint a representative to act on behalf of the incapable) or assistance (normally by means of authorization). [111]

Since a contract is formed through business declarations, **capacity** is then **a condition of validity of a contract**. In Macau Law, there are a number of factors that may affect the capacity of a person in juristic sense.

II. Minors

117. In Macau Law, the first indicator used to separate the capacity and incapacity of a person is the concept of minor (a person who has not reached the age of 18). The regime of incapacity of minor also serves as the regime of reference for other cases of incapacity. In general, **minors are lack of "capacity to act"**, unless the law has provided otherwise (article 112, Macau Civil Code).

In fact, this general principle is subjected to exceptions from two directions: first of all, there are cases on which the minors are deprived of the capacity of enjoyment; secondly, there are also cases on which minors are granted with both capacity to act and

---

[110] About the concept of "capacidade de agir", see Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, p. 193; see also Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, p. 89. The definition we gave to capacity is a little bit different from the cited Portuguese legal literatures, which mainly stress on the susceptibility "to exercise rights and to perform obligations", without mentioning specifically the practice of legal transaction.

[111] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, p. 215.

capacity of enjoyment. Examples for the first case of exceptions can be found in the Law of Family and Law of Succession (article 2026, Macau Civil Code determines that minors before emancipation have no capacity to dispose by will; article 1705, Macau Civil Code determines that minors under 16 has no capacity to acknowledge a child; article 1479, Macau Civil Code determines that minors under 16 are not allowed to marry); while examples for the second case of exceptions can be found in the general part of the Macau Civil Code (the spending of trivial amount; the spending of salary by minors over the age of 16 and under employment; juristic acts related to the jobs authorized by the statutory agent etc.; see article 116).

118. It should be noted that the formula of "age 18" as the division line between persons capable and incapable is only a formal criterion. It rests on the presumption that persons reaching the age of 18 are mature. This presumption is of course not accurate since the maturity of a person is a graduate process and varies from time to time, from person to person. However, since it is not practical to test case by case the maturity of each person, the law need to establish a standard, and "18 years old" is then taken as a standard. Nevertheless, the range of application of this standard is limited, it is only partially valid in the restricted area of juridical transaction; it mainly involves juridical transactions with certain economic or social significance.

119. Those minors who are over 16 years old are allowed to marry with the permission of the person who exercise paternal power or of the guardian (article 1487, Macau Civil Code). The marriage of a minor produces the effect of emancipation, which means that the minor acquires full capacity to act unless the law has provided otherwise (article 121, Macau Civil Code).

For areas of civil law other than juridical transaction (such as the restriction of the right of personality, the accountability of civil liability, the acquisition of possession etc.), the factor of age may also be used as a ruler, but "age 18" is no longer the exclusive indicator.

In order to protect the interests of minors (since they are not mature enough to ponder significant factors and make decisions corresponding to their own interests), juridical transactions performed by them are *annullable (anulável)*, and the action of annulment could be requested by the person exercising paternal power, by the guardian, by the administrator of his assets or by the minor himself after his maturity (reaching 18 years old) or emancipation (article 114, Macau Civil Code). Nevertheless, in order to establish a balance among the protection of minor, the principle of good faith and the protection of third party in a transaction, if the minor, by means of fraudulent acts, convinces the other party that he is mature or emancipated, the transaction is not longer annullable (article 115, Macau Civil Code; this rule is supposed).

Judging from the effect of a legal transaction done by a minor, it is not correct to say that a minor is restricted from entering into a contract. The restriction is only on the effect – possibility of being annulled - of the contract, which is in favor of the minor and disfavor to the counter party. Therefore, in many formal contracts, a minor, logically under the request of the counter party, is usually represented by his parent with paternal power or other guardians with due power to act on his behalf.

III. Insanity

120. The concept of insanity does not appear in the Macau Civil Code; yet the

various situations of incapacity resulted from health problem is covered by the Code under the headings of "interdictions" (interdições) and "inabilities" (inabilitação). Like the case of incapacity of minors, the regulation in this section also pursues to provide protection to a specific group of persons; and since the régime of protection for minors in the area of legal transactions is considered most comprehensive, the regulations about interdictions and inabilities are not applicable to minors before emancipation (article 122, 2). The status of interdiction and inability can only be declared by the court, and since the filing of a case and the declaration of the court is time consuming, in order to avoid the gap between the age of maturity of a potential interdicted or unable and the declaration of the court, the law permits a request of interdiction or inability be filed one year before the age of maturity.

121. In the case of **interdictions**, the deprivation of legal capacity (capacity to act) is based on the reason that a person shows incapable of taking care of his personal or patrimonial affairs due to mental infirmity, deafness, muteness or blindness.

122. In the case of **inabilities**, part of the reasons to restrict the capacity to act is equal to that of interdictions, i.e., still on the grounds of mental infirmity, deafness, muteness or blindness of a person, yet this time, the health problems are not serious enough to declare an interdiction; on the other hand, there are other reason for declaration of inability not applicable to the declaration of interdiction, those are the cases of a person being spendthrift, alcoholic, or drug addict and shows that he is not capable of taking care of his patrimony.

123. The legal consequences for interdiction and inabilities are different. In the case of interdiction, the consequence is in principle equivalent to that of a minor; while in the case of inability, a curator shall be appointed with the power to control the legal transactions of the unable (especially in the case that the unable pretend to dispose his goods). After the registration of the court decision, contracts (legal transactions) concluded by interdicted or unable persons without due reparation (represented by a guardian in case of interdiction authorized by a curator in the case of inability) are annullable. The requirement of registration provided by article 131 of the Macau Civil Code as well as other rules balancing the effect of legal transactions done before and within the period of litigation (articles 132, 133 of the Macau Civil Code) are consecrated to be in consideration of the protection of third parties.

§ 2. LACK OF INTENT AND VICES OF INTENT

I. Introduction

124. Under the principle of private autonomy, a juristic (legal) transaction is valid only when the party is free and conscious about what he is doing. The level of freedom and consciousness does not require a special intelligence or technique, not even the knowledge to read and write. All what a contracting party need is the ability to understand what he is doing and to choose whether to do or not to do such an act. The freedom of the party is deprived if a juridical transaction is concluded without his intent or the intent has defects. It is starting from the specific point of intent that the Macau Civil Code regulates a group of cases that may affect validity of contract (as well as other

juridical transaction). Under the heading of "Lack of Intent and Vices of Intent", the Macau Civil Code has provided extensive rules for the cases of simulation (articles 232 ff), mental reservation (article 237), non-serious or joke declarations (article 238), lack of will or of awareness of a declaration and physical duress (article 239), mistake in the formation of will (article 240), mistake in the declaration or on its transmission (article 243), error of calculation or in writing (article 244), error on the basis of the transaction (article 245), fraud (article 246 f), duress (article 245) and temporary lack of capacity (article 250).

In the following paragraph, we shall only address a few (including Mistake, Fraud, Violence and simulation; those are either the ones that appear most frequently in contract matters, or the ones which play an important role for purpose of comparative law) and not all of them.

II. Mistake

126. In the discussion of Civil law, mistake or error is usually described as a false representation of the reality or the misapprehension about the facts or the law; according to the theory of declaration of intent, mistakes may lead to a vitiated intent or a divergence between intent and declaration.

The rules in the Macau Civil Code about mistakes diverges a lot from those of the Portuguese Civil Code, therefore, discussions on this matter in Portuguese literature cannot be taken as immediate reference. On the other hand, the discussion and institutionalization of mistakes in Civil Law has a profound tradition dating back to Roman Law, many times, a correct interpretation and application of the modern institution of mistakes depends a lot on a historical study[112], especially for the case of the Macau Civil Code, in which the draftsmen have completely reformulated the legal regime of mistake.

Nevertheless, in a comprehensive work of contract law, doing a thorough presentation on the historical development and the succession of "mistake"[113] is almost impossible. Under such a context, we shall present this topic in the following order: first, an introduction to the current statutory framework of mistakes in Macau; second, a brief outline on the sources of ideas inspiring the current regime of mistake in Macau Law; and finally, an introduction to the particular types of mistakes regulated by law.

127. The regime of mistakes is inserted in the General Part of the Civil Code, under the heading of declaration of intent. Apparently, the Macau Civil Code seems to have identified four types of mistakes: namely, mistake in the formation of will (article 240), mistake in the declaration or on its transmission (article 243), error of calculation or in writing (article 244) and error on the basis of the transaction (article 245). Nevertheless, a careful analysis of the respective provisions of the Macau Civil Code and the doctrinal[114] and legislative background[115] behind it shall induce us to reduce the four

[112] See Werner Flume, El negocio jurídico, traduccion por José María Miquel González y Esther Gómez Galle, Fundación Cultural del Notariado, p. 517.

[113] For an introduction on the historical development of "mistake", see Tong Io Cheng, Theoretical and Institutional Sources of Error in Declaration of Intent, in Journal of the East China University of Political Science and Law, number 2 (General Serial No. 57), March 2008, p. 27 ff.

[114] The most influential work in this matter in Macau is the book of Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, pp. 462, 494-499, 505-513.

[115] See 1º Versão do Trabalho – Proposta de Localização da Parte Geral do Código Civil, como data de 19

apparent types of mistakes into the traditional dichotomy of "erro vicio" (mistake in the formation of will) and "erro na declaração" (mistake in the declaration)[116], which was built upon the theories of "vitiated intent" and "divergence between the intent and the declaration"[117]. Unlike their Portuguese predecessor, the draftsmen of the Macau Civil Code have made the "erro-vício"(mistakes in the formation of will) the general reference of the other (mistake in the declaration).

128. As far as the institutional and doctrinal origin of mistake in the Macau Civil Code is concerned, first of all, the insertion of mistakes under the general theory of *defects (vices) of intent*, the adoption of the distinction between "mistake in the formation of will" and "mistake in the transmission of declaration" as well as the adoption of mistake in the basis of transaction is thought to be the influence of German legal theory and legislative model, and it seems that by adopting already the theory of juridical transaction and declaration of intent, such an arrangement of the regime of mistake is quite natural. Secondly, as to the concrete rule of article 240, about mistakes in the formation of will, the requirement of being "recognizable" is the influence of Italian Law, while the formula used for the subjective and objective tests of essentialness (being fundamental or not) as well as the adoption of the concept "information" in this issue should be inspired by the corresponding rules of the Principles of European Contract Law drafted by the Ole Lando Group, which in its turn has absorbed some solutions reached by the UNIDROIT. It should be noted that in the process of legal succession, the doctrinal discussions of Portuguese legal literature is important, since the legislative decision made in this issue of the Macau Civil Code, the formulae used in the provisions, as well as the concrete interpretation of several provisions can only be found in those discussions.

A. Mistake in the formation of will

129. Article 240 of the Macau Civil Code provides that:

> *1. A business declaration is annullable as a result of an essential mistake of the person making the declaration, provided that the mistake was recognizable by the addressee of the declaration, or provided that it was caused by the information provided by the latter.*
>
> *2. A mistake is essential if:*
>
> *a) It fell upon the decisive motive of the intention of the person who incurred in the mistake, in such a way that, in case he had known the truth, he would not have concluded the transaction, or, if he would have concluded it, he would have done so under*

---

de Março de 1996; We would like to thank Dr. Eduardo Ribeiro for his generousity and kindness in providing us the above material.

[116] In concrete, mistake in calculation and mistake in writing is a less serious type of mistake in the declaration; therefore, the consequence is the right to rectify the error. Mistake in the basis of transaction can be reduced to the category of mistake in the formation of will; nevertheless, it might not pass the normal test of essentialness. The relevance given to the mistake in the basis of transaction is based on the principle of good faith; therefore, the general conditions of essentialness set forth by the prototype of article 240 are not applicable to them.

[117] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, pp. 462, 500.

substantially different terms; and

b) *A reasonable person, placed in the position of the person who incurred in the mistake, with correct knowledge of the truth, would not have concluded the transaction, or, if he would have concluded it, he would have done so under substantially different terms.*

3. *A mistake is considered as recognizable if, taking into account the content and circumstances of the transaction and the situation of the parties, a person of normal diligence, placed in the position of the declaration's addressee, would have noticed it.*
4. *However, the transaction cannot be invalidated if the risk of occurrence of the mistake was accepted by the party making the declaration or, given the circumstances, should have been, or also if the mistake was due to gross negligence of the person making the declaration.*

Mistake in the formation of intent happens in the decision making process; it vitiates the intent (or will). According to the classical theory of declaration of intent, will or intent is the real nuclear of a business declaration; therefore, a declaration made as a result of a vitiated intent should not be valid and binding. Nonetheless, since the decision making process of a person involves the evaluation of innumerous subjective and objective factors, a mistake in any of those factors may have the chance to affect the decision. However, giving relief (annulment) to all transactions vitiated with mistakes in the formation of will (or any other type of mistake) shall be a great harm to the stability of transactions, which in turn discourages the enthusiasm in doing transaction. Therefore, a balance or compromise between the two directions (relieving all cases of mistakes or values) is normally adopted by positive law. At past, due to the influence of Roman Law, the identification of cases susceptible of annulment is usually done through the establishment of **prototypes** (for example, *error in persona*, *error in corpore*, *error in substantia* etc.; this technique is still partially adopted by a number of Codes currently in force, including the Portuguese Civil Code and French Civil Code).

After the reform of 1999, the Macau Civil Code has shifted to another technique: the establishment of abstract criteria; namely, from the positive aspect, the criteria of **essentialness** and **visibility** (the possibility of being recognized), being the latter of the two replaceable by the **provision of information from the addressee**; and from the negative aspect, the **assumption of risks** by the party making the declaration and the **gross negligence** of the party making the declaration.

In order to clarify what kind of mistake is essential, the law has established both a concrete (subjective) test and an abstract (objective) test; in another word, only when a mistake passes the subjective test and objective test be it considered essential. By subjective test, the law requires the mistake to be related to a motive that is decisive for the party to make a contract. By objective test, the law places a reasonable person in the position of the person who incurred in mistake, and see if the former, knowing the truth, would conclude the same transaction under the same terms or not. If the answer is negative, the mistake is objectively essential.

In case the mistake is not objectively essential, there may still be a chance for relief.

Article 241 provides that if the parties recognized the importance of the motive by agreement, a mistake on such a motive is still a reason for annulment. Alternatively, if the addressee of the declaration knew or had the duty to know the importance of element related to the mistake, the objective test shall be skipped; fulfilling other criteria set forth by law, the mistake is also a reason for annulment. Finally, even if an objectively non essential mistake fails to fall in either one of the situations foreseen in article 241, it may still be relevant if it meets the requirement of "mistake in the basis of transaction", provided in article 245.

Another requirement from the positive aspect is the mistake being recognizable by "person of normal diligence". However, in case the mistake is caused by information provided by the addressee, the transaction can be annulled even if the mistake is not detectable by person of normal diligence.

From the negative aspect, the law stipulated two situations to exclude the possibility of annulment even when a mistake took place. They are respectively the case that the risk of mistake being accepted by the party making the declaration and the case that the mistake arouse from the **gross negligence** of the party making declaration. It should be noted that, before the drafting of the Portuguese Civil Code of 1966, there was a debate about whether the concept "**excusable error"** should be used in the provisions of mistakes, and the decision was negative, mainly because it is difficult to measure the degree of negligence of the mistaken party. By adopting the concept of **gross negligence (**a negative way to express the possibility of excuse**)**, the Macau Civil Code actually revived the once died out polemic.

Example 1 for illustration:

In the negotiation of a leasing, the landlord told the potential tenant that his property good and could be used for any commercial purpose. In this conversation, the landlord has not intention to deceive; he just told what he believes. The tenant expressed his idea of running a restaurant, and the landlord affirmed with the idea. After the contract is signed, the tenant applied to the government for a license to run the restaurant he prospected, and was told that the property could not be used for such a purpose.

In this case, the tenant made a mistake in a fact which is decisive for his business declaration; i.e., he thought that the property could be used to install a restaurant. If the tenant had known that the property could not be used for such a purpose, he would have decided not to conclude the contract (make the business declaration). Obviously, the above mentioned fact is essential for him (the requirement of **subjective essentialness**). If a reasonable person is placed into the position of the tenant, and was informed about the truth, that person would also not conclude the transaction; otherwise his decision would have been unreasonable (the requirement of **objective essentialness**). Since the information of the property being usable for installing a restaurant is provided by the landlord, the requirement of **visibility can be exempted**. On the other hand, there is **no signal** demonstrating that the tenant had **accepted the risks** of the occurrence of mistake, **nor** is there any **gross negligence** from the tenant. Therefore, the business declaration of the tenant is annullable according to article 240 of the Macau Civil Code.

In the same example, if the landlord said nothing about the possible utility of the property, the transaction is still annullable, since the tenant had already revealed his

intention to install a restaurant, and if the landlord is a person with normal diligence, he would have noticed such a big mistake of the tenant. Therefore, the mistake of the tenant shall fulfill the requirement of **being recognizable** (visible or detectable).

Example 2 for illustration:

In the negotiation of purchase and sale of apartment, the purchaser has expressed his idea of paying a unit price of 5000 per square feet. The seller showed him his apartment and told him that the size is approximately around 1000 square feet, but he has forgotten the measuring of the premise, and would like to sell to it for a lump sum of 5 million,. He suggested the purchaser to measure the apartment right at the spot. The purchaser answered that it would not be necessary. The transaction was concluded. Later on, the purchaser found out that the apartment has only 950 square feet.

In this case, the purchaser shall have no right to annul the transaction. By accepting the deal in a lump sum of 5 million and giving up the chance to do the on spot measure, the purchaser has accepted (or at least it shall be legitimate to presume that he has) the risk of variation in the size of the apartment. A negative requirement is then fulfilled.

B. Mistake in the declaration and its transmission

130. Even if there is no defect in the intent formation process, mistakes can still be happened in the process of declaration or the transmission of declaration. In those cases, article 242 of the Macau Civil Code created a pointer, linking them to the positive and negative requirements already established for the case of "erro-vicio" (mistake in the formation of will).

Mistakes in the declaration and mistakes in the transmission of declaration are actually two categories. In the first case, the party making the declaration made a mistake in expressing his intent without knowing it.

Example 1 for illustration:

In a purchase and sale of apartment, the purchaser who intents to buy apartment 15A mistaken to write apartment 5A.

In the second case, the declaration made by the party is always transmitted by an intermediate, and the mistake occurs in the process of transmission.

Example 2 for illustration:

A buyer of an antique send a messenger to transmit his verbal proposal to the seller, and the messenger made a mistake, proposing a price of ten thousand Euro instead of ten thousand US dollars.

They are regulated in the same provision because both in the aspect of "hypothesis" and in the aspect of legal consequences the two situations have many similarities. In both cases, the party making the declaration has a correct apprehension of facts and made his decision according to his evaluation of the various relevant factors; he may even know the meaning of the signals he chose to express his intent. Therefore, if the issue of mistakes is classified according to the dichotomy "erro-vicio" (mistake in the formation of will) and "erro-obstáculo" (mistake in the declaration), both of them belong to the latter.

C. Mistake in the basis of transaction

131. Article 245 of the Macau Civil Code has provided for a special type of mistake – mistake in the basis of transaction. The provision of such a type of mistake is the result of the reception of German legal doctrine, first introduced by Winscheid and then developed by Oertmann and Larenz.

The Macau Civil Code did not explain what a mistake in the basis of transaction is, nor did it define what a "basis of transaction" is. It simply established the legal consequence of annulment or modification of the contract in case a mistake of this kind is proven. By doing so, it was believed that the law left blank this concept for legal doctrine and court practice. Although the doctrinal discussion about the details of a "basis of transaction" is still polemic, it is still possible to give a general idea of the concept. We are of the opinion that basis of transaction is at the first place **motive** that fails to pass the objective test of essentialness. Such a motive is known to both the person making declaration and the addressee of declaration, and implicitly accepted by them as the context of the decision made (making a business declaration). When the misapprehension of such a context makes the transaction grossly unfair, the interested party may invoke the mistake in the basis of transaction and annulled the business declaration or modify the contract terms. The theoretical foundation of this mechanism is once again the principle of good faith.

Example for illustration:

Adam concluded a contract with a lorry driver to transport his furniture from Macau to Taipa. It is well known to both of them that the three bridges linking the Taipa Island to the main city are with different length, one almost doubles the other. At the day they concluded the contract, both of them believed that the transportation shall be done through the bridge with shortest distance, and the price was agreed upon such a presumption. However, what they did not know was that the bridge with shortest distance was in fact already closed for security purpose at the time they concluded the contract.

In this case, the basis of transaction is the presumption that the transportation be done through the bridge with shortest distance. However, such a presumption was a mistaken belief at the very beginning of the transaction. Performing the contract in the original terms becomes apparently unfair to the lorry driver; therefore, he may invoke the mistake in the basis of transaction and annul his business declaration.

III. Fraud

132. In the Macau Civil Code, fraud *(dolo)* is defined as "*any suggestion or artifice that someone employed, with the intention to or knowing that he will induce a person making declaration into mistake or keep him in mistake.". "The disguise, by the addressee or third party, of the mistake of the person making declaration"* is also considered as fraud *(article 246).*

The person who made a business declaration on the basis of a fraud has the right to annul the declaration (article 247, 1); while the party who caused the mistake is liable to compensate the damage caused in terms of pre-contractual liability or the rules liability in general.

In fact, mistake and fraud are closely related concepts; a fraud may even be considered a special form of mistake. The main difference between the two concepts is of course the subjective attitude of the addressee, or *in maxime*, the subjective attitude of a third party somehow related to the transaction.

In case of fraud, there is must be an artifice or suggestion, made by the addressee or by third party. In addition, there must be an "**intention to deceive"**. This intention is shown when the addressee of the declaration by the following facts: inducing the other party into mistake, knowing the other party will fall into mistake by his suggestion or knowing the other party already in mistake and say nothing. In the second and third cases, it is clearly shown that the provisions of the Macau Civil Code in the issue of fraud have consecrated the idea of **duty to inform**.

Example for illustration:

In the negotiation of a leasing, the potential tenant expressed his idea of looking for a property to install a restaurant. Even though the landlord knows clearly that his property cannot be used for commercial purpose, in order to convince the tenant to conclude the contract, he affirmed the idea of the tenant by saying that the premise has been used for the same purpose. The contract was concluded and the tenant found out the truth: the premise cannot be used to install a restaurant.

In this case, the landlord has committed a fraud, and the tenant has the right to invoke the annulment of the transaction.

IV. Violence (duress)

133. In the cases of mistake and fraud, the intent and decision of the party making declaration are affected by the misapprehension of some facts; yet the party did not make his declaration under physical or moral constraint, or intimidation of constraint. In this sense, we may still say that the party is "free" to make his decision (make the business declaration).

A totally different situation of defect of intent is the case of duress (coacção moral), regulated in article 248 of the Macau Civil Code. In this case, the liberty of the party to make declaration is restricted by an illegal and serious threat of some evil to the person, to his honour or to his property. In another word, the business declaration is made under the fear of the intimidation.

A declaration made under duress is annullable.

A threat made to the family of the declaring agent or to any third person with the result of inducing the agent to make a declaration is also relevant for purpose of duress. However, the normal exercise of a legal right or the threat to exercise such a right is not considered as duress (article 248, 3).

V. Simulation

134. In a simulation, the contracting parties (both parties are making and receiving declarations in the same process) agreed between one another to issue a business declaration which is not corresponding to his real intent, with the purpose to deceive a third party.

According to the theory of defect of intent, a simulation makes a divergence between intent and declaration, and it is by nature bilateral, because it is agreed between the declaring agent and the addressee of declaration to deceive a third party. The legal

regime of simulation is a very important component of Civil Law teaching in the pedagogic tradition of Portuguese and Macau law. This is because, on one hand, the general protection given by Civil Law towards third party with good faith in a transaction has an intensive reflection in this regime; on the other hand, the frequent practice of simulation, specifically in the area of real estate transaction and the area of taxation, has in fact forced the whole legal community (including the legislator, judges, lawyers and academics) to pay special attention on the issue; and finally, the legal rules involving simulations (articles 232 – 236 of the Macau Civil Code) are quite complicated and thus not easy to apply.

135. According to the provisions of article 232 of the Macau Civil Code, there are three requirements for the invocation of simulation:

- *pactum simulationis*, which is the **agreement** between contracting parties to create a false outlook of a transaction;
- There is a **divergence between the real intent and the declared intent**, in another word, the parties making declarations might have either another transaction in mind, or simply no intent to conclude any transaction;
- Both of the contracting parties have the **intention to deceive** third parties.

A simulated transaction is null (article 232, 2), since the contracting parties have no intention to celebrate such a transaction.

Example 1 for illustration:

Adam, in order to escape from the debts he owed, concluded a contract of gift with his mistress Betty, offering her an apartment and verbally agreed with her that in case he goes bankrupt, Betty would allow him to live in the apartment with her. Betty knows clearly that Adam is in debt and knows his intention to save the apartment from the debtors, yet she wants the apartment. A few months later, Adam was declared bankrupt, and would like to move in to the apartment already gifted to Betty. Betty refused. Adam wants to declare the transaction void by simulation.

In this case, the intention of Adam to invoke simulation shall not prevail. Adam might have thought that he is deceiving the debtors, yet Betty has never promised him to make a false declaration; for Betty, the transaction is real. Doubtlessly, Adam has a motive behind his declaration, but he did declare what he wanted. For this reason, there is also no divergence between real intent and declared intent, neither from the perspective of Betty nor from the perspective of Adam.

<u>Distinction between absolute and relative simulation, critics</u>: Legal doctrines used to distinguish between absolute simulation and relative simulation. In the first case, the declarations of the parties are totally sham or fictitious. There is no real transaction at all, but only the outlook of a transaction. In the second case, the only real transaction is hidden behind the outlook. Nevertheless, it might not be very logical to distinguish between absolute simulation and relative simulation as if they are two types of simulations with completely different properties. The fact is: the meaning of simulation limits to the creation of a false outlook of transaction (and the fulfillment of other requirements set forth in article 232); whether there is a hidden transaction or not is another story (the validity of the hidden transaction mainly depends on its own

characteristics).

I would rather believe that the Portuguese and Macau legislators are already aware of the above logic, and thus, when they formulated the key provision for the regime (article 232 of the Macau Civil Code and article 240 of the Portuguese Civil Code), they only referred to "Simulation"("simulação") in general, and not "absolute simulation". After the general provision, the law has specified the case of relative simulation (article 233), determining that the validity of the hidden transaction is not affected by the fact that the simulated (outlook) transaction is null. Therefore, in our opinion, it might be more appropriate to distinguish between simulation in its pure form and relative simulation.

136. Simulation and the formal requirement of transaction: The problem of formal requirement in a simulated transaction is raised particularly in the case of relative simulation. This is because in such a case, being the outlook transaction null, there is a chance to salvage the hidden transaction. Nevertheless, when the law determines that the nullity of the outlook transaction does not affect the validity of the hidden transaction, it does not mean that all hidden transactions are automatically valid in a case of simulation. The validity of the hidden transaction itself depends on its own formal and substantial conditions of validity.

Nevertheless, such a logical cognition process has encountered a lot of difficulties when the rule is applied to the reality. For the party who would like to argue the validity of the hidden transaction, it is difficult to prove the existence of such a transaction, and that the transaction fulfilled the formal requirement. In most cases, the parties simulating the outlook transaction shall not reduce their real deal in a paper; and even if they do so, rarely any hidden transaction really fulfill the formal legal requirements of its own.

Before the 1966 Portuguese Civil Code, the polemic about this issue is already quite large among the academics, and there were two opposing positions which attracted a lot of attention from the legal community. One of them is the relatively more restrictive position of Beleza dos Santos[118], and the other is the relatively open position of Manuel de Andrade[119]. According to Beleza dos Santos, in case the hidden transaction is a formal one, and only the outlook transaction has fulfilled its formal requirement while the hidden one has not, the hidden transaction is null. On the contrary, according to Manuel de Andrade, the fact that the outlook transaction had fulfilled the formal requirement signifies that the reason for which the hidden transaction is subjected to a formal requirement is also satisfied, therefore, the hidden transaction should be valid.

The 1966 Portuguese Civil Code pronounced on the matter and provided that: "*if the hidden transaction has a formal nature, it is only valid when the form required by law is observed*."[120]

However, even with the enforcement of this new rule in 1966, the dispute in Portugal did not die out immediately. On the contrary, opinions continued to divide both in academic community and in the courts, there are still scholars defending the restrictive position[121] and open position[122]. The reason why the polemic can continue is

[118] Beleza dos Santos, A Simulação em Direito Civil, I, Coimbra, 1921, pp. 357-368.
[119] Manuel de Andrade, Teoria Geral da Relação Jurídica, Coimbra, 7ª Reimpressão, 1992, pp. 191-194.
[120] Article 241, 2, Portuguese Civil Code.
[121] For opinions favoring the restrictive position, see Carlos Mota Pinto, Ibid., pp. 478-480; Heinrich

mainly because the new provision did not specify on the detail of how the legal form required by the hidden transaction is considered observed, thus left a space for discussion. Nevertheless, it should also be noted that it is through this discussion that the problem turned gradually clarified; on addressing the problem, the scholars would not restrict themselves to take position and repeat what has been said, but most of the time, add new requirements and create new criteria for distinction.

137. In 1999, when the draftsmen of the Macau Civil Code reconsidered the issue of relative simulation, they have obviously benefited from the discussions happened in Portugal.

> *Article 233 (Relative Simulation)*[123]
>
> 1. *If, beneath a simulated transaction, there is another transaction that the parties wanted to conclude, the corresponding rules that would apply to it if it had been concluded without dissimulation shall be applicable; its validity is not affected by the fact that the simulated transaction is void.*
> 2. *If, nonetheless, the dissimulated transaction has a formal nature, it is only valid when the form required by law is observed.*
> 3. *For purpose of the previous number, the form required for the dissimulated transaction being observed by the simulated transaction is considered sufficient, as long as the reasons determining the formal requirement of the dissimulated transaction do not oppose this validity.*

The first two rules are exactly the same as the Portuguese Civil Code. On the question of how to determine whether the hidden transaction has observed its formal requirement, the Macau Civil Code obviously inclined to the open position, but a moderate one, by adding a new rule on its number 3. According to the wording of this provision conjugated with the doctrinal development in Portugal, the most appropriate interpretation of it should be in line with the opinions of modern academics like Castro Mendes and Oliveira Ascensão[124]. The main idea of those opinions is to distinguish the different reasons for which a formal requirement is imposed to a transaction. In case the protection of third party (by the publicity effect of some legal forms) is one of the reasons to impose the formal requirement (in the case of a public deed, yes), the validity of the

---

Ewald Hörster, A Parte Geral do Código Civil Portuguese – Teoria Geral do Direito Civil, Almedina, 1992, pp. 547.

[122] For opinions favoring the open position, see Pires de Lima/Antunes Varela, Código Civil Anotado, I, 4ª Ed., Coimbra, 1987, pp. 228; Castro Mendes, Teoria Geral do Direito Civil, II, AAFDL, 1979, pp. 293-294; Oliveira Ascensão, Direito Civil – Teoria Geral, II, pp. 225-226; Menezes Cordeiro, Tratado de Direito Civil Português, I, I, pg. 633; Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, pp. 527.

[123] The translation of number 1 comes from Jorge Godinho, Ibid, p. 216, while number 2 and number 3 are translated by the author of this book.

[124] A more open position has been proposed by Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, pp. 527; this writer suggests that the hidden transaction could be valid even if the reason of a formal requirement is for protection of third party through publicity of the act, since the purpose of this requirement (publicity of the act) can be achieved by the sentence declaring the simulated transaction void, and the sentence is at least as solemn as a public deed.

hidden transaction (which is not revealed and publicized, and thus the third parties have no knowledge of them) shall contradict this purpose. Therefore, in case of the hidden transaction being formal, it shall only be valid in the case when the formal requirement is not linked to the protection of third parties.

Example 2 for illustration:

Adam wants to offer an apartment to his mistress Betty, but for purpose of deceiving his own family, he formally concluded a contract of purchase and sale with her. Later, the son of Adam discovered the secret and would like to declare the transaction void by invoking simulation. In turn, Betty invoke the validity of the hidden gift in her defense.

In this case, the outlook transaction is a purchase and sale of immovable, but the hidden transaction is a gift. According to Macau Law, both a purchase and sale of immovable and a gift of immovable require the form of public deed (article 866 CC; article 94, 1, Código do Notariado). The form of a public deed implies the publicity of the act, therefore, the hidden transaction shall not be valid, otherwise it opposes the purpose of such a formal requirement.

138. Simulation and the protection of third parties. The idea of protecting third parties is already implicitly seen in the new provision of Macau Civil Code about relative simulation. Nevertheless, a more explicit and stronger protection can be found in article 235, under the heading of "The impossibility of simulation opposing third parties with good faith".

If a third party acquires a right with good faith from a party apparently holding it, and the latter was then proven to have his right obtained through a transaction of simulation, a situation of conflict of interests shall occur. Logically, if the one disposing the right has obtained his right through an act of simulation, whenever the simulation is invoked, the related transaction shall be null and thus the disposing party has no right. If he has no right, the third party acquiring the right from him shall also acquire nothing. Nevertheless, in order to protect the third party with good faith, the Macau Law sacrifice the interest of party involving in the simulated business, by providing that in the case of a simulated transaction declared null, the acquisition of right by the third party shall not be affected.

§ 3. OTHER CONDITIONS OF VALIDITY

I. The "object" of the rights of obligation

139. In Macau Law, the discussion of "object" is usually done within the framework of juristic relation or subjective right.[125] In this sense, object is described as the "something" upon which a right holder exercises his right. In an obligational relation, the object (of the rights of obligation) is a human act (to do or not to do something), which is technically termed **"prestação" (performance)**[126]; it is the means to satisfy the interests of the creditor. Nevertheless, in case a diligent reader is not satisfied with such

[125] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, pp.329-338.

[126] See Carlos Mota Pinto, Ibid, pg. 334; also Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, p. 28.

a vague description and asks for a more precise definition of the concept "object" or requests for a unitary theory of "object" applicable to all kinds of juristic relations, the issue immediately becomes complicated and perhaps rarely anybody can give a satisfactory answer. This is because at the very outset, "subjective rights" itself is already an open concept, new forms of subjective rights (for example, the case of potestative rights, rights of personality etc.) may appear in such a way that the discussion of object is something almost meaningless, redundant or unnecessary; even within the context of traditional classification of subjective rights, since the structure of the various categories of rights may vary from case to case, it is still hard to formulate a unitary theory of "object". The traditional classification of subjective rights we hereby referred is of course the classification between rights of obligation and real rights (in this discussion, we believe the category of real rights is better substituted with the category of ownership). In fact, if there really are circumstances on which a discussion under the theme of "object" **seems** reasonable, it should be the traditional domains of obligation and ownership. Nevertheless, the so called "object" of a right of ownership and that of a right of obligation is still very different, and this is the reason why the Macau Civil Code has to deal with these two types of "objects" in completely different sectors.

141. When the Portuguese and Macau Law started to regulate the concept of "object" of transaction and to use it to establish conditions for the validity of juridical transactions (article 273 of the Macau Civil Code and article 280 of the Portuguese Civil Code), they treated it as the "**object of juridical transaction**". Since contract is a sub-category of juridical transaction, by this treatment of the Macau Civil Code, one may easily conclude that such a concept of object is covering the "**object of a contract**". We believe the range of application of the said provision is mainly in the area of obligation. However, it should be noted that the discussion of the object of obligation sometimes being shifted to and substituted with the discussion of the object of a contract[127] has its own reasons. On one hand, contract is the most important source of obligation; on the other hand, in a contractual obligation, the performance is actually predetermined in the contract by the will of the contracting party, therefore, at the moment a contract is concluded, there might have already enough elements to judge whether certain performance is entertained by law. According to some Portuguese scholars, the concept used in the provision of the Portuguese Civil Code (which is completely inherited by the Macau Civil Code in its article 273) is wide enough even to cover the content (the clauses) of a contract, although such an extensive interpretation is not advisable[128]. Below is the respective rule adopted by the Macau Civil Code:

> *Article 273 (requirements of the object of juridical transaction)*
> 1. *A juridical transaction is void when it is physically or legally impossible, contrary to the law, or not determinable.*
> 2. *A juridical transaction which is contrary to the public policy or offensive of good mores is void.*

[127] See Alejandro M. Garro, International Encyclopaedia of of Law – Argentina Law of Contracts, Kluwer Law International, 1995, pg. 96.

[128] See Oliveira Ascensão, Direito Civil – Teoria Geral, Vol. III, Coimbra, 1999, pg. 88; also Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, pp. 273-274.

142. Cases of physically impossible performance may include: a performance that requires the debtor to deliver the moon or to transport a person with a velocity which is impossible at the moment of performance etc.[129]. Cases of legally impossible performance may include: selling a thing which is "*res extra commercium*", promising to establish a real guarantee which is not foreseen by law etc.. A performance is contrary to the law only when it violates a mandatory rule (for example, selling the heritage of a living person; assuming obligations contrary to a duty imposed by law; promise to commit a crime). The law requires a performance to be determinable but not determined. A performance is determinable when it is described with enough criteria for its determination. In case a performance is described through a "*genera suma"* (for example, by indicating just an animal, a mineral, a vegetable etc.), it is not determinable[130].

Public order is the fundamental principles of a legal order, while good mores are moral rules or generally recognized social conducts (for example, offering a give to the judge in order for him to make a just decision[131]). Not fulfilling the requirements set forth in article 273 shall cause a contract null.

II. Laesio

143. The problem of "*laesio*" is regulated in the Macau Civil Code under the heading "negócios usurários", in article 275. When someone deliberately takes unfair advantage from other's needs, improvidence, inexperience, carelessness, dependence, mental state, or character weakness, the juridical transaction is annullable.

§ 4. CONSEQUENCES OF A LACK OF SUBSTANTIVE VALIDITY

I. Invalidity: nullity and annulment

144. Failing to meet the conditions of substantive validity, a contract (in Macau, the problem is examined under the concept of juridical transaction) shall result in invalidity. In Macau law, there are two types of invalidity, namely, **nullity** and **annulment**. A juridical transaction is **annullable** (which corresponds to annulment) in the following situations: a party lacks capacity to act; there is a mistake in the business declaration; a party concluded a transaction as a result of fraud or duress; the juridical transaction is concluded with *laesio* (considered as *negócio usurário*). A juridical transaction is **null** in the following situations: simulation occurs; the object of transaction being impossible, illegal, indeterminable, contrary to the public order or offensive of good mores.

In practice, the most important difference between nullity and annulment is perhaps in the problem of who has the rights to bring an action. As a principle, the action targeted to declare the nullity of a juridical transaction can be raised by any interested person (for example, a creditor of the contracting parties), or by the "*ex officio*" declaration of the court (article 279, CCM); there is no time limit for the invocation of

---

[129] See Pires de Lima/Antunes Varela, Código Civil Anotado, Vol. I, 4ª Ed., Coimbra, 1987, pg. 258.

[130] See Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, p. 253.

[131] Ibid.

nullity. In case of annulment, the person with a right to invoke an action is pre-established by law, and the general time limit for its invocation is within one year after the termination of the defects (article 280, CCM).

145. The main reason for the law to establish two regimes of invalidity with such different characteristics is a result of the evaluation of interests. In case of nullity, the typical interests at stake are interests of the public concern **(public interests)**; therefore, it is the legal order itself that cannot tolerate the validity. In this sense, the law establishes a regime to facilitate the discovery and condemnation of this type of vices. This is the reason why the law allows any interested parties to invoke the defect; even nobody invokes it, had it be known to the court, it shall be declared "*ex officio*".[132] In case of annulment, the interests at stake are generally private interests among the parties **(private interests)**. According to the principle of private autonomy, the right of the parties to handle their own interests should be recognized[133]. Therefore, only the parties whose interests are affected shall have the right to choose between maintaining the transaction or to destroy it, the court or the law shall not replace them to make the decision and invoke the annulment "*ex officio*". In all cases of annulment, the idea of protecting the free will of a person is clear; yet in some cases, the protection of free will can be easily linked to the protection of certain group of persons in a weaker position (such as the protection of minors and of insanity). In any of the case, if the party given with a right to invoke annulment remains silent after certain period of time, this right shall extinct. Such a time limit (of one year in general) established for the invocation of annulment is the result of a balance of interests, i.e., between the interests of protection of free will and the stability of juridical transaction.

II. Retroactive effects of invalidity

146. According to the provision (of article 282, 1) of the Macau Civil Code, both the declaration of nullity for a null transaction and the annulment of an annullable transaction produce retroactive effects, and all performance done should be restituted, and when the restitution *in specie* is not possible, the corresponding value of the performance should be restituted.

In the conceptual level, treating the retroactive effect of nullity and annulment in the same terms may not be appropriate, because a null transaction is null and should produce no effect since the beginning (the so called *ex tunc* effect); if such a transaction never produced effect, it is unnecessary to say the declaration of nullity is retroactive. On the contrary, an annullable transaction produces effect at the outset; it only turns invalid after the court decision, therefore the invalidity of annulment is supervening, or *ex nunc*.

Nevertheless, even a transaction is null at the beginning, this fact might not be discovered by the interesting parties. Before the nullity is invoked in court, the null transaction can perfectly maintain its outlook as a valid transaction. The related parties may do their performance according to the null transaction. And this is the reason why the Macau Civil Code has unified the effect of nullity and annulment under one article and with the same treatment.

147. It is for sure that Macau law is totally aware of such a conceptual difference.

---

[132] See Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, pp. 577-578.

[133] About the recognition of the power of self management of interests, see Orlando de Carvalho, Teoria Geral do Direito Civil, versão policopiada, Coimbra, 1981, pp. 20-28.

First of all, in the case of nullity, the choice of word by the Macau Civil Code is careful enough to show the difference: "the declaration of nullity" and "the annulment" of the juridical transaction. By introducting the word declaration, it tells us that the court does not change the effect of the transaction. The transaction is null at the beginning, the court just declares it. Secondly, in the procedural law level, the forms of procedure provided for the two situations are also different. A case of declaration of nullity corresponds to the form of **declarative action (acção declarativa);** while a case of annulment corresponds to the form of **establishing action (acção constitutiva)**[134].

III. Invalidity and the protection of third parties

148. When a juridical transaction is declared null because of simulation, the Macau law has provided a special treatment for third parties with good faith whose rights are affected by the nullity (article 235). A logical deduction shall be: if the protection of third parties can be raised as a question and deserved special treatment in the case of simulation, why the same question cannot be raised and the same treatment cannot be found in other cases of invalidity? The answer is: Yes! Macau Civil Code has dealt with the problem of protecting third parties in other cases of invalidity. Nevertheless, the granting of protection to third parties with good faith in cases of invalidity other than simulation is subject to more demanding requirements, though the effect is still non-opposability.

According to article 284:

1. *The declaration of nullity or the annulment of a juridical transaction in respect to immovable goods, or to movable goods subject to registration, does not prejudice the rights acquired by third party with good faith in relation to the same goods under onerous title, in case the registration of acquisition of the third party is prior to the registration of the action of nullity or annulment, or prior to the registration of the agreement on the invalidity of the transaction concluded by the parties.*
2. *Fulfilling the presuppositions of the previous number, if the third parties that have acquired rights from those who would have legitimacy for the disposition of the goods according to the description of registration, the rights of them shall only be recognized if the action of nullity or annulment is not filed and registered within one year after the conclusion of the invalid transaction.*
3. *At the date of acquisition of the third party, in case no registration of the related good is found, the rights of the third party shall only be recognized if the action of nullity or annulment is not filed and registered within three year after the conclusion of the invalid transaction.*
4. *At the moment of acquisition, if the third party acquiring the goods, without fault, did not know the vice of the null or annullable*

[134] See Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, pp. 579.

transaction, he is considered to be of good faith.

Despite the good intention of the legislator to protect third parties, it is obvious that the protection conferred by this article is not thorough and the legislative technique doubtful. First of all, when it limits the transaction to those relating to the transaction of immovable, it is not understandable. Secondly, the requirement of 1 or 3 years for protection has actually turned all transaction theoretically unsecured within that period.

Chapter 3. The Contents of a Contract

§ 1. DIFFERENT CONTRACTUAL CLAUSES

I. Introduction

149. Under the principle of **freedom of contract** (article 399, CCM), which is a corollary of the principle of **private autonomy**, the parties are free to determine the content of a contract[135]. Therefore, unlike English law[136], the "contents of a contract" is neither a unified topic in the regulatory system of the Macau Civil Code nor a unitary topic in doctrinal discussion.

As we have seen in our previous discussion (Introduction to the law of contract, Chapter one, notion of contract), in the Macau Civil Code, contract is first seen as a juridical transaction, and then a source of obligation. Therefore, in relation to the formation and interpretation of contract as well as the conditions of formal and substantive validity, rules are found in the General Part of the Civil Code. As far as the "contents of a contract" are concerned, related rules are scattering all over the various part of the Law of Obligation (Book II, namely, from article 391 to article 395, about the content of an obligation; from article 399 to article 450, about the general provisions of contract, preliminary contract, agreement of preemption, the transfer of contractual position, *exceptio non adimpleti contractus*, resolution of contract, delivery of earnest, etc.; from article 504 to article 1174, regarding the types of obligation, the transmission of credits and debts, the guarantees of obligations, the fulfillment and non-fulfillment of obligation, the various types of nominate contracts). Judging from the alluded regulatory structure, it is easy to conclude that an abstract discussion on contents of a contract shall have no focus point in Macau law; while a concrete discussion on the contents of different types of contract shall result in too many details, which may go beyond a manageable dimension.

In spite of all the difficulties, the following discussion shall still stick to an exposition centering on the contents of a contract. The most important reason for this choice is of course the comparative purpose of this work; we believe such an arrangement would be more comprehensive for readers who are familiar with the expository system of common law. On the other hand, such an attempt is also a good chance for a continental lawyer to re-examine the rationality of the legal system he is familiar with from another angle.

II. Express and implied clauses of a contract

150. The concept "terms of contract", as to refer to "the obligations assumed

---

[135] See Antunes Varela, Das Obrigações em Geral, Vol. I, 8ª Ed., Almedina, 1994, pg. 240-241.

[136] The distinction between conditions and warranties in English Law has no equivalence in Macau Law. For a comparison between Belgian law and English law in this matter, see Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 147; for an introduction of this topic under the perspective of Hong Kong law (which is a member of the common law family), see Ping-fat Sze, International Encyclopaedia of Law – Hong Kong Law of Contracts, Kluwer Law International, 2001, pg. 94.

respectively by the parties of a contract"[137], has no direct equivalence in Macau law. For a continental lawyer, the discussion of the characteristics and nature of an "obligation" shall go a lot beyond the scope of the contents of contract. It is within the general discussion that deals with almost all types of obligations (be it originated by contracts, torts, unjust enrichment, unilateral promises or *negotiorum gestio)*, and shall generate a number of categories and classifications with another method of logical thinking. In order to go into that logic, perhaps a comprehensive textbook of the Law of Obligations is needed.

151. The "contents" of a contract shall of course exercise influence on the characteristics of the obligation eventually established; yet under the principle of freedom of contract, the "contents" of a contract shall not be pre-determined by a series of positive requirements. From a continental perspective (with special reference to Macau and Portuguese laws), the delimitation of the contents of a contract would rather be done in a **negative approach**: avoiding as much as possible or at least taking into consideration the circumstances that may affect the validity or the enforcement of a contract.

Parting from the broad concept of "terms of contract", common lawyers very often distinguish between express contract terms and implied contract terms. For continental lawyers, the function of such a distinction shall only be achieved through the systematic integration between the declared intent of the contracting parties and the various layers of express and implied supplementary rules provided by the Civil Code.

At the level of declaration, the Macau Civil Code admits both express and tacit (or implied) business declaration. "It is express when made by words, in writing, or by any other direct means of expressing the intent; it is tacit when it is deducted from facts that reveal it with all probability (article 209, 1).

For continental lawyers, the "contents" expressed in the declaration made by the parties are still the starting points and the minimum reference for the determination of the duties of the parties and the final effect of the contract, yet it is not their habit to consider everything beyond the declaration as implied terms. For those factors affecting the duties of the parties and the effects of the contract, there are solutions embedded in the various conceptual levels of our Code. First of all, if a contract concluded by the parties corresponds to a nominate contract, the supplementary rules listed in the Civil Code for that particular type of contract as well as the general rules for business declaration, for obligations and for contracts in general are automatically applicable to it. If a contract concluded by the parties does not corresponds to a nominate contract, the general rules for business declaration, for obligations and for contracts in general are still applicable. Therefore, the contracts drafted according to continental law are always precise, because there is always the code to supplement it in many aspects.

152. The factor really considered implied by continental lawyers shall perhaps be the principle of good faith and its concretizations in different parts of the Code. Through the theory of **basis of transaction (base de negócios)** and the **change of substantive circumstances (alteração substancial das circumstancias),** the subjective motives which the contracting parties considered as the presumption or basis of their transaction as well as the objective environment which the parties rely on for a normal performance of contract are taken into consideration.

[137] Ping-fat Sze, International Encyclopaedia of Law – Hong Kong Law of Contracts, Kluwer Law International, 2001, pg. 94.

Although it would be impossible to delimit all the possible contents or clauses for a contract, through practice, it is, however, possible to identify several types of clauses frequently appear in a contract. Some of those clauses even aroused the attention of the legislator and get incorporated to the Codes or regulated by other normative acts. At the following, we shall examine the standard clauses of contract, the exemption clauses and limitation clauses, the penalty clauses and the arbitration clauses.

III. Standard clauses of contract

153. In Macau, the "standard clauses of contract" (clausulas contratuais gerais) are regulated by a special law (Lei n° 17/92/M, with exactly the heading of **Clausulas Contratuais Gerais**). According to this law, standard contract clauses are clauses formulated in advance and to be used in an undetermined number of contracts. These clauses are prepared by one party of a contract and presented to another party for the conclusion, while the latter is left with no chance to negotiate its content, but only the choice to accept or not. Among all characteristics of the standard clauses of contract, the most important one should be its uniformity or standardization[138] (the same set of clauses is to be used in a series of contracts). The use of standard clauses of contract is normally considered as a restriction to the principle of freedom of contract, especially at the point of the freedom to fix the content, since the clauses are prepared in advance by a party and its content is uniform, the other party has no chance to negotiate it.

The law regulating standard contract clauses in Macau is divided into five chapters and has altogether twenty eight articles. The first chapter deals with the definition and the scope of application (articles 1 to 3). The second chapter deals with the inclusion of standard clauses into a particular contract. Special duties are imposed to the party preparing the standard clauses and including them in a contract because this party has always a much **stronger bargaining power** [139]. In view of the disparity in bargaining power and the disadvantageous position of the consumer, the law must at least assure that before the consumers make their decision, they know clearly what they are accepting, even if they cannot change the standard clauses. Therefore, a **special duty of communication** and a **special duty to inform** are imposed to the offering party. In order to fulfill its duties, the offering party should communicate the complete set of standard clauses to the accepting party in advance and with adequate means (article 5, Lei 17/92/M); as well as to inform the accepting party about the contents of all the clauses included. The duty to inform covers also the duty to explain in case of doubt. When there is a conflict, the duty of proof rests also on the offering party (who benefits from it).

The third and fourth chapters have to do with the validity of certain type of standard

[138] See Joaquim de Sousa Ribeiro, Cláusulas Contratuais Gerais e o Paradigma do Contrato, Coimbra, 1990, pg. 174.

[139] In many cases, the offering party is an enterprise running under monopoly or oligopoly, providing unique services or controlling scarce resources, or at least taking advantage of its organization structure and of the nature of the transaction; the other party, mostly consumers, can rarely refuses the offer or negotiate for a better term, since the products or services offered are their daily needs, while they have no possibility to find an alternative offer from elsewhere, or from the perspective of the consumer, the transaction is too small comparing to the cost to negotiate a better term. In rigorous term, the particular consumer is protected not even because they are weaker in a contractual relation, but because they are the holder of diffused or diluted interests within a mass of consumers. See Joaquim de Sousa Ribeiro, Cláusulas Contratuais Gerais e o Paradigma do Contrato, Coimbra, 1990, pg. 227.

clauses. The law (Articles 12, 13, Lei 17/92/M) prohibits under the penalty of nullity standard clauses that exclude or limit a series of liability, that presume a will of the party in accepting a contract or renewing a contract, that confer the exclusive right of interpretation to the proponent, that modify the burden of proof and the transfer of risk etc. Among all the cases prohibited, the case of article 12, 1c[140] has a special significance, because it is in direct confrontation with the general regime of clauses excluding the liability of obligor in case of non-fulfillment, defective fulfillment and delay(article 798, Macau Civil Code). It should be noted that the law of Standard Clauses of Contract was passed in 1992; before the promulgation of the Macau Civil Code of 1999, article 12, 1c, distinguishing between non-fulfillment with "dolus" or "gross negligence" and non-fulfillment with slight negligence, was an exception to the general rule. Nevertheless, after the approval of the new Civil Code in 1999, the general regime of clauses excluding liabilities in advance (article 798, 2, Macau Civil Code) is no longer in conflict with the law of Standard Clauses of Contract.

Finally, the fifth chapter has established a special civil procedure (the so called prevention action) for particular entities (like the Consumer Council, the Public Ministry etc.) to invoke and the court to declare the prohibition of some clauses even if they are not inserted to a contract.

IV. Exemption clauses and limitation clauses

154. According to the principles of private autonomy and freedom of contract, the parties are free to include any clause in their contract, including those to exclude or limit the liability of a party. In many cases, especially in mass transactions, one of the contracting parties would like to have its risks controlled before entering into a contract, and the insertion of a clause excluding or limiting the liability of one party in advance is a powerful tool to achieve this objective.

Nevertheless, in this aspect, the Macau Civil Code has chosen to restrict the autonomy of the parties. As a general rule, the law has determined that a clause by which the creditor gives up in advance any of the rights granted to him by other previous provisions (mainly the rights to claim indemnities) in case of non-fulfillment and delay of debtor is **null** (Article 798, 1, Macau Civil Code). This general rule has an exception: if the fulfillment is to be done by a legal representative of the debtor or other person employed for the purpose, a clause excluding the liability of the debtor is valid, unless the exclusion itself contravene the public policy (article 789, 2, Macau Civil Code).

This general rule (with its unique exception) is inherited from article 809 of the Portuguese Civil Code. The reason for the Portuguese draftsmen made this choice rest on his belief that the rights being renounced are irreducible complex of the rights of obligation.[141] By permitting a contracting party to exclude his liability in advance, the "nature of obligation" shall be endangered. The contracting parties are not all the way prohibited to exclude their liabilities or to renounce their rights; it is just that the exclusion and renouncement should only be done after the non-fulfillment occurred. Nonetheless, even during the enforcement of the Portuguese Civil Code, there were opposing opinions sustaining the exclusion of liability (mainly the liability to indemnify)

[140] This article prohibits the inclusion of clauses that exclude or limits the liabilities resulting from definite non-fulfillment, delay or defective fulfillment in case of "dolus" or gross negligence.

[141] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 134-136.

in advance, shall not endanger the nature of obligation, turning a contractual relation into a natural obligation, because the creditor still has the rights to claim for the specific performance as well as the rights to invoke other means guarantees[142]. Therefore, excluding the liability of one party to indemnify does not mean that the other party has given up all his rights to claim. It was then suggested that article 809 of the Portuguese Civil Code be interpreted restrictively, so that the clause excluding liability in advance shall only be void when the non-fulfillment or delay is resulting from "*dolus*" or gross negligence of the debtor.

In view of the doctrinal dispute in Portugal, and in order to avoid the difficulty of a restrictive interpretation, the Macau Civil Code, adopting the opinion of Pinto Monteiro, has added another exception to the general principle of article 798, providing that "*a clause excluding the liability for non-fulfillment, defective fulfillment or delay, for cases in which there is no "dolus" or gross negligence, is nonetheless valid."* [143] Here, it is clearly seen that the classical distinction between "culpa grave" (gross negligence) and "culpa leve" (slight negligence) is revived and used as a criterion to evaluate the validity of a clause excluding liabilities in advance.

V. Penalty clauses

155. Under the broad concept of penalty clauses, the doctrine has identified two realities: the penalty clauses in a strict sense and the *liquidated damages clauses*. Strictly speaking, *penalty clauses* are clauses stipulating a punishment in case of non-fulfillment; in another word, its function is to motivate or compel the fulfillment of obligation. Liquidated damages clauses are clauses fixing in advance the amount to be paid as compensation (imdemnização) in case of non-fulfillment. In the first case, the penalty corresponds to the conduct or act of the obligee, it may not have a direct relation to the damages suffered by the creditor.[144]

The Macau Civil Code has adopted the above distinction in its article 799, identifying within the broad concept of penalty clause (cláusula penal) two variants: *compensatory penalty clause* (*cláusula penal compensatória*) and *compelling penalty clause* (*cláusula penal compulsória*)[145]. Since it is most of the time difficult to determine whether a penalty clause is compensatory or compelling, the law has provided that in case of doubt, the clause shall be considered compensatory.

In some way, a liquidated damages clause is similar to a clause of limitation of liability. Traditionally, when the former (clause of limitation of liability) refers to

---

[142] This opinion was first raised by Pinto Monteiro and then sustained by a number of scholars. See António Pinto Monteiro, Cláusulas Limitativas e de Exclusão de Responsabilidade Civil, Coimbra, 1985, pp. 198, 206, 217.

[143] It should be noted that number 2 of article 798 is added according to the suggestions made by António Pinto Monteiro, Cláusulas Limitativas e de Exclusão de Responsabilidade Civil, Coimbra, 1985, pp. 178; Also see Tou Wai Fong, The Innovations Brought by the Macau Civil Code, in 10.° Aniversário Assoiação dos Estudantes da FDUM, AEFDM, 2000, pp. 60ss.

[144] See António Pinto Monteiro, Cláusula Penal e Indemnização, Almedina, 1999, pp. 467 e seguintes; João Calvão da Sival, Cumprimento e Sanção Pecuniária Compulsória, Coimbra, 1997, pp. 268 e seguintes; from a perspective of comparative law, see Luís Manuel Teles de Menezes Leitão, Direito das Obrigações, Vol. II, Almedina, 2002, pg. 280.

[145] The innovation of the Macau Civil Code is believed to have adopted the research result of Pinto Monteiro. See António Pinto Monteiro, Cláusula Penal e Indemnização, Almedina, 1999, nota à 1ª Reimpressão.

damages, the parties use it to set an upper limit of liability, while the liquidated damages clause stipulates the exact amount to be paid in case of non-fulfillment, presuming that all the loss are covered by that amount, and exempting the creditor to prove that he has suffered a loss in a that amount.

The Macau Civil Code is aware of the fact that the rigidness of a penalty clause (for example, when the penalty is excessive) may contradict the idea of equity; therefore, it provided a chance for the debtor to reduce the penalty.[146] In article 801, 1, it provides that: "*Upon request of the debtor, the agreed penalty may be reduced by the court, in accordance with equity, if it is found to be manifestly excessive, even if for a supervening cause; any stipulation to the contrary shall be void.*"

156. Closely related to the concept of penalty clause is the earnest money (which corresponds to the Portuguese term *sinal*)[147]. The main difference between the two legal devices is that the **penalty clause being consensual** (article 799, Macau Civil Code) by nature, while the **earnest money** (article 436, Macau Civil Code) has a ***real*** character (which means that the establishment of earnest money requires the delivery *ad constitutionem* of the thing or money). Both the penalty clause and the earnest money are compulsory means for fulfillment, and both of them may liquidate part or all of the damage in case of non-fulfillment. Therefore, the rigidness found in penalty clause may very probably be found in the establishment of earnest money. For these reasons, the Macau Civil Code has established a link between the two devices, making article 801 of the Civil Code (about the reduction of penalty) applicable to the case of earnest money after necessary adjustment.

VI. Arbitration clauses

157. Arbitration clauses are clauses providing for the submission of controversies to arbitration, according to DL 29/96/M, which regulates the arbitration system of Macau. The intent to submit to arbitration can either be manifested in the form of a clause inserted to the contract or an independent agreement. In the arbitration clause, the parties may also include in the clause contents like rules for the appointment of members of the arbitral tribunal and the scope covered by an eventual arbitration. In case there is nothing written for the appointment of arbitrators to form the tribunal, and the parties cannot reach agreement, any of them may submit the dispute to the court of first instance (article 16).

Although an arbitration clause or arbitration agreement can be inserted into a contract or concluded between the parties according to their free intent, it shall not be considered simply a contract of civil nature (with effects among the parties), but rather an act or a contract of procedural nature (contracto de natureza processual), because the effects it produces mainly reflect in the procedure[148].

An arbitration clause can be revoked by agreement of the parties until the decision

---

[146] See Tou Wai Fong, The Innovations Brought by the Macau Civil Code, in 10.° Aniversário Assoiação dos Estudantes da FDUM, AEFDM, 2000, pp. 60ss.

[147] For a detail and critical analysis of these two regime, see António Pinto Monteiro, Cláusula Penal e Indemnização, Almedina, 1999, pp. 163 e seguintes; João Calvão da Sival, Cumprimento e Sanção Pecuniária Compulsória, Coimbra, 1997, pp. 247ss.

[148] For the above qualification as well as the introduction and critics of other qualifications, see Cândida da Silva Antunes Pires, Cláusula Compromissória e Compromisso Arbitral. Da Sua Natureza Jurídica, in BFDUM, Ano IX, n° 20, FDUM, 2005, pp. 17-46.

of arbitration is made. In case the arbitral tribunal is established before the revocation, the parties have the duty to inform the tribunal of their revocation of the clause. In this case, the arbitration fees shall be paid according to the original agreement between the parties and the arbitrators (article 8).

The existence of arbitration clauses or arbitration agreement may interrupt the prescription (article 316 of the Macau Civil Code).

§ 2. INTERPRETATION

158. Contract is formed by the declarations of intent, and declarations are done through the use of language. The basic units of language are words and sentences. The meaning of a word or a sentence can only be determined through its usage, and the process to search and determine the meaning of a particular word, sentence or text is interpretation. Since contract is a legal device, the interpretation of a contract cannot be done so freely like the interpretation of an artistic work; instead, this particular process of interpretation should be done under certain guiding principle(s) and a clear objective. The most important principle guiding the work of contract interpretation is the principle of good faith; and the objective of contract interpretation is to establish the meaning of the agreement which is decisive for the legal effect of the contract.

Interpretation of juridical transaction is a presupposition for a correct application of law; if interpretation of law is a big premise for application, interpretation is a small premise. Like any other hermeneutic activities, the base for an interpretation of contract to occur is normally a text (even in a verbal form). When there is a text to interpret, and a text is multi-meaningful by nature, the ever on-going controversy of whether the interpretation is done in a sense favoring the real intent of the party making the declaration or in a sense sticking to literal meaning of the text shall take place. The former is called the subjective approach and the latter is called the objective approach. The approach expressly adopted by the Macau Civil Code (in article 228) is called the *impression of the addressee approach*[149], which is considered a variant of the objective approach, because the impression of the addressee mainly comes from the text. According to this provision, the meaning of a business declaration shall be the one that "*a normal addressee, placed into the position of the real addressee, could deduce from the behavior of the party making declaration*". Nevertheless, in order to attribute the result of interpretation done by the above deduction, the result itself must be something that *the party making the declaration can reasonably expect*.

In consonance to the maxim "*falsa demonstratio non nocet*", the law has compromised the obvious objectivism by providing that "*As long as the addressee knows the real intent of the party making declaration, the declaration issued is worth according to that intent*" (article 228, 2).

In an interpretation, although the base of operation is the declaration (usually expressed in the form of a text), nevertheless, the law never ruled out the possibility of an implied declaration. Additionally, the effect of a contract may also depend on a number of subjective and objective circumstances beyond text declared. Therefore, as the

[149] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, pp. 447-448.

starting point of the deduction process, the legislator had chosen the word "**behavior**" ("comportamento") and not the word "declaration" (declaração) or the "text" (redacção). By the word behavior, the whole **context** behind which a business declaration is done can be taken into consideration. Since the interpretation activity is a search of the meaning of a business declaration, and this meaning is obviously linked to the intent of the declaring party, supposing an interpretation can go beyond the text, maximizing the function of interpretation, it is not difficult to imagine that many cases of mistakes[150] could be solved through interpretation.

In case a doubtful result is obtained through the process interpretation, the law has established an extra criterion to determine the meaning of the declaration: if the transaction is gratuitous, prevalence should be given to the interpretation less burdensome to the disposing party; if the transaction is onerous, prevalence should be given to the interpretation that leads to a more equilibrium performance (article 229). The function of this rule is doubtful by itself. First of all, interpretation is needed only when there is a doubt; secondly, this rule seems more like a criterion distributing the risks of uncertainty of a juridical transaction, and not properly a rule of interpretation.

The theory of impression of addressee is adopted by our law. It is supposed to be an objective approach moderated with subjective element. Nevertheless, in certain type of transactions, the law may revise its position and incline to different directions. In the interpretation of formal transactions, the law prefers a position which is more objectivism: the interpretation must have a minimum correspondence to the text, even if the text is not perfectly expressed (article 230, 1). In the interpretation of a will: the interpretation which is more corresponding to the real intent of the testator shall prevail (article 2024).

If there is a loophole in the business declaration, the reparation shall be done according to the hypothetic will of the parties, under the ultimate control of good faith (article 231).

§ 3. CONDITIONAL CONTRACTS

I. Notion of condition and conditional contracts

159. Although the regime of "condition" is regulated in the General Part of the Macau Civil Code (article 263 ss), its usual area of application is contract, especially contracts with patrimonial character. Beyond this area, many juridical transactions are not allowed to insert a condition (for example, marriage, acceptance of heritage, adoption and the exercise of potestatvie rights by unilateral transaction)[151].

Condition is an uncertain future event. When a contract is subordinated to a condition, it is a conditional contract. Condition is normally inserted into a contract in form of an accessory clause (cláusula acessória). The subordination to a condition does not affect the validity of a contract; a valid and binding contract is valid and binding with or without a condition. What a condition can affect is the moment to start producing effect and the moment to cease produce effect.

---

[150] About the relation between interpretation and mistake, see Ferrer Correia, Erro e interpretação na teoria do negócio jurídico, Coimbra, 1939.

[151] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, pp. 558.

II. Types of conditions

160. There are two types of conditions distinguished by the Macau Civil Code (article 263): conditions suspending the effect of a juridical transaction *(condição suspensiva*) and conditions resolving a juridical transaction (condição resolutiva). When a juridical transaction is affixed with the first type of condition, it will not produce until the verification of an uncertain fact; when a juridical transaction is affixed with the second type of condition, the verification of an uncertain fact resolve the transaction. The classification of conditions into "suspensive" and "resolutory" is the basis of the whole legal regime of condition.

Apart from the traditional classification of condition into suspensive and resolutory, which has a direct reflection in the positive law, there are also several doctrinal classifications (like the dichotomies of potestative conditions and causal conditions, possible conditions and impossible conditions etc.) which are also important for the understanding of the phenomenon. In a *potestative condition*, the future uncertain fact is absolutely depending on the will of a party. For example, Adam makes a donation to Bruce under the condition that Bruce pays him a visit. On the contrary, in a *causal condition*, the future and uncertain fact is an external and natural event, including an event depending on the will of a third party.

A condition is possible or not depends on whether it meets the requirement of legal and physical possibility.

III. Requirements of a condition

161. There are several requirements for a valid condition: 1) a condition cannot be a present or past event, otherwise it shall not be considered a condition; 2) it must be legally and physically possible; 3) it must not contravene the law, public policy or public morality (article 264, 1, Macau Civil Code).

A condition contravening the law, public policy or offensive to public morality cause the whole juridical transaction null. While a juridical transaction is affixed with a legally or physically impossible condition, the effect depends on the nature of the condition. In case of a suspensive condition, the whole juridical transaction is null; in case of a resolutory condition, just the impossible condition is considered not written (article 265, 2, Macau Civil Code).

IV. The effect of a pending condition and the verification and non-verification of a condition

162. For those who celebrate a contract to dispose of a right under a suspensive condition or to acquire a right under a resolutory condition, at the time when the condition is pending, should behave according to the principle of **good faith** (article 265, Macau Civil Code).

Therefore, if the verification of condition is obstructed, against the principle of good faith, by a person who shall be prejudiced by the verification of condition, the condition is taken to be verified; on the contrary, if the verification of a condition is provoked, also against the principle of good faith, by a person who shall benefit from the verification of condition, the condition is taken to be not verified (article 268, 2, Macau Civil Code).

At the period when the condition is pending, the person who concludes a contract to

acquire a right under suspensive condition is not the holder of that right, at least not until the verification of the condition. Nevertheless, he is considered to have a kind of **"expectation" (expectativa)**. In case the debtor fulfills his obligation before the verification of the condition, the performance can be restituted according to the rule of unjust enrichment[152]. However, the creditor under the situation of expectation is allowed to practice acts of conservation in relation to the object of juridical transaction (article 266).

The verification of a condition produces, in principle, a retroactive effect (article 269). Such an effect is sometimes excluded by law in special cases(article 270) and can also be excluded by agreement of the parties.

The non-verification of a condition turns a juridical transaction stable, in another word, the conditional nature of the transaction disappear. In case it is sure that a condition shall not verify, the effect is equal to the non-verification of a condition (article 268, 1, Macau Civil Code).

V. Terms

163. In Macau law, a "condition"(condição) is distinguished from a "term" (*termo*), which is also an accessory clause. While condition is an uncertain future event, "term" is a future event which is certain to occur, although the moment of occurrence can be certain or not certain. In the first case, we call it a certain term, and in the second case, an uncertain term. For example, a date fixed for the performance of contract is a *certain term (termo certo),* while the death of a person is an *uncertain term (termo incerto).*

Like the case of condition, terms can also be classified as suspensive and resolutory. Nevertheless, the classification with most practical significance is the classification between essential term and non-essential term. It is essential when the performance should be done until the date fixed by the parties, otherwise the fulfillment shall be considered impossible. It is non-essential when the date fixed for performance is passed, the fulfillment shall not be impossible, but the debtor is considered in delay.

The Macau Civil Code has established a very detail rule for the computation of term in article 272.

[152] See Carlos Mota Pinto, Teoria Geral do Direito Civil, 3ª Ed., Coimbra, 1993, pp. 568.

Chapter 4. Privity of Contract

§ 1. THE RULE OF PRIVITY OF CONTRACT

I. Introduction

164. The rule of "privity of contract" (or "relativity of contract") is developed from the Latin Maxim "*res inter alios acta alteri non nocet*" or its variant, "*res inter alios acta neque nocet neque prodesse potest*" (what was done between ones do not prejudice nor benefit others). It implies that contractual rights and duties only affect the parties to a contract. In a more comprehensive way, this rule may be developed and decomposed in the following manner: in principle, 1) contracts are binding; 2) a contract binds the contracting parties; 3) if a contract confers rights, the rights are for the parties; 4) third parties are not bind by the contract; 4) a contract does not confer rights to third parties.

The binding force of a contract has been expressed in the famous article 1134 (1) of the French Civil Code, which declares, "*The conventions legally formed worth as law for those who made it.*" Similar ideas are also seen in article 1372 (1) of the Italian Civil Code of 1942 and article 702 of the Portuguese Civil Code of 1867. Nevertheless, in the preparatory work of the Portuguese Civil Code of 1966, the draftsman believed that a declaration similar to the French Civil Code and Italian Civil Code would not be necessary, since the Code in preparation has adopted the unitary idea of obligation, and contract was taken as a source of obligation, the force of an obligation is common, independent to the sources that produce it[153]. The suggestion of the draftsman was then adopted by the legislator. In another word, for the Portuguese Civil Code of 1966 and the Macau Civil Code (which inheriting the whole structure of the Portuguese one in this matter), the binding force of contract is to be found in the general provisions of obligation.

In turn, the idea of relativity of contract is generally expressed in an implicit way. In the case of the Italian Civil Code of 1942, the idea can be seen in articles 1372 (2), 1379 and 1398 etc.[154] The same idea can also be found implicitly in the Macau Civil Code, article 400, which provides:

1. A contract should be punctually fulfilled, and can only be modified or extinguished by mutual consent of the parties or in the cases admitted by law.

2. In relation to third parties, a contract only produces effect in the cases and terms specifically provided by law.

It is therefore important to clarify who are the parties and who are third parties in a contract. In fact, "parties" and "third parties" in a contract are contrasting each other: if a person is not one of the parties, he is a third party. It should be noted that both "parties" and "third parties" are not permanent status of a particular person. It has to be

[153] See Adriano Paes da Silva Vaz Serra, Efeitos dos Contratos (Princípios Gerais), BMJ, (74), Lisboa, 1958, p. 334.

[154] see P.G. Moateri, Alberto Musy and Filippo Andrea Chiaves, International Encyclopaedia of Law – Italian Law of Contracts, Kluwer Law International, 1999, pg. 103; Adriano Paes da Silva Vaz Serra, Efeitos dos Contratos (Princípios Gerais), BMJ, (74), Lisboa, 1958, p. 334.

considered at a particular moment[155]. For the purpose of article 400 of the Macau Civil Code, the concept "parties" may include: those who reached the agreement by making business declarations (by themselves or through an agent) and, at the moment of consideration, still occupying the contractual position, or their heirs that take over the contractual position at the moment of consideration, as well as those who took the contractual position by particular title (*inter vivos*) of one of the contracting party[156] at the moment of consideration. According to the above logic, the determination of third parties in a contract is not difficult, however, when the problem of third parties in a contract is compared with other concepts of third parties (such as third parties of a right of obligation, third parties in relation to a registration or in relation to the invocation of invalidity of certain transactions etc.; which are beyond the scope of our discussion), the confusion will be great.

In principle, a contract only binds the parties. Notwithstanding that the third parties generally have the duty to respect the rights and duties arising from a contract, just like respecting any other legal rights. However, there are also exceptions especially provided by law, in which a third party of a contract may be conferred with rights and benefits (*infra*), or in which the duties of a contracting party being extended in such a way that he is to responsible to the damages of third parties (in the case of product liability)[157].

II. Contracts in favor of third parties

A. Notion and development

165. Contracts in favor of third parties are perhaps the most important exception of the principle of privity of contract,[158] which is provided in the Macau Civil Code (article 437, 1) under the following terms: "*By means of contract, one of the parties can undertake, towards the other party which is vested with an interest worthy for legal protection, an obligation to realize a performance in favor of a third party, which is a stranger to the transaction; the party that undertake an obligation is called promisor and the party to whom the promise is done is called promissee.*"

It should be noted that this regime is not a direct heritage of the Classical Roman Law, but an innovation in the nineteenth century. In many cases, institutional innovation or reform are pushed by social and economical needs, and innovation of legal institution especially pushed by the need of commercial development. The appearance of life insurance in the commercial sector is perhaps the key factor to push the development of contracts in favor of third parties, since until the late nineteenth century, under the rigid rule of privity of contract, it would be very difficult to construct the legal relation of a life insurance contract[159]. Yet after its adoption by modern law, the

---

[155] See E. Santos Júnior, Da Responsabilidade Civil de Terceiro por Lesão do Direito de Crédito, Almedina, 2003, pg. 447.

[156] Adriano Paes da Silva Vaz Serra, Efeitos dos Contratos (Princípios Gerais), BMJ, (74), Lisboa, 1958, p. 335.

[157] For a comprehensive reflection of product liability in Portuguese law, see João Calvão da Silva, Responsabilidade Civil do Produtor, Coimbra, 1990.

[158] There are also opinions reluctant to consider the contracts in favor of third parties an exception of the principle of privity of contract, because the said principle never lost its force completely. For this position, see Beatriz Segorbe, Da Cláusula a Favor de Terceiro, BFDUM, ano IX, n.° 20, FDUM, 2005, pp. 73-94.

[159] See Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law

application of this legal device has gone far beyond the restricted scope of insurance contract.

In Portugal, the regime of contracts in favor of third party is not seen in the Code of Seabra. The first Portuguese legislation dealing with this matter is the Decreto n° 19126, which appeared to be too simple and defective. The initiative of the Portuguese legislator to adopt this regime in the Civil Code of 1966 (which is later inherited by the Macau Civil Code in 1999) and regulate not only the concept but also the various types of contracts in favor of third parties in detail was inspired by article 328 of the German Civil Code and the doctrines of the glossator Martin[160]. Except the normal form of contracts in favor of third parties, the Macau Civil Code also regulated the so called "liberatory" type of contracts in favor of third parties (article 437, 2).

In order to illustrate the scope of application of as well as the legal relations established through this regime, the use of a few examples[161] may be advisable.

Example 1 for illustration:

A conclude a life insurance contract with the insurance company B, appointing C as his beneficiary;

Example 2 for illustration:

A has the duty to deliver certain goods to B, and for the purpose of delivery, he conclude a contract with a transportation company C, binding the latter to deliver the goods to B, as well as issuing the invoice.

Example 3 for illustration:

A, the owner of a property, has rented it to B, in the contract, he has agreed with B that the payment be made to a third party; supposing he has the duty to pay C periodically an amount equals to the rent, and he has grant a power of attorney to C for the collection and reception of the rent.

Example 4 for illustration:

A is the creditor of B, he made an agreement with C to liberate the debt of B, but C turned to be the debtor instead.

Example 5 for illustration:

A conclude a life insurance contract with the insurance company B, indicating as beneficiary his nephew, adding a condition that if his nephew dies before him, the performance shall be done to a charity fund(without specifying which).

From the notion law and the illustration given above, several characteristics and conditions of validity may be drawn for this kind of contract:

1. Contracts in favor of third parties are not exactly a new type of nominate contract; instead, many non-nominate or nominate contract, after adding some clauses with certain characteristic, could be subsumed into this category;

---

and Taxation Publishers, 1993, pg. 160.

[160] Antunes Varela, Das Obrigações em Geral, Vol. I, 10ª Ed., Almedina, 2000, pg. 415.

[161] The first four of the following five examples are derived from the ones given by Antunes Varela, Das Obrigações em Geral, Vol. I, 10ª Ed., Almedina, 2000, pg. 409.

2. In a contract in favor of third parties, there are only two contracting parties, namely the **promissee** (sometimes also called **stipulator**) and the **promisor**;
3. One party promises the other party to make a performance to a third party (normally called **beneficiary**);
4. The third party is not a "party" of a contract in a traditional sense;
5. The stipulator must have an interest that is worthy for legal protection;
6. This interest of the stipulator could be patrimonial in nature (e.g. establishing a loan or paying a debt) or non-patrimonial in nature (e.g. a gratuitous offer in case of life insurance);
7. The benefit of the third party may reflect in the conferment of a right or the liberation of a debt.

B. Rights and Duties of the Stipulator, the promisor and the third party

166. In the following paragraphs, the relationships among stipulator, promisor and the third party shall be addressed under the perspective of rights and duties. Before doing a structural analysis of the legal relations, it is necessary to clarify several concepts. First of all, for purpose of the legal regime of "contracts in favor of third parties", the concept "third parties" is large, the stipulator may appoint one or more particular persons as third party or third parties, or else, he may assign the benefits for an unspecified group of persons, or even, for public interest (article 439, Macau Civil Code). Secondly, as mentioned in previous discussion, "contracts in favor of third parties" itself is not a new type of nominate contract, many nominate or non-nominate contracts vested with certain characteristic (which makes it an exception of the relativity of contract) can be admitted into this category. It is true that there are cases of nominate contracts which bear this characteristic by nature (the case of civil liability insurance[162]); yet there are also cases which a nominate contract in its original form has nothing to do with the idea of "contracts in favor of third parties", but vested with this characteristic by adding one or few clauses (the case of a transportation contract with a duty to deliver the goods to a third party). In the first situation, a contract is **intrinsically in favor of third parties**, and in the second situation, a contract is only **extrinsically in favor of third parties**. In any cases, a contract in favor of third parties shall establish at least three sets of legal relations, and all of them are inter-related.

1. Relationship between Stipulator and promisor

167. The relationship between the stipulator and promisor is sometimes described as the main contract, but in Portuguese literature, the name "relation of provision" (relação de cobertura ou de provisão)[163] is better known, since this is the relation where the right of the third party comes from. According to what have been said, the relation of provision may appear in different forms (purchase and sale, transportation, insurance,

[162] Regulated as a nominate contract in articles 1024-1027 of the Macau Commercial Code, with the following definition: "In civil liability insurance an insurer undertakes, within the limits of the law and the contract, to cover the risk of the emergence for the insured of an obligation to **compensate a third party** for damage caused by an event foreseen in the contract." Bold added by the author, and the translation is from Jorge Godinho, Ibid., pg. 446.

[163] See Antunes Varela, Das Obrigações em Geral, Vol. I, 10ª Ed., Almedina, 2000, pg. 418.

leasing etc.). For example, in an insurance contract, the duty of the stipulator is to pay premium, meanwhile, he has the right to sue for the rescission of contract; in a leasing contract, the landlord has the right to receive rent and the duty to provide the premise. The reciprocal rights and duties between the stipulator and promisor shall not be affected by the existence of a clause attributing benefit to a third party. The promisor possesses the right to demand the stipulator for performance as it is agreed in the contract. Meanwhile, unless the stipulator and the promisor has agreed otherwise, the stipulator has the right to demand the promisor to execute the promise (article 438, 2), i.e., to perform to the third party. The contract can also be declared null or annulled by either party (because, in strict terms, only the stipulator and promisor are parties of the contract) in case there is a problem in the substantive and formal conditions of validity.

2. Relationship between promisor and third party

168. When a contract concluded is one in favor of a third party, though the third party did not participate in the declarations of intent, he acquires the right to demand the promisor to fulfill his promise. This right of the third party is acquired immediately after the contract is conclude, independent to his acceptance (article 438, 1, Macau Civil Code), and independent to the right of the promissee.

On the other hand, when the third party exercises his right of demand, the promisor may defend himself with all means of defense derived from the contract (article 443, Macau Civil Code). For example, if a third party sue the promisor, demanding him for fulfillment, the promisor may invoke the nullity or annulment of the contract (concluded between the stipulator and promisor).

3. Relationship between stipulator and third party

169. Although the third party acquires the right to sue the promisor immediately after the contract is conclude, it does not mean that his acceptance is meaningless. The significance of acceptance is mainly reflected in the relation between the third party and the stipulator. Before the acceptance (in the form of a declaration) of third party is communicated to the stipulator, the latter has the right to revoke the promise. The acceptance turn the third party into a definite position in relation to the rights conferred to him by the contract. Instead of acceptance, the third party may of course declare his rejection to the benefits conferred (article 441, Macau Civil Code).

III. Contracts for person to be named

170. Like the Italian Civil Code (articles 1401-1402), the Macau Civil Code (aricles 446-450) has also regulated the contracts for persons to be named. In this type of contracts, one party reserves the rights to, eventually, appoint a third person to acquire the right undertake the duties arising from the contract.

Obviously, this type of contracts shall not be considered a new type of nominate contract as well. Similar to contracts for the benefits of third parties, the clause reserving the right to appoint a third party to become the eventual “party” of contract can be inserted to various types of contracts. In fact, the addition of such a clause shall turn a contract into a conditional one, yet the condition is not in relation to the effect of the contract, but in relation to the determination of the parties. Perhaps it is even clearer to describe it as a contract which one party is in alternative (either the original one or a third

party) [164].

Contracts for person to be named and contracts for the benefit of third parties are absolutely two different legal regimes. In the first case, if a third person is eventually appointed, he substitutes the rights and duties of the original contracting party.

The appointment of third person should be done within the stipulated period, in case there is no stipulation on this matter, it should be done within a period of five days after the conclusion of contract. The declaration of appointment should be done in a written document, with the attachment of an instrument (document) of ratification issued by the third party (article 447, Macau Civil Code).

In case the appointment is not done within the due period or not done according to the formalities regulated by law, the contract shall produce effect between the original parties (article 449, Macau Civil Code).

The use of this type of contracts may cause problem to the stability of transaction, and may be used as a means of fraud to refuge tax payment.

[164] See Antunes Varela, Das Obrigações em Geral, Vol. I, 10ª Ed., Almedina, 2000, pg. 434.

§ 2. TRANSFER OF CONTRACTUAL RIGHTS AND DUTIES

171. In Macau law, the transfer of contractual rights and duties is generally dealt with under the framework of "transmission of obligations" (*transmissão de obrigações*), which covers the "assignment of credits" (*cessão de créditos*), the "assignment of single debt" (*transmissão singular de dívidas*), *sub-rogatio*, and transfer of contractual position (*cessão de posição contratual*).

I. The assignment of credits

172. By means of a contract, the creditor of an obligational relation can transfer his credit rights to another right holder. The contract with such an effect is called the "assignment of credits". The "assignment of credits" is an act of patrimonial attribution, causing a transfer of patrimonial rights from one person to another. From the perspective of obligation, the assignment of credits changes a juristic relation (the obligation) in its subjective perspective. The creditor which transfers his rights is called the *assigno (cedente)*, while the new right holder is called the *assignee (cessionário)*, and the debtor whose debt has been assigned is called the *assigned debtor (devedor cedido)*. In principle, for the assignment to occur, the consent of assigned debtor is not required. What the assignment of credits shall change is just the active (the creditor) side of the obligational relation, but not the passive side (the debtor), nor the structure of the credit.

From an analytical point of view, the assignment of credit is in itself a contract; it should however be distinguished from the underlying transaction which reveals the social or economic purpose that the assignor and assignee pretend to achieve. In fact, nobody would transfer a credit to another without a reason, purpose or cause (*causa*). An assignment of right may be done for reason of generosity, in exchange for a sum of money, in exchange of other property or for liberality etc. That is why the assignment of credit in Macau law is described as a transaction of *variable cause (causa variável)*[165]. According to article 572, 1 of the Macau Civil Code, the requirement and effect of between the contractual parties of an assignment of credit "shall be defined in function to the type of underlying transaction that serves as its basis"[166]. In another word, if an assignment of credits is done with an onerous title, the regime of purchase and sale is applicable; while it is done with a gratuitous title, the regime of *donatio* is applicable. However, if the assignment is with respect to credit rights of hypothec involving

[165] Almeida Costa, Direito das Obrigações, 9ª Ed., Almedina 2001, pg. 758; another expression with similar meaning - "transaction policausal" – is suggested by Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., 1995, pg. 301. In Macau, see Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 272-276.

[166] For a critical and analytical expostion of the solution adopted by Portuguese law (which is also relevant to Macau law), see Maria de Assunção Oliveira Cristas, Transmissão Contratual do Direito de Crédito – do Carácter Real do Direito de Crédito, Almedina, 2005, 53-63.

immovable, and the assignment is not done through a will, the formal requirement shall be public deed (article 572, 2, Macau Civil Code).

In the Macau Civil Code, the first rule provided for the assignment of credit is about the possibility of assigning a credit. The creditor can transfer the credit in total or just a part of it; in any case, the consent of the assigned debtor is not needed, but in order for the assignment to produce effect in relation to the debtor, this fact must be communicated to him or accepted by him (articles 571, 577, Macau Civil Code).

In principle, a credit can be assigned according to the free will of the creditor. However, there are also circumstances in which the assignment may be obstructed because of the prohibition of law, be excluded by the agreement of the parties, or excluded by the nature of the performance itself[167]. As far as the prohibition by law is concerned, article 573 has provided an important example. According to this provision, an assignment of credits or other rights under litigation made to judges or the public prosecutor, agent of the court or the attorney representing the litigating parties is null. Or, obviously, if the holders of rights and duties in the obligational relation have reached an agreement in not transferring the credit (*pactum non cedendo*), doing the assignment shall breach this agreement. Nevertheless, even if an assignment done in violating the *pactum non cedendo*, the fact of breach is not opposable to the assignee, unless the latter knows the existence of the agreement at the moment concluding the assignment (article article 571, 1, Macau Civil Code). Finally, the nature of performance may also affect the possibility of assignment. For example, the performance of aliments and performance of personal services, as well as the right of preemption etc., are not assignable.

173. The effect of assignment is of course the transfer of credit, yet this effect shall only produce in relation to the debtor if he is notified (article 577, Macau Civil Code). Therefore, the **notification or communication** is of utmost important in an assignment of credit. If not excluded by the parties through agreement, the transfer shall cover the guarantees and other accessory rights which are not separable from the person of the assignor. On the other hand, the guarantor should at least assure the existence of and possibility to demand the credit at the moment of assignment, but not the solvency of the debtor (article 581, Macau Civil Code).

The debtor can oppose the assignee with all means of defense that he is legitimate to invoke against the assignor; with the exception to those that result from the facts appearing after the debtor was informed about the assignment (article 579, Macau Civil Code).

II. Sub-rogatio

174. A sub-rogation (*sub-rogatio*) is the substitution of the creditor by a third party that fulfills an obligation of fungible performance in place of the debtor, or supplying the

[167] See Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 272-276.

debtor with the means for fulfillment[168]. A sub-rogation can be conventional or non-conventional. In the first case, it is declared by the creditor or by the agreement between debtor and the third party; in the second case, it is the law that determines directly the sub-rogation.

A sub-rogation can occur by initiative of the creditor through the issuance of an express declaration. When the creditor receives the performance from a third party, he may declare the sub-rogation, so that the third party who makes the performance acquires the rights originally belonging to the creditor (article 583, Macau Civil Code). In another word, a third party who makes the performance may take the position of creditor. The sub-rogation by initiative of creditor is therefore a unilateral juridical transaction.

Similarly, sub-rogation can also occur by initiative of the debtor. On or before the moment of the fulfillment of debt, by agreement between the debtor and the third party that makes the performance[169], the rights of the creditors can also be taken over by the third party. In this operation, the consent of the creditor is not required (article 584, Macau Civil Code).

A sub-rogation can also occur when a third party provides money or other property for the debtor to fulfill his debt. Nevertheless, in this case, for the sub-rogation to occur, it is necessary to mention in the lending document that the thing or money is to be used for fulfillment and the lender shall take the position of the creditor (article 585, Macau Civil Code). Also, in this form of sub-rogation, the consent of the creditor is not required.

Apart from the cases mentioned in the above paragraph, a fulfillment of debt by a third party only produces the effect of sub-rogation if the law specifically determines so (e.g., article 640, article; article 950, 4 etc.).

III. The assignment of singular debt

175. The assignment of singular debt is a juristic operation by which a third party is obliged to make a performance to the creditor for the debt owed by the debtor. For an assignment of singular debt to occur, there are two possible paths: a) through a contract concluded between the old debtor and the new debtor, with the ratification of the creditor; b) through a contract concluded between the new debtor and the creditor; in this case, the consent of the debtor is not required. In any of the case, the old debtor is only liberated when there is an express declaration of the new debtor; otherwise, there will be a joint and several obligation for the old debtor and new debtor (article 590, Macau Civil Code).

Before the ratification of the creditor, the contract between the old debtor and new debtor can be revoked (article 591, Macau Civil Code).

---

[168] Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 277.

[169] Pires de Lima/Antunes Varela, Código Civil Anotado, Vol. I, 4ª Ed., Coimbra, 1987, pg. 606.

IV. The transfer of contractual position

176. The transfer of contractual position has been recognized by legal scholars as early as in the first two decades of the 20th century, yet its adoption to the positive law as an antonomous institution only started with the Italian Civil Code of 1942.[170] A transfer of contractual position is different from any other form of transfer of contractual rights and duties at the point that in all other cases, the operation of transfer is either in relation to the side of credit or to the side of debt, while the transfer of contractual position is in relation to the global obligation of a contract.

In the formal system of the Macau Civil Code, the transfer of contractual position is regulated in the chapter of "contract", while other cases of transfer (assignment of credits, assignment of debt and subrogation) are regulated in a separate chapter: the transfer of obligational rights and duties. This arrangement is justified because in other cases of transfer, the obligational rights or duties may have different source, while in case of transfer of contractual position, the rights and duties are always contractual.

The notion of transfer of contractual position given by the Macau Civil Code (article 418) is the following: "*In a contract with reciprocal performances, any of the parties has the power to transfer to a third party his contractual position, as long as the other contracting party, before or after the conclusion of contract, consents with the transfer*." Therefore, the basic elements extracted from this notion is: a) the contractual relation subject to modification must be a contract with reciprocal perfomances; b) there must be a contract of transfer between one contractual party and a third party; c) the consent of another contractual party.

A transfer of contractual position is not an accumulation or combination of assignment of credits and assignment of debts, it is a transfer of the contractual position as a whole, which covers all the rights (rights to demand performance, potestative rights etc.) and duties (duty to perform and accessory duties etc.) a contractual position may involve. After the transfer, the original contracting party is in principle released from the contractual relation. The transfer of contractual position, according to the doctrine[171], is also a transaction with variable cause (negócio policausal), so that the formal and substantial requirements of the transfer is defined in function to the underlying transaction which serves as its basis (article 419, Macau Civil Code).

In all contractual relations, the fulfillment of obligation is depending on a series of circumstances, there is always a risk of non-fulfillment. Since the contractual position is transferred as a package, in principle, the risk of non-fulfillment shall also be undertaken by the transferee. Therefore, the Macau law (article 420, Macau Civil Code) determines that "the transferor guarantees, at the moment of transfer, the existence of the contractual

[170] See Carlos Mota Pinto, Cessão da Posição Contratual, Almedina, 1982, pp. 72ss. This work is the fundamental dogmatic reference for this topic in Portuguese legal literature.

[171] See Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 282.

position being transferred." The fulfillment of obligation shall only be guaranteed when the transferor and the transferee have reached an agreement on the issue.

The transfer of contractual position is not a rupture of the original contractual relation; it is instead a modification of a contractual party by transaction. Therefore, in principle, the other party of the contract has the right to oppose the transferee with all the means of defense deriving from the contract (article 421, Macau Civil Code).

§ 3. SUBCONTRACTING

177. Sub-contract is a contract deriving from and depending on another contract. It exists because a contracting party of certain contract would like to use the services of a third party to help performing his own duties, and therefore, establishes another contractual relation with the third party. The base-contract (on which the subcontract is derived) and the sub-contract are both autonomous contracts bound by the principle of relativity, yet they are necessarily connected together with respect to their existence and effects. This is why the phenomenon of subcontracting is sometimes characterized as a necessary, genetic and functional **colligation of contracts**[172]. The dependant relation between the base-contract and sub-contract is unilateral.

Under the principle of freedom of contract, the contracting parties of various types of contract may resort to the mechanism of sub-contract. Nonetheless, there are also several types of sub-contracts specifically regulated in the Macau Civil Code, namely: sub-leasing (article 1007), sub-deposit (article 1115), sub-contract of works (1139) etc.

Being the sub-contract and base-contract two autonomous contracts, the contracting parties of each of them are also different. Under the principle of privity of contract, a contracting party of the base-contract can only demand his counter party; similarly, a contracting party of the sub-contract can only demand his counter party. However, in view of the intimate relation between the two contracts (which are pursuing the same objective), the said relativity of the two contractual relations may sometimes be broken through. Such a possibility of breaking through the relativity of two closely related contracts is admitted in Portuguese legal literature (which is followed by Macau legal practitioners). For example, in some cases of the sub-contract of service of work, the owner of work is allowed to sue the sub-contractor for performance or for liabilities; and on the contrary, the sub-contractor is also allowed to sue the owner of work for payment[173].

Sub-contracting is different from the transfer of contractual position. A transfer of

---

[172] See Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, pg. 351.

[173] See Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos, Almedina, 2000, pgs. 387-388.

contractual position causes the replacement of one contracting party from the contractual position, the transferor is therefore normally liberated from the contractual relation; yet in the phenomenon of sub-contracting, the contracting party which establishes the sub-contract is never released from his original contractual position because of the sub-contract. Instead, the original contract becomes the base-contract on which the sub-contract is depending.

§ 4. OBLIGUE ACTION AND THE PAULIAN ACTION

178. Both the obligue action and the paulian action may imply a breaking through of the rule of relativity of contract. In the first case, the creditor is allowed to sue a third party against whom the debtor has a right of a patrimonial nature. In the second case, any acts (normally acts between debtor and a third party) involving the reduction of patrimonial guarantee of a credit right may be challenged by the creditor.

I. The obligue action (sub-rogação do credor ao devedor)

179. The so called obligue action is regulated in the Macau Civil Code under the heading "*sub-rogação do credor ao devedor*" in the chapter of "General Guarantee of Obligations". This type of sub-rogation, deriving directly from law, is different from the conventional sub-rogation regulated as a means of transfer of contractual rights *(supra*).

In this sector, by sub-rogation, the creditor shall have power to exercise rights of patrimonial nature, originally belonging to the debtor yet the debtor did not exercise, against third parties. The invocation of sub-rogation is only allowed when it is critical for the satisfaction or guarantee of the creditor's rights. (Article 601, Macau Civil Code). In another word, it shall only be admitted when the debtor has demonstrated some problem of solvency.

When the sub-rogation is to be exercised in the judicial way, it is necessary to summon the debtor (article 603, Macau Civil Code). It is nevertheless important to notice that the legal consequence of a sub-rogation is special. The goods gained from the action do not enter the patrimony of the creditor filing the action, but back into the patrimony of the debtor[174]. Therefore, it benefits the debtor himself as well as other creditors (article 604, Macau Civil Code). The creditor bringing the action does not even have any privilege against other creditors; he is just one of them.

II. The Paulian Action (impugnação pauliana)

180. Like the sub-rogation, Paulian Action is also regulated within the chapter of "General Guarantee of Obligations". The requirements of Paulian action are provided in Macau Civil Code in article 605:

[174] Pires de Lima/Antunes Varela, Código Civil Anotado, Vol. I, 4ª Ed., Coimbra, 1987, pg. 625.

"Any acts involving a reduction of the patrimonial guarantee of the credits, and which are not of a personal nature, may be challenged by the creditor, if the following circumstances are met:

a) The credit is prior to the act or, if subsequent, the act has been intentionally executed with the purpose of preventing the satisfaction of the right of the future creditor;

b) *The impossibility for the creditor to obtain full satisfaction of his credit, or the worsening of such impossibility, arises from the act."*[175]

In case the act performed by the debtor and the third party is an onerous act, the Paulian action is only granted if the debtor and the third party have acted in bad faith. On the contrary, if the act is gratuitous, the paulian action is granted even if the debtor and third party acted in good faith (article 612, Macau Civil Code).

In case the *paulian* action is successful, the act performed by the debtor and the third party is not null or annulled; it is just not effective and not opposable against the creditor who brought the action. This means that, in case the juridical transaction between the debtor and third party is an act of alienation (the debtor sold a house to the third party), the success in the Paulian Action shall not destroy the transfer of property from the debtor to the third party, therefore, the property shall not be brought back to the patrimony of the debtor. The juridical transaction is not opposable to the creditor who brought the action; it means that this creditor may act as if the juridical transaction never existed, and thus has the right to restitute the goods by executing the patrimony of the one who has the duty to restitute. On the other hand, he has also the right to practice acts of conservation of the patrimony at stake.

Therefore, the demand to make in a petition of Paulian Action should first be the ineffectiveness and non-opposable effect of the act against the plaintiff.

[175] The translation comes from Jorge Godinho, Ibid, p. 226.

Chapter 5. The Extinction of Contractual Obligations

§ 1. FULFILLMENT

I. Introduction

181. In English legal literature, the term performance is used indistinctively to denote two related but different concepts - namely, "prestação" and "cumprimento" - appearing in the Macau Civil Law. Nevertheless, in the exposition system of our legal culture, it is important to highlight the difference; otherwise, several parts of the positive law shall not be explained with enough conceptual clarity. Since we have already used performance to denote "prestação" in our previous discussion, the expression "fulfillment" shall be used here to refer exclusively to the concept of "cumprimento".

In Macau law, the regimes of fulfillment and non-fulfillment are common regimes in the law of obligation, thus, applicable in principle to all types of obligations regardless of their source. Therefore, according to the conceptual system of our positive law, it shall only be possible and correct for us to talk about the extinction of obligation (being it established by contract or by other sources), and not the termination of contract. Concentrating on contract matters, instead of dealing with the whole phenomenon of obligation in general, perhaps it shall be possible for us to do an exposition on the termination of contractual obligations.

II. The notions of fulfillment and performance

182. By definition, fulfillment is doing voluntarily a performance owed by the debtor[176]. The fulfillment of an obligation is of course a satisfaction of the interests of the creditor. Once the interests of the creditor are satisfied, the obligational relation also extinguishes. Therefore, fulfillment is the most desirable way to end an obligation (obviously including a contractual obligation). Nonetheless, the interest of the creditor being satisfied does not necessarily mean a fulfillment; there are many ways for the creditor to satisfy his interests, though none of them comparable to a fulfillment.

The notion of fulfillment given above urges the notion of performance (prestação). By definition, performance is what the debtor of an obligation is obliged to (i.e., the behavior or an act that the debtor is obliged to adopt in the benefit of the creditor). A performance, defined as an act of the debtor, can be classified into the performance of fact (presta'c~ao de facto) and the performance of thing (presta'c~ao de coisa)[177]. In the

[176] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 7; also Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 332.

[177] Although one may argue that a performance of thing is also a performance of fact, this distinction continue to be fundamental, since the delivery of a thing has special significance in all juridical systems inherited from the Roman Law.

first case, the performance can either be a series of material action (e.g. cleaning a house, washing a car, gardening etc.) or a juridical transaction (e.g. making a business declaration)[178]. In the second case, the performance reflects either in delivering a thing already belonging to the creditor, providing the creditor with the use and enjoyment of a thing not belonging to him, or restituting to the creditor a thing which is granted to the debtor for enjoyment.

For purpose of fulfillment, the word voluntary may be interpreted in a flexible sense. It does not require the complete freedom of the debtor in deciding to perform or not to perform. In another word, there are types of threats admitted as lawful (the threat of judicial action, of the eventual execution of his patrimony, of certain compulsory measures such as "astreintes" etc.); if the debtor does his performance under the pressure of those lawful threats, his performance is still voluntary.

Obviously, it shall not be considered voluntary, however, if the performance is done under the coercion of the court, namely, through the process of specific performance or other types of execution.

In principle, the law does not exclude the possibility of a third party doing the performance (prestação) instead of the debtor, yet in this situation, the word fulfillment is normally avoided, since a third party is not bound to do the performance[179].

III. Two important principles guiding the process of fulfillment

A. Fulfillment and the principle of good faith

183. The principle of good faith is a basic principle of civil law enforceable for the whole process of transaction (from the pre-contractual stage to the stage of extinction of obligation). At the stage of fulfillment, this principle is expressly stated in article 752 (2) of the Macau Civil Code: In the fulfillment of obligation as well as in the exercise of the corresponding right, the parties should act in good faith. Here, the law does not define what good faith is. It left a blank check for the court to evaluate ethically the conduct of the parties according to the circumstances of the transaction[180]. Therefore, it is a flexible control of many practical problems not foreseen by the law.

B. The principle of punctuality

184. The principle of punctuality[181] is first shown in article 400 (1) of the Macau Civil Code. It determines that "*A contract shall be punctually performed, and can only be modified or extinguished by mutual agreement of the parties or in the cases allowed by law.*"

---

[178] For different purpose, the concept of performance (prestação) can be subjected to different classifications. The classification described here is only for preparation of our following discussion. For a more detail classification, see Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 28 – 32.

[179] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 8.

[180] In a sentence made in 2003, the court of Macau has shown how this principle is concretized. See Ac. 143/2001, TSI, RAEM, dated 25/9/2003.

[181] For a detail description of this principle, see Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 14.

The word "punctually" is not just referring to an action in the right time and right place, but used in a broad sense to signify that the obligation should be fulfilled point by point according to the performance by which the debtor is bound. This principle has three corollaries: 1) the obligation cannot be released by doing a performance different from the one established (this corollary is seen in article 828 of the Macau Civil Code); 2) the debtor is not entitled to ask for a reduction of performance by arguing that the performance shall lead him into a precarious economic situation; 3) the completeness of performance (see *infra*).

IV. Fulfillment and the completeness of performance

185. In a contract, the way of doing a performance is a matter subject to the stipulation of the contracting parties. When the performance foreseen in a contract is susceptible of breaking down into various performances with the same nature (e.g. the payment of a lump sum of money), the problem of completeness of performance may occur. In this case, the law demands that the performance be done completely. Only a complete performance is regarded as fulfillment. This means that, if the debtor offers to do one part of the performance, the creditor has the right to reject it. The debtor being rejected should offer to do a complete performance; otherwise, he shall face the legal consequences of delay (*mora*) or non-fulfillment.

Nevertheless, even if the performance described by the contract is a complete one, the creditor has the right to demand for a partial performance. In this case, it is the creditor that changes the rule. In accordance with the principle of private autonomy, the law passes the ball to the debtor. He may choose either to do the partial performance according to the request of the creditor or choose to stick to the original agreement and do the complete performance (article 753, Macau Civil Code). In case the complete performance offer by the debtor is rejected, it is the creditor that falls into delay.

Finally, if there is a custom to follow so that the performance previously described in a contract as one performance but latter required to be done partially, the custom can be followed.

V. The conditions of a valid fulfillment

186. In principle, the problem of capacity mainly appears as a condition of validity of a contract. Nevertheless, even when a contract is validly concluded, the problem of capacity may appear again. This is because, on one hand, the act of performance itself may be a juridical transaction; and on the other hand, there is generally a time gap between the conclusion of contract and the fulfillment of contractual obligation (as long as the performance is not instantaneous). A contracting party having capacity in the conclusion of a contract may not "maintain" his capacity until the performance.

For this reason, the Macau Civil Code has dealt with the problem in the sector of fulfillment, stipulating the **capacity of the debtor and creditor** as well as the **legitimacy**

of the debtor as the conditions of a valid fulfillment.

In this respect, the provisions of the Macau Civil Code are based on the theoretical classification on performance of fact and performance of thing.

In article 754 (1), the law provides that when the performance reflects in an act of disposition, the debtor should have capacity to act. This is because when the fulfillment requires a performance of thing or a performance of material facts, the problem of capacity shall not arise; the incapacity of the debtor will not affect the validity of fulfillment (the capacity to act, translated as the capacity of will, has little to do with the material acts of delivery or cleansing etc.). On the contrary, if the performance reflects in an act of disposition (normally requires the declaration of intent, e.g. signing a contract as a result of the right of preemption or option), the capacity of the party making declaration is then determinant. In principle, the incapable debtor doing the performance has the right to annul the act according to the general rules of annulment. However, even when the performance is an act of disposition, if the incapable debtor doing the performance is not suffering any damages from the fulfillment, the creditor receiving the performance is entitled to oppose the annulment.

Similarly, the creditor is also required to have capacity in receiving the performance, obviously for the sake of protecting the debtor from receiving a performance which is prejudicial to his interests. Therefore, the incapable creditor receiving the performance has no right to annul it if there is no prejudice to him. Only when the performance done is different from or less then what is obliged, the creditor has the right to annul it. Yet if the performance or part of the performance has been received by the legal representative of the creditor or directly entered the patrimony of the creditor, the debtor can still oppose the total or partial annulment, invoking that the performance is totally or partially done (article 754, 2).

Finally, article 755 (1) stipulates also the legitimacy (legitimidade) as the condition of a valid fulfillment in the case of performance of thing, providing that: "*The creditor, with good faith, which receives a performance of thing that cannot be alienated by the debtor has the right to impugn the fulfillment, without prejudice to the right of being compensated for the damages suffered.*"

The function as well as the real meaning of this provision is doubtful. Since the right to alienate a thing is in the level of "right", and the delivery of a thing is in the level of fact. If the performance owed by the debtor is a transfer of right, the delivery of a thing shall not fulfill the obligation in anyway; it is even doubtful how and why the creditor would accept the delivery in replacement of the transfer of rights. In case the performance owed is the transfer of possession, then it has nothing to do with the right to alienate, a delivery of a thing shall fulfill the obligation in anyway. It seems that the hypothesis (estatuição) set forth by this provision is in itself contradictory. With the control of "good faith" imposed by the same provision, the contradiction is somehow

attenuated[182], but not demolished. A good example to demonstrate this contradiction is the lease of immovable by a lessor wihout due power to alienate the thing. According to article 980 of the C.C., non fulfillment only occurs when the lack of power of lessor affects the use and enjoyment of the lessee.

VI. Time and place of performance

187. Time and place are the two fundamental parameters to determine the existence of a fact. For a contractual obligation, the time and place for performance are best to be agreed upon in the contract. Nonetheless, it is also imaginable that there are cases which the parties have not specifically agreed on the time and place of performance; and the Macau Civil Code has regulated these situations.

Therefore, when the place of performance is not stated by the parties on the contract nor is it regulated in special provisions of a nominate contract[183], the general rule is that the performance be done in the domicile of the debtor (article 761). This so called general rule is not that general, because it excludes two types of extremely important obligations: monetary obligations and obligations regarding movable goods. In case of performance addressing to the delivery of movable goods, the default place of performance is the place where those goods were located at the moment the contract is concluded (762). In case of monetary obligations, the default place of performance is the domicile of the creditor at the time of fulfillment (article 763).

The time factor in the fulfillment of obligation is better examined both under the perspective of the creditor and the perspective of the debtor. In other words, the moment from which the debtor is entitled to offer the performance, under the penalty that the creditor refusing to receive it falls into delay; and the moment from which the creditor is entitled to demand for the performance, under the penalty that the debtor refusing to do it falls into delay[184].

When the time to perform is not stated by the parties nor by the specific rules regulating the particular contract matter, the default rule is this: the creditor has the right to demand the performance at any time, and the debtor can also be released from the obligation by fulfillment (article 766, Macau Civil Code). This is the type of obligation which is traditionally called "pure obligations" *(obrigações puras)*.

If the time to perform is fixed by the party at a particular moment, the performance has to be done in that exact moment. When the time to perform is agreed by the parties to be within a period of time, this period can be in favor of the creditor or in favor of the debtor. The law presumes that the favor is for the debtor. In other words, before the

[182] Special acknowledgement should be given to Prof. Manuel Trigo, for his kind help in exchanging ideas with the author of this monograph about the interpretation of the cited provision.

[183] There are many cases which the law regulates the place of performance in a nominate contract, for example, article 993 of the Macau Civil Code regulates clearly the place where the rent should be paid.

[184] See Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 354.

end of this period, the creditor has no right to demand the performance, but the debtor has the right to offer the performance. This presumption can of course be rebutted if the creditor proves that the period is established in favor of him or in favor of both. Once again, the intents of the parties are the deteminant factors.

The debtor shall lose his presumed favor *(favor debitoris)* and may be demanded by the creditor to perform immediately regardless of the established time period in there circumstances: 1) if the debtor becomes insolvent, even the insolvency is not declared by the court; 2) if the guarantees of the credits diminished for reason imputable to the debtor; 3) the debtor fails to provide the guarantees that has been promised (article 769). However, the loss of favor does not affect the co-obligee of the debtor, nor the third party that established guarantee in favor of the debtor (article 771).

If the obligation can be fulfilled in two or more installments, the non-fulfillment of one of them causes the remaining installments to mature immediately (article 770).

VII. Who has to perform and to whom the performance shall be done

A. Who has to perform

188. Macau law is very clear at the question of who can make the performance. In general, either the debtor or a third party (interested or not in the fulfillment) can do the performance (article 757, 1).

A third party intending to do a performance has no need to get the approval of the debtor or the creditor, unless there is an express agreement between the parties that the performance shall be done by the debtor, or the performance by the third party might prejudice the interests of the third party.

When a performance can be done either by the debtor or by any third party, it is fungible. On the contrary, if the identity of the person making the performance is a decisive factor for the creditor to receive the performance, such a performance is non-fungible.

Whether a performance is fungible or not mainly depends on the agreement of the parties. In another word, by agreement, the contracting parties can make any performance fungible, independent to the nature of the performance.

The default rule referring to the nature of the performance is only applicable when the contracting parties had said nothing in this respect. Therefore, if there is nothing said about whether a performance is fungible (i.e., the possibility of the performance being done by somebody other than the debtor), but the performance by a third party may prejudice the interests of the creditor, the creditor has the right to refuse it, and his refusal shall not result himself in delay. The so called “nature” that determines a performance non-fungible has to do with the fact that in stipulating the performance, the personal quality of the debtor has been taken into consideration. For example, a famous singer signing a contract to perform in a concert shall not be substituted by another person.

After doing the performance, the third party may replace the original creditor according to the rule of sub-rogation (article 583).

There is also the chance that a third party made a performance by mistake. In this case, depending on the circumstances, the third party may either claim for restitution by unjust enrichment (article 467 ss), or annul the juridical transaction done by applying the provisions of mistake (article 240 ss).

B. To whom the performance shall be done

189. According to article 759 of the Macau Civil Code, the performance should be made to the creditor or his representative, or any other person authorized to receive it in his name. In principle, a performance made to a third party does not extinguish the obligation. There are however several exceptions to this general rule, namely: a) when the performance made to a third party is in compliance to the contract (the case of contract in favor of third party is a good example) or agreed by the creditor; b) if the creditor ratifies such a performance; c) if the person receiving the performance later acquired the credit right; d) if the creditor later on benefited from the fulfillment and he has no founded interest not to consider the performance as equal to a performance done by himself; e) if the creditor is the heir of the person who received the performance and is also liable for the debts of the deceased; f) other cases that the law admits (article 760).

VIII. Evidence of fulfillment

190. The debtor that fulfilled an obligation has the right to demand evidence of fulfillment from the creditor. In case the creditor issue a receipt about the capital without reserving the interests or other accessory performance, the law presumes that the interests as well as other accessory performance are also paid (article 775, 1, Macau Civil Code).

When a debt has extinguished, the debtor has the right to have the title of obligation restituted to him (article 777, Macau Civil Code).

§ 2. NON-FULFILLMENT

I. Introduction

191. The definition of non-fulfillment as well as the formal structure of its legal regime in the Macau Civil Code is strictly linked to the idea of performance (prestação).

In legal textbooks, a non-performance (não cumprimento) is normally defined as the non-realization of performance by the debtor, as long as the obligation is not extinguished by other causes of extinguishment typified in the Civil Code[185].

Notwithstanding the correctness of this definition, in order to describe more comprehensively the range and content of the concept, several remarks should be added. First of all, it is of utmost importance to clarify at the very beginning that non-fulfillment is not just the reverse situation of fulfillment. In Macau Law, fulfillment and non-fulfillment are not treated as a dichotomy in the field of the extinguishment of an obligation. An obligation may extinguish by fulfillment, by non-fulfillment or by other causes typified in the Civil Code. On the other hand, a non-fulfillment of obligation does not necessarily conduct to the extinguishment of an obligation; the case of delay is included in the broad concept of non-performance, but the legal consequence of delay is not the extinguishment of obligation. Thirdly, the concept of performance referred herewith should strictly follow the principle of punctuality; which means, the performance has to be done at the right time, the right place, and exactly the way it is bound.

The formal regulatory structure of non-fulfillment in the Macau Civil Code is mainly determined by two criteria – the possibility of doing the performance and the fault – intercepting with one another. As a result of manipulating these two criteria (and sporadically, the consideration of other factors, such as the punctuality, the legal consequences etc.), the Macau Civil Code has arranged the issues of non-performance under the following system:

Book II Obligations

….

Chapter VII Fulfillment and non-fulfillment of obligations
Section I Fulfillment
Section II Non-fulfillment
Subsection I Impossibility of fulfillment and delay not imputable to debtor
Subsection II Non-fulfillment and delay imputable to debtor
Division I General provisions
Division II Impossibility of fulfillment
Division III Debtor delay

[185] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 61.

II. Impossibility of fulfillment and delay not imputable to debtor

A. The impossibility of fulfillment not imputable to debtor

192. The Macau Civil Code (article 779, 1) states that, an obligation shall extinguish when the performance turns impossible for a cause not imputable to debtor. The tricks of interpretation aroused mainly on the hypothesis, or more accurately, on the word "impossibility. The fulfillment of an obligation depends on the performance; when the performance is impossible, the fulfillment is of course impossible as well.

According to the systematization of the Macau Civil Code, the case of initial impossibility (which leads to the nullity of obligation, in terms of article 395) should immediately be ruled out from the field of non-performance, since it has to do with the establishment of an obligational relation, and in the field of performance and non-performance, an obligation is presumed to be validly established. Therefore, the impossibility of fulfillment herein referred to should only include the case of supervening impossibility. This conclusion is clearly supported by the wording of the provision itself, by using the expressions "turns impossible".

The supervening impossibility, though not imputable to the debtor (by the evaluation of fault) in any cases, can be classified into objective and subjective. The impossibility is **objective** when the performance is impossible for anybody. The impossibility is only **subjective** when it is impossible for the debtor to do the performance, yet other persons can do it. According to the system of the Macau Civil Code, article 779 refers only to the case of objective impossibility (for example, A promised to sell a painting to B but the painting is burnt in a fire), and the consequence is clear: the extinguishment of obligation. In case of subjective impossibility (article 780), the obligation only extinguishes when the performance is non-fungible (by nature or by agreement of the parties).

The supervening impossibility can either result from an act of the creditor, an act of third party or any other facts (including the change of law) not related to the wrong action or omission of the debtor.

If the performance only becomes partially impossible, the debtor shall be released by doing the possible part of the performance. In such a case, the counter performance of the other party shall be reduced proportionally. Nonetheless, if the creditor has no interests in the partial performance, the transaction can also be resolved (article 782.).

When an obligation is extinguished for impossibility of performance and the impossibility is not imputable to the debtor, the creditor, in principle, has no right to demand any indemnity in terms of non-fulfillment. Nevertheless, if the debtor acquires certain rights because of the fact that turn the performance impossible, the creditor may substitute the debtor as the holder of the rights acquired (article 783).

When the obligations are originated from a bilateral contract, the impossibility of one performance shall release the creditor from doing counter performance. If the counter performance is already done, the creditor has the right to demand its restitution according to the provisions of unjust enrichment (article 784).

A small deviation of the general rule of extinguishment without responsibility occurs when an obligation is originated from a contract which causes the transfer of real right of a thing. In such a case, the risk of loss or damage of the thing (which turns the fulfillment of the obligation also impossible) shall be borne by the creditor (article 785, 1).

B. Delay in fulfillment not imputable to the debtor

193. There are situations which the impossibility of performance not imputable to the debtor is only temporary, i.e., though it is impossible to do the performance at the stipulated moment, it is possible to do it afterwards. In this case, if the creditor still has interests in the fulfillment (having interests or not is not decided by the free will of the creditor, but by the objective of the obligation), the debtor is not responsible for the delay (article 792).

III. Non-fulfillment and delay in fulfillment imputable to debtor

A. Non-fulfillment imputable to debtor

194. Non-fulfillment imputable to debtor may also be referred to as "failing to fulfill" (falta de cumprimento) or non-fulfillment with fault. The principle rule of this regime is provided by article 787 of the Macau Civil Code: "The debtor who fails in the fulfillment of an obligation with fault shall become responsible for the damage caused to the creditor."

There are three situations normally identified[186] as non-fulfillment imputable to debtor. First, the refusal of fulfillment by debtor; second, the impossibility of fulfillment for a cause imputable to the debtor (article 790); and third, the creditor loses interests in the fulfillment because of the delay of the debtor or the debtor fails to fulfill within a reasonable period given by the creditor after interpellation (article 797).

As stated by article 787, the most important legal consequence of non-fulfillment imputable to debtor is the obligation of indemnity, for the damage caused to the creditor. In case of a bilateral contract, in addition to the right to claim indemnity and to restitute what has been performed, the creditor has also the right to resolve the contract (article 790, 2). In case the debtor acquires certain rights because of the fact that turn the performance impossible, the creditor may substitute the debtor as the holder of the rights acquired in the terms of article 792, remitting to article 783.

In the conceptual system of Macau Civil Law, contract and civil liability are the two

[186] See Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 381-382.

major sources of obligation, each of them have different requirements. Nevertheless, the two sources are not all the way isolated issues. As stated in the previous discussion, the non-fulfillment of an obligation originated from a contract may lead to the liability of indemnity. At the point of indemnity, it is indifferent whether the liability is originated by the non-fulfillment of a contractual obligation or the infringement of an absolute right.

Nonetheless, it must be noted that, the requirements for a contractual liability to occur is different from that of a tort. In the field of liability originated from the non-fulfillment of a contractual obligation, according to article 788 of the Macau Civil Code, the debtor is presumed to be with fault.

In case the performance becomes only partially impossible owing to the fault of the debtor, the creditor shall have the right to resolve the transaction or to demand the fulfillment of what is still possible. In the latter case, the creditor shall reduce his counter-performance proportionally. And in any of the case, the creditor has the right to demand indemnity. Nevertheless, if the partial non-fulfillment is of little importance, the creditor may not resolve the transaction (article 791).

B. Delay imputable to debtor

195. When an obligation is not fulfilled at the due moment (tempo devido) for a cause imputable to the debtor, but the fulfillment is still possible, there is a delay imputable to the debtor (Cfr. Article 793, 2, Macau Civil Code).

In short, three requirements could be drawn from the legal provision: a) the fulfillment being possible; b) not fulfilled at the due moment and c) a cause imputable to the debtor.

By the first requirement, the cases of impossibility already discussed in the previous paragraphs are ruled out from this category. Additionally, other cases immediately ruled out from the category of delay are the obligations with a negative content. For example, by contract, a person obliged not to publish an article in certain period violate the contract and published it. In this case, the violation is immediately a non-performance, not a delay.

When the fulfillment is still possible, the most important factor determining a delay of this type is the "**due moment**" to fulfill. It is quite a complicated task to determine what the due moment is. And in order to avoid absurd result, a systematic interpretation is required.

Since the "due moment" is in fact the moment on which a performance should be done, we must resort to the general rules determining the time to perform. Before entering into other discussion, it is important to recall the rule that the period for performance is established in favor of the debtor. In other words, before the moment predetermined for performance, the debtor has the right to perform but the creditor has no right to demand the performance. Therefore, it is logical that before the moment predetermined for performance, the debtor shall never fall into delay. On the other hand,

a delay shall not occur when the obligation is not liquid or not certain.

For a "pure obligation" (see article 766, Macau Civil Code), the debtor only falls into delay when he is judicially or extra-judicially notified to perform (article 794, 1, Macau Civil Code).

For an obligation which time to perform is fixed by the parties or by the supplementary rules of a particular contract, the debtor falls into delay when the fulfillment is not done at the predetermined period or moment; therefore, in those cases, the moment fixed by the parties or by law is the due moment to fulfill, and no notification (or interpellation) is needed (article 794, 2a, Macau Civil Code). Nevertheless, in case the performance ought to be done at the domicile of the debtor, delay only occurs when the creditor demands the performance therein (article 794, e).

In addition to the above, there are also other situations on which the delay of debtor establishes without the need of notification, namely: when the obligation is originated from an illicit fact (article 794, 2b) and; when the debtor himself impedes the notification (article 794, 2c).

From the above description, for an obligation with fixed period of fulfillment, the thinking of the legislator is clear at the following point: the consequence of failing to perform in the moment fixed by the parties or by law is the establishment of delay (with due consequence).

196. Nevertheless, the situation of the debtor shall be aggravated (in the sense that the debtor not fulfilling at the predetermined moment not merely falls into delay, but rather falls into definitive non-fulfillment, with the effects provided in article 790 of the Macau Civil Code) if the following circumstances occur: a) the creditor loses his interests in the performance (article 797, 1a); b) in case the debtor already fell into delay, the performance not being done within the period reasonably fixed by the creditor through notification (article 797, 1b); c) the debtor himself declares that he refuses to perform[187].

For purpose of article 797, 1a, the loss of interest shall be determined objectively. For example, an organizer which contracted a specialist to give a speech in a seminar shall lose its interests if the specialist fails to perform at the date and time scheduled for the seminar; the tailor who fail to deliver a wedding dress to a bride on a fixed period which was also marked as the wedding day.

Like in the case of non-fulfillment, the fault of the debtor in the delay is also determined according to the provisions applicable to civil liability (article 788, 2, Macau Civil Code).

197. The legal consequences of delay of debtor consist mainly in the following: a) the obligation to indemnify the creditor; b) the inversion of risk; c) the conversion of delay into non-fulfillment imputable to debtor.

[187] This case is not listed in law, but developed by doctrines. See António Menezes Cordeiro, Estudos de Direito Civil, Coimbra, Almedina, 1987, pp 121-142; Ribeiro de Faria, Obrigações, II, Almedina, 2001 (reimpressão), p. 447.

According to article 793, 1, of the Macau Civil Code, the debtor falling into delay has the obligation to repair the damages caused to the debtor. In order for the creditor to make a claim, he has to prove that the damages exist and there is a link between the delay and the damages. However, in the case of pecuniary obligation, the law presumes that there are always damages and the indemnity shall correspond to the interests (article 795,1, Macau Civil Code). The interests shall be due at the legal rate, except for the cases which the due interests rate is higher than the legal rate or the cases which the parties have stipulated a higher rate. The presumption of the law on the damages caused by the delay could is rebuttable by the creditor proving that the delay caused him a damage much higher than the interests calculated according to the legal rate.

In contracts which involve the delivery of a thing, the delay of the debtor shall invert the risk of loss or deterioration of the thing to be delivered. Thus, at the moment the debtor falls into delay, even if the thing is lost or deteriorated for a cause imputable to the creditor, it is the debtor which is responsible for the damages. However, the following rule shall not be applicable if the debtor can prove that the damages suffered by the creditor would have equally been suffered if the obligation had been performed on time (article 796, 2).

As mentioned in the previous paragraphs, the delay of the debtor may be converted into a definitive non-fulfillment by initiative of the creditor. This is the case foreseen in article 797, 2b of the Macau Civil Code. Although the debtor in delay is responsible for the damages caused to the creditor, it is not reasonable to maintain the creditor bound to the contract if the delay goes on and on for a long time. Therefore, the Macau Civil Code admits that the creditor could convert the delay into non-fulfillment through a notification. In other words, if the debtor is already on delay, the creditor may issue him an interpellation giving him another reasonable period (normally within 7 to 10 days) to performance. After this period, the obligation shall be considered non-fulfill and the rules of non-fulfillment imputable to debtor is applicable.

IV. Creditor delay

198. Apparently, it shall be hard to imagine how the creditor would enter into delay, since it is the debtor who has the duty to perform, not the creditor. However, if we resort to the logic of fulfillment, which is the satisfaction of interests of the creditor, we shall immediately understand why the delay of creditor is possible: in many cases, the interest of the creditor could only be satisfied with the cooperation of his good self.

Therefore, article 802 of the Macau Civil Code states that "*the creditor falls into delay when he, without a justified motive, refuses to accept a performance offered to him in legal terms or refuses to practice the acts necessary for the fulfillment of obligation.*"

For examples, in a purchase and sale contract, the creditor is obliged to accept the delivery; in a contract of work, the creditor is obliged to provide the necessary materials; in a labor contract or contract of *mandatum*, the creditor is obliged to give necessary

instructions etc.

The refusal of the creditor to accept the performance, when justified, shall not constitute delay. For example, if the debtor delivers a good with a quality far lower then the promised one, the creditor shall refuse it and not falling into delay. Similarly, the creditor shall also not fall into delay if there is an unforeseeable event.

The effect of creditor delay reflects in the following aspects: a) the change in the responsibility of the debtor in relation to the object of performance; b) the risk of loss or deterioration of the thing; c) the resolution of contract by debtor and d) the damages.

Once the creditor falls into delay, the debtor shall only be liable to the object of performance when he has *dolus*. And in the period of creditor delay, the debt stops to generate interests (article 803).

The creditor falling into delay shall be liable for the supervening impossibility of fulfillment not imputable to the debtor. In case of bilateral contract, even if the delayed creditor lost his credit right, he is obliged to do the counter-performance (article 804).

If the object of obligation is not the delivery of a thing, and the creditor is on delay, the debtor can resolve the contract according to the provisions regulating the delay of debtor (article 805).

The creditor on delay should indemnify the debtor for the extra expenditures he made because of the unsuccessful performance and the deposit and conservation of the object (article 806).

§ 3. OTHER CAUSES OF EXTINCTION OF CONTRACTUAL OBLIGATIONS

I. Accord and satisfaction (dação em cumprimento)

199. The juridical nature of accord and satisfaction is quite polemic in Macau Law. Some writers classify it as a contract of fulfillment[188], yet others refuse to do so[189]. While several other legislations (the cases of German Civil Code and Italian Civil Code) refused to admit it as a cause extinguishing an obligation, the Macau Civil Code has done the contrary.

The key provision for accord and satisfaction is article 828 of the Macau Civil Code, which, a *contrario*, reflects the principle of punctuality of fulfillment. Under the said principle, the performance of the debtor should correspond to the one due point by point. Nevertheless, by resorting to the regime of accord and satisfaction, the parties may agree to extinguish an obligation by a performance different from the one initially agreed.

For the accord and satisfaction to take place, there are two requirements: a) doing a performance different from the one due; b) agreement of the creditor, in exonerating the debtor against such a performance.

The creditor agreeing on a performance different from the original one does not mean that he has to take any performance with low quality. The law provides that a creditor accepting the accord and satisfaction be guaranteed against the defect of the thing delivered or the rights transferred to him, in the same terms provided for a purchase and sale. Moreover, in case of a defect performance, the creditor may also choose to demand the original performance and the indemnity for damage (article 829).

If the accord and satisfaction is declared null or annulled for a cause imputable to the creditor, the guarantees provided by third parties shall not revive, unless the later had known the defect on the day he was noticed about the *datio*.

II. Consigment of deposit (consignação em depósito)

200. In certain circumstances, the debtor can be liberated from the obligation through the deposit of the thing due. According to article 832 of the Macau Civil Code, a consignment of deposit may occur in any of the following situations: a) when the performance cannot be done or cannot be done safely for any reason relating to the person of the creditor; b) when the creditor fell into delay. In any cases, the debtor is free to do the deposit or not. As long as the performance is fungible, not only the debtor, but also the third party who has the right to do the performance can request for a consignment of deposit.

There are various cases on which the performance cannot be done because of the personal reasons of the creditor. For example, the creditor became incapable and the fulfillment requires a juristic act or juridical transaction of the creditor; the creditor is interdicted and no legal representative was appointed. The case of creditor delay is already discussed in the previous section.

---

[188] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 180

[189] See Luís Manuel Teles de Menezes Leitão, Direito das Obrigações, Vol. II, Almedina, 2002, p. 184.

Since it is for a reason imputable to the creditor that turned the fulfillment impossible or unsafe, the law provides an alternative, so that the debtor could liberate himself from the obligation by doing a deposit. The obligation shall extinguish as if the performance were done on the day of deposit (article 837).

In the Civil Procedure Code, there is a special procedure provided for the consignment of deposit (articles 920 – 928, Macau Civil Procedure Code). Those who would like to do the deposit should request to the court and declare his motive.

After the deposit, the consignee has the duty to deliver to the creditor the thing consigned. The debtor who made the deposit may also revoke it and request to have the thing back, as long as the creditor has not issue a declaration of accepting the deposit (article 836, Macau Civil Code).

III. Compensation (compensação)

201. When two persons are reciprocally creditor and debtor, fulfilling certain requirements, any of them can set himself free from his obligation by means of compensation (*compensação*).

In Macau Law, compensation does not take place automatically. It either works upon the unilateral declaration of one party or the agreement of both parties. In the first case, the compensation is legal or unilateral; it shows that the law has granted the party with a potestative right to extinguish the obligation. While in the second case, the compensation is voluntary or conventional.

The regime foreseen in articles 838 – 847 of the Macau Civil Code refers to a legal or unilateral compensation. In order for a legal compensation to take place, the two obligations at stake should meet the following requirements: a) the reciprocity of the credits and obligations; b) the possibility to claim the credit in court; c) the homogeneity of the obligations and; d) the declaration made by one party to the other.

By the first requirement, the law excludes the possibility of a party compensating the debts of a third party (article 842). The reciprocity of credits between two persons may be caused by a variety of reasons. For example, A owes B 500 patacas for the purchase of book but later on, A paid a restaurant bill for B in the same amount.

By the second requirement, the law excludes not only the possibility of a party declaring the compensation to extinguish a debt with a natural obligation, but also the possibility of the party declarating the compensation to invoke a debt which is opposable through "*exceptio"* in substantive law.

By the third requirement, the law excludes the compensation of two debts with different nature. Therefore, a debt of monetary nature cannot be compensated with the delivery of certain goods.

The fourth requirement in fact only highlighted the importance of the intent of a party. Compensation could either be referred to the whole obligation or a part of it.

There are several obligations that cannot be extinguished by means of compensation, namely, the case of credits originated from an illicit fact, the credits not susceptible of pledge, the creditor of the Macau SAR (article 844).

A successful compensation produces retroactive effect; the obligations are deemed extinguished at the moment they are susceptible to the compensation (article 845).

In case a compensation is declared null or annulled, the respective obligations

continue to exist (article 847).

IV. Novation (novação)

202. The Macau law distinguishes two types of novations, namely, the objective novation and the subjective novation.

When the debtor establishes a new obligation with the creditor in replacement of an old one, there will be an objective novation. For example, the artist contracted to sing a song got a sore throat and agreed with the creditor to perform piano in replacement. In this case, the old obligation is deemed extinguished.

When a new debtor or new creditor is substituted for the original one who is released from the obligation, there will be a subjective novation. For example, A promised B to wash his car; yet since he is too busy, his wife C volunteered to replace him for the job.

In any of the cases, the intent to establish a new obligation should be expressly declared (article 850).

The novation shall not produce effect if the original obligation does not exist (or declared null or annulled) at the time the new obligation is established.

When a novation occurs, the guarantees attached to the original obligation also extinguish, unless the parties expressly declared for their reservation.

V. Remission (remissão)

203. In Macau law, remission can be done through a contract or a unilateral declaration (article 854, Macau Civil Code). In the second case, the remission has the characteristic of a liberality, and is considered a donation, regulated by article 934 and the subsequent provisions of the Macau Civil Code.

A remission granted to one solitary debtor only releases the other solitary debtors for the share of the released debtor (article 855, 1).

A remission granted to one of the sureties does not discharge the other sureties, except for the share of the released surety. However, if the other sureties consented to the release, they remain liable for the full amount, unless they have declared otherwise (article 857, 2).

A renouncement of the guarantees of the obligation does not raise a presumption of remission of debt (article 858).

A remission granted to the debtor also benefits the third parties (article 857, 1).

VI. Confusion (confusão)

204. In an obligation, when the qualities of debtor and creditor are united in the same person, there is "confusion" or merger. In this case, the obligation extinguishes (article 859).

The rights of the third parties are not prejudiced by the confusion. If usufruct or pledge is established upon the credit right, this credit right subsists regardless of the confusion. If the qualities of surety and principle debtor are united in the same person, the suretyship extinguishes, unless the creditor has legitimate interests in the subsistence of the guarantee (article 862).

Chapter 6. Remedies

§ 1. INTRODUCTION

205. In Macau, textbooks in the field of Civil Law would not have dedicated a chapter to the subject of remedies for non-performance[190]. The so-called remedies are scattering throughout the general part of the Civil Code as well as the various parts of the Law of Obligations, and many of them already discussed in other chapters of this monograph.

By dedicating a chapter to this topic, we are presuming that this monograph might target his reader pool to professionals accustomed to the common law system. The "remedies" chosen as the subject matter of this chapter are those measures with great relevance and the ones that have not been dealt with or adequately developed out in other chapters.

§ 2. COACTIVE ENFORCEMENT OF PERFORMANCE

206. "When an obligation is not voluntarily fulfilled, the creditor has the right to demand judicially its fulfillment and to execute the patrimony of the debtor, as stated by law."

According to this provision, the creditor whose credit right is not satisfied by the voluntary performance is provided with two remedies: **action for fulfillment** and **execution of patrimony**. The two remedies provided by law are not contemporaneous, but in principle, one after the other. The concretization of these two remedies is seen in the law of Civil Procedure, through the institutionalization of declarative proceedings (articles 389 – 676, Code of Civil Procedure of Macau) and executive proceedings (articles 677 - 836, Code of Civil Procedure of Macau). In a **contractual relation**, a creditor whose credit right is not satisfied by the voluntary performance normally claims to the court, through a declarative proceeding, for the judicial recognition of the existence and validity of his right, as well as to obtain a court order for the debtor to perform. If the debtor makes the performance while the action is pending or even after the court order is made, there will be no need to file the executive procedure. On the contrary, if the debtor insists on not performing despite the decision of the court, the creditor may raise an executive proceeding, with the objective to execute the patrimony of the debtor. In this case, the court judgment made in the declarative proceeding serves as the "executive title" (*título executivo*), which is the fundamental requirement for an executive proceeding (article 677, Code of Civil Procedure of Macau). Nevertheless, a judgment in the declarative proceeding is not the only possible title for executive proceeding, documents prepared or authenticated by a notary that recognizes an obligation as well as

[190] Similar phenomenon also occurs in Belgium and many other Civil Law countries. See Jacques Herbots, International Encyclopaedia of Law – Belgium Law of Contracts, Kluwer Law and Taxation Publishers, 1993, pg. 191.

other legal instruments such as cheques and promissory notes are also "executive titles". A creditor possessing an executive title may therefore bypass the step of declarative proceeding and go directly into the executive proceeding.

The content of a performance is an important factor to determine the type of remedies available. In certain circumstances, i.e., when the coactive performance is possible and the law permits, a creditor may request that the performance be done coactively. Those are the circumstances categorized in articles 817 ff of the Macau Civil Code, under the heading of **"specific performance" (execução específica)**[191]. Therefore, in case the content of the performance consists in the delivery of a specified thing, the creditor may request the delivery be done through the court (article 817, Macau Civil Code). The proceeding corresponding to this right is regulated in article 821 ff of the Civil Procedure Code of Macau. In case the performance consists in doing a positive fungible fact, the creditor may request that the fact be performed by other person on the cost of the debtor (article 818, Macau Civil Code). The proceeding corresponding to this right is regulated in article 826 ff of the Civil Procedure Code of Macau. On the contrary, if the performance consists in doing a negative fact, say for example, the debtor is obliged not to construct in a piece of land during a period, when this duty is not complied, the creditor is entitled to request that the work constructed be demolished on the cost of the debtor (article 819, Macau Civil Code). The proceeding corresponding to this right is regulated in article 834 of the Code of Civil Procedure of Macau.

Among all the cases of specific performance, the case of specific performance for an obligation generated by a promissory (or preliminary) contract is the one that attracted much attention in doctrinal debate[192] and the most special one in terms of its mode of enforcement. While the procedural solutions for all other cases of specific performance are found in the sector of executive proceedings, the procedural solution for the specific performance of a promissory consists in a common declarative proceeding, in the ordinary form (article 11, 2; article 389 ff; Code of Civil Procedure of Macau). Such a characteristic of the specific performance of a promissory contract also has to do with the content of performance. The obligation generated by a promissory contract is the obligation to make another contract, or more accurately, to make a business declaration. If a party refuses to make a declaration as promised, the court is not supposed to impose a person to do such an act which he is not willing to do (*nemo praecise*), because it has to do with the personal freedom and dignity of human being[193]. In alternative, the Macau Law provides that the other party may request the court to make a judgment producing the same effect of the business declaration which was not made by the party failing to perform and with fault (article 820, Macau Civil Code).

---

[191] The work of Jorge Godinho seems to have restricted artificially the range of specific performance to the cases in which the court is "replacing the missing business declaration". See Jorge AF Godinho, Macau Business Law & Legal System, LExisNexis, 2007, pg. 103.

[192] See João Calvão da Silva, Cumprimento e Sanção Pecuniária Compulsória, Coimbra, 1997 (2ª Reimpressão), pg. 221 ss.

[193] For a detail description of this issue, see João Calvão da Silva, Cumprimento e Sanção Pecuniária Compulsória, Coimbra, 1997 (2ª Reimpressão), pg. 225 ss.

§ 3. EXCEPTIO NON ADIMPLETI CONTRACTUS

207. The defense of non-performance (*Exceptio Non Adimpleti Contractus*)[194] is a particular remedy existing in the life span of a synallagmatic contracts. In the so-called synallagmatic contracts, each party has the right to refuse his performance if the other party does not perform or offer to perform at the same time. Obviously, if the performance of each party is fixed to a particular moment or period, the performance should be done at the predetermined moment.

The legal regime of *exceptio non adimpleti contractus* is expressly consecrated in articles 422 ff of the Macau Civil Code. It is provided that "*in the bilateral contracts, if no different periods are set for the fulfillment of performances, each of the contracting parties has the right to refuse his performance while the other party does not make the performance he is obliged to make or does not offer his performance at the same time*." (article 422, 1).

The requirements for a party to invoke the defense of non-performance can be summed up as the followings: a) the existence of a synallagmatic contract; b) the party who invokes the defense does not have an obligation to perform earlier than the other party; c) non-performance of the other party, the other party does not offer to perform or has done a defective performance; d) the invocation of such a defense is not contrary to good faith. Unlike the corresponding provision in the Italian Civil Code (article 1460), the Macau Civil Code does not mention expressly the requirement of good faith. Nevertheless, it does not mean that good faith is not taken as a requirement in Macau Law. The omission of the term good faith in article 422 is just because this idea is already expressed in the general rule of fulfillment consecrated in article 752 (2) of the Macau Civil Code, which is also applicable to the invocation of this defense[195].

After a contract is concluded, if one party loses his presumed favor (*favor debitoris*) in the time of performance and does not fulfill or does not guarantee the fulfillment, the other party may refuse to do his performance even if the obligation to perform of the latter is stipulated to be earlier (article 423, Macau Civil Code). Here it is important to recall the situation on which a debtor shall lose his *favor debitoris*: a) if the debtor becomes insolvent, even the insolvency is not declared by the court; b) if the guarantees of the credits diminished for reason imputable to the debtor; c) the debtor fails to provide the guarantees that has been promised (article 769, Macau Civil Code).

The *exceptio non adimpleti contractus* is opposable to the ones who subsequently substituted any of the contracting parties on his rights and duties (article 425).

§ 4. LIMITATION OF ACTIONS

208. Limitation of actions fixes the time within which parties must take judicial action to enforce a right. Obligatory rights not invoked within the time period fixed for action shall turn into natural obligations. The legal rules regulating the issue of

[194] For a comprehensive analysis of *exceptio non adimpleti contractus* in Portuguese law, see José João Abrantes, A Execpção de Não Cumprimento do Contrato no Direito Civil Português, Almedina, 1986.

[195] See José João Abrantes, A Execpção de Não Cumprimento do Contrato no Direito Civil Português, Almedina, 1986, pp. 119-123.

limitation of actions are found in the general part (articles 293 – 319) of the Macau Civil Code, under the heading of "prescription" (prescrição).

The juridical transactions with a purpose to modify the legal rules (about its duration, the condition for the prescription to take effect etc.) on limitation of actions is null (article 293, Macau Civil Code). The limitation of actions due to the lapse of time may benefit all parties with an interest to invoke it (article 294, Macau Civil Code). The limitation of actions should be invoked in court as a defense, opposing the demand based on a credit right already passed its period of prescription. In case the defendant in a proceeding fails to invoke the limitation, the court could not take notice of it *ex officio* (article 296, Macau Civil Code). The right to enforce the limitation may be renounced after the period of prescription has completed. The renouncement can be done expressly or tacitly, and only those who have legitimacy to dispose the benefits created by the prescription may renounce it (article 295).

After the prescription, the debtor has the right to refuse the performance or to oppose the exercise of rights already prescribed. The prescription of a principal right implies also the prescription of the right of interests and other ancillary rights. Nevertheless, those who spontaneously fulfilled an obligation which has passed the period of prescription cannot demand its restitution (article 297).

The ordinary period of prescription for an obligatory right is fifteen years (article 302, Macau Civil Code). However, the duration of this period may be reduced to five years (article 303), two years (article 310) or six months (article 309) depending on the nature of the obligation. Normally, commercial debts shall have a shorter duration of prescription. Normally, the period starts to count when the right is ready for the holder to exercise (article 299).

The period of prescription shall be suspended (while the period is not completed, there will be no limitation of actions) owing to a number of special relations between the debtor and creditor or unforeseeable events. For example, while the debtor and creditor are spouse, the period shall not complete earlier than two years after the divorce; while the creditor is exercising the paternal power over the debtor, the period shall also not complete earlier than two years after the relation is over. Other relations that may cause a suspension of prescription includes the relation of guardian and the interdicts, of employer and employee, of collective person and its administrator etc. The prescription period shall also suspend when the creditor is obstructed to exercise his rights because of *force majeure* or the fault of the debtor. The suspended period of prescription may continue once the factors causing the suspension have disappeared.

The prescription period may also be interrupted by serving of process through delivery of a pleading or notice, by the acknowledgement of the right and by arbitration agreement (article 315 – 317). Once the prescription period is interrupted, the time previously lapsed shall not be calculated for the effect of limitation of actions (article 318).

§ 5. DAMAGES

209. Under Macau Law, the right to claim for damages may result from great variety of situations (for examples, the infringement of the right of personality, the infringement

of property rights, pre-contractual liability, the non-fulfillment or delay etc.) separately regulated in different parts of the Civil Code and other legislations, some of them already discussed in the previous chapters of this monograph. It is of course possible to look at it as a remedy of non-fulfillment, but such a vision is somehow fragmented in the eyes of a Macau lawyer. According to the system of the Macau Civil Code, loss or damages alone is seen as one of the requirements to generate civil responsibility, which in turn gives rise to the obligation to indemnify or compensate the loss, corresponding to the right of the creditor in broad sense to demand for indemnity (article 477, Macau Civil Code).

The causes leading to the claim for damages may vary, but when it comes to the problem of compensation, a set of common rules may be extracted, forming by themselves a unitary legal regime. Being aware of the above phenomenon, the Portuguese Civil Code of 1966 has decided to make an innovation [196] in the regulation of damages, elevating the category "obligations of indemnity" as specific mode of obligation, parallel to the categories like "pecuniary obligations", "obligation of interests", "alternative obligations", "generic obligations", "solitary obligations" etc.

As far as the Macau Civil Code is concerned, the regime of obligation of indemnity (articles 556 – 566) conserved the structure of its Portuguese predecessor, but goes into more detail in certain points. The law (article 556) states as general principle that: "*those who were obliged to repair a damage should restitute the situation that would have existed, had the event that leads to the obligation not occurred*." In other words, if a thing is damaged, the debtor bearing the obligation to repair the damage should first think of a natural (*in natura*) restoration or reparation; and if the thing is destroyed, he should deliver another which is identical to the damaged one. This corresponds to the idea of "**real loss**" adopted by the Macau Civil law. Compensation or indemnity fixed in money terms shall only be accepted when the natural restoration is impossible (in another word, the damaged thing is non-fungible by nature). Nonetheless, when the natural restoration is possible, but the natural restoration cannot repair the whole loss, the part of loss not covered by restoration may be indemnified in terms of money. On the other hand, if the natural restoration is too onerous (whether it is onerous or not should be examined by the principle of good faith) for the debtor, the indemnity can also be fixed in terms of money[197]. As far as how the exact amount of money compensation is determined, the law has adopted the so-called **"theory of difference"**; therefore, in the calculation of amount to be compensated, the court should measure the difference between the real patrimonial situation of the victim at present, and the hypothetic patrimonial situation at the same day imagining that the damages had never occurred. On calculating the damages to be indemnified or compensated, the court should consider not only the damages effectively caused, but also the benefits that the victim ceased to obtain as a result of the infringement (article 558, c.c.) The court may also consider the foreseeable future damages[198]. If the future damages are not determinable, the amount

[196] About the inovation and characteristics of this regime, see Antunes Varela, Das Obrigações em Geral, Vol. I, 10ª Ed., Almedina, 2000, pg. 876 ss.

[197] Cfr. Article 560 (2), (3), Macau Civil Code; this part of content is more detail then the corresponding one in the Portuguese Civil Code.

[198] See the interpretation of Vaz Serra, Anotação ao acórdão do S.T.J. de 5 de Julho de 1968, in R.L.J, nº 102, Coimbra, 1968-69, pp. 296-298; Ibid, Anotação ao acórdão do S.T.J. de 12 de Fevereiro de 1970, in

of compensation can be postponed to an ulterior decision[199].

Whenever the fault of the victim has contributed to the occurrence or aggravation of damages, it is up to the court to decide, according to the seriousness of the fault of each party, whether the compensation should be granted in full or even be excluded. Those who invoke the fault of the victim should prove it to the court, whereas the court may also recognize it *ex officio*.

R.L.J., n° 105, Coimbra, 1972-73, pp. 45 ss.

[199] Cfr. Article 558, Macau Civil Cdoe.

Part II. Specific Contracts

Chapter 1. Agency

§ 1. INTRODUCTION

210. In Macau law, the concept of **"agency"** corresponds to the legal phenomenon of "representation" (representação), which is institutionalized as a legal regime in the General Part of the Macau Civil Code. The Macau Civil Code does not define directly what an agency (representação) is; in article 251, it simply describes the relationship of the parties involved in this phenomenon, by stating that: "*A juridical transaction done by the representative in name of the person being represented, within the limits of powers of the latter, produces effects in the legal sphere of the latter*."

In legal language, the term "representation" was historically used to describe a number of legal relations with different nature, namely, legal representation (the relation of representation directly created by law with the purpose to repair the incapacity of the minors), organic representation (the relation of between a legal entity and its representatives) and voluntary representation (the relation of representation created by juridical transaction). Nowadays, the idea of relationship between the legal entity and its representatives is rarely admitted as a relation of representation, since the representatives are by themselves the integral part or organs of the legal entity. Therefore, in view of the Macau Civil Code, and according to the criterion of how a representation is formed, there are two types of representation: **legal representation** and **voluntary representation**. Dogmatically, three characteristics may be drawn from a relation of representation: a) acting in name of the other; b) acting on account of the other; c) powers granted to the representative to act in name of the other. The type of representation that the Macau Civil Code has dedicated most attention to is the voluntary representation. In fact, the whole regime of representation within Macau Civil Code was molded upon the phenomenon of voluntary representation.[200] Parting from the above concept of representation, it is indeed very difficult to perceive the phenomenon of representation (or "agency") merely as a specific contract.

There are several concepts akin to the concept of representation, which urge us to make a distinction.

The first and most important one is the contract of mandate (*madatum*). Since the Roman model of *dominus-procuartio* relation declined because of a drastic social change, the phenomenon of "representation" has found its host in the contract of mandate[201]. The link between *mandatum* and the phenomenon of representation was never broken until the nineteenth century[202]. Even nowadays, at the beginning of the twenty first

[200] See António Menezes Cordeiro, A representação: Sistema e Perspectivas de Reforma, in Da Modernização do Direito Civil – I Aspectos Gerais, Almedina, 2004, pp. 177-178.
[201] Pedro de Albuquerque, A Representação Voluntária em Direito Civil (Ensaio de reconstrução dogmática), Almedina, 2004, pp. 157.
[202] Pedro de Albuquerque, Ibid, pp. 313, 335, 1205.

century, many civil legislations currently in force are still not spending any effort to clarify the distinction between *mandatum* and the phenomenon of voluntary representation[203]. For Macau Civil Code, the two phenomena are basically distinguished. Representation is regulated in the General Part of the Code, subordinate to the Chapter of juridical transaction; while *mandatum* is within the Law of Obligation, as a specific type of nominate contract. *Mandatum* (mandate) is *a contract by which one party binds himself to accomplish one or more juridical transactions for the account of another* (article 1083, Macau Civil Code). The Legal doctrines observed a long time ago that *mandatum* can perfectly appear without establishing a relation of representation; on the other hand, voluntary representation can also be established (through a unilateral act, the procuração) without resorting to the tool of *mandatum*.[204] Sticking to the conceptual difference between mandate and agency, but being aware of the close relation between them, the law (article 1104, Macau Civil Code) also provides that: "*when the mandatory in a contract of mandate has been granted the power to act in the name of the principal, the legal regime of representation is also applicable to hi*m." Like other civil legislations in continental law countries, the legal regime of *mandatum* in Macau Civil Code also regulated in detail the rights and duties of the mandatory (article 1087, including the duty to follow instructions, the duty to render account, the duty to inform, the duty of diligence etc.) and the duties of the principal (article 1093, including the duty to provide necessary means, to pay expenses and remuneration etc.), as well as the termination of the contract (article 1096 ss). Since the focus of this chapter is agency, the legal regime of mandate shall not be discussed in detail.

The second phenomenon easily confused with representation is the *negotiorum gestio*. In Macau Law, the difference between representation and *negotiorum gestio* lies mainly in two points: first, the legal regime of representation applies restrictively to juridical transactions, while *negotiorum gestio* is applicable to juridical transactions or material act (article 458, Macau Civil Cdoe); second, in *negotiorum gestio*, although the *gestor* (agent) acts for the interests of the principal, he was not given the power to do so.

Sometimes, the contracts for person to be named are also confused with representation. In fact, this type of contracts is closely link with representation. Nevertheless, a contract with a clause reserving the possibility to name a third person as contractual party does not establish a relation of representation. The original contractual party in this type of contract is required to name the third party within a short period of time, and at the act to name a third person, he has to get the ratification of that person or attach a proxy which is already done in advance (see supra). In any of the case, there is another business declaration by the person named, which should be read as the real act that established the representation.

Finally, the distinction between *nuncius* and representation is often mentioned by scholars[205] as well. Nevertheless, a *nuncius* is just like a messenger, he transmits the

---

[203] Belgian Civil Code is one of those cases. Details see Jacques Herbot, Ibid, pp. 219 ss; for the case Argentine law till 1995, see Alejandro M. Garro, International Encyclopaedia of of Law – Argentina Law of Contracts, Kluwer Law International, 1995, pg. 159 ss.

[204] See Ferrer Correia, A procuração na teoria da representação voluntária, in Estudos Jurídicos, II, Coimbra, 1969, pg. 1 ss; Also Pires de Lima/Antunes Varela, Código Civil Anotado, I, 4ª Ed., Coimbra, 1987, pp. 240-241.

[205] See P.G. Moateri, Alberto Musy and Filippo Andrea Chiaves, International Encyclopaedia of Law – Italian Law of Contracts, Kluwer Law International, 1999, pg. 120; António Menezes Cordeiro, A

content of a business declaration, but has no room for decision; on the contrary, an agent has been given the power to act, and thus the power to decide when he really acts.

§ 2. VOLUNTARY REPRESENTATION AND PROXY

I. The regime of voluntary representation

211. Voluntary representation is the prototype upon which the legislator of the Macau Civil Code has built the whole regime of representation. Logically, the description of the relation between the principal and the representative (i.e., the legal effect of an act done by the representative produces on the legal sphere of the principal) given in the previous paragraph is perfectly applicable to a voluntary representation.

The phenomenon of representation involves two persons: the principal *(representado*) and the agent or representative (*representante*), and by definition, it is related to the practice of juridical transaction. It is already explained in this monograph that the validity of a juridical transaction (or simply, a contract) depends on a number of substantive conditions, and many of them have to do with the intent of the person making the business declaration. Therefore, in any contract, if one party intervenes with a representative or agent, the problem of determining whether the business declaration is valid (for example, whether there is a mistake, duress or fraud) shall become difficult, because the interpreter has to decide whether it is the intent of principal or the intent of the agent that should be taken into consideration. This problem is tackled by article 252 of the Macau Civil Code, by stressing that, in principle, it is the situation of the representative that should be examined. The reason is simple: vices of intent or lack of intent is developed from the idea of freedom; in a relation of representation, the representative is given the freedom to decide and to declare, logically it is his will that should count. The intent of the principal is generally not taken into consideration because he has already manifested it on establishing the voluntary representation. Nevertheless, since the connection between the principal and the representative is very close, the law does not rule out the possibility that the intent of the principal being determinant to the juridical transaction involved. In this case, the intent of the principal is also examined. Nevertheless, on evaluating whether a contractual party (or a party making a business declaration) acts with good faith or bad faith, the conduct of the principal is more decisive in the negative aspect. In concrete, the good faith of the representative shall not benefit a principal with bad faith.

When the principle appoints someone as his representative, he would of course expect this person to protect his interest on making a business transaction. In a transaction, if one representative simultaneously represents both of the contractual parties, a conflict of interests may occur easily. Therefore, the Macau Civil Code also dedicated a rule to tackle the problem of "transaction with oneself" (negócio consigo mesmo). According to article 254, the representative, in so far as is not otherwise authorized, entering into a transaction in the name of the principal with himself in his own name or as representative of a third party shall turn the transaction annullable.

Since under the Macau Law, representation and mandate, though many times closely

---

representação: Sistema e Perspectivas de Reforma, in Da Modernização do Direito Civil – I Aspectos Gerais, Almedina, 2004, pp. 179.

related, are separately treated as two legal regimes, the establishment of a voluntary representation is in no way equivalent to the conclusion of a contract of mandate. In the General Part of the Macau Civil Code under the heading of "voluntary representation", "proxy" (*procuração*) is highlighted as the act or means of one person conferring to another the power of representation. In order to have a better understanding of the regime of voluntary representation in Macau, it is necessary to do a comprehensive analysis of proxy.

II. Proxy (procuração)

212. The law (article 255) states that "*a proxy is an act by which someone confers to another, voluntarily, the powers of representation.*"

The doctrines normally classify a proxy as a unilateral juridical transaction[206], which implies that it is sufficient with a business declaration only from the one giving out the powers. The beneficiary is not required to accept it, but of course, has the right to renounce it (article 258, 1). Despite its nature of being a unilateral transaction, a proxy can be embedded in a contract and appears in the form of a contractual clause. In certain types of contract (namely, *mandatum*, employment contract and contract of works), the insertion of some clauses granting powers of representation to the one party is a usual practice. In those cases, the contract itself is mixed with a proxy, but the proxy being included does not lost its characteristics as a unilateral juridical transaction. On the other hand, even if a proxy is established through a separate instrument, labeling itself exactly as a "proxy"), it will be very difficult to separate this act completely from the relation on which its ground is founded[207]. This is true both in the conceptual level and in the empirical level. This link between the proxy and the relation of base is most clearly reflected in the termination of proxy: when the ground relation (for example, a mandate) of a proxy extinguishes[208], the proxy also extinguishes, unless the principal has intended otherwise (article 258, 1, Macau Civil Cdoe).

Being a unilateral juridical transaction, a proxy can be revoked at anytime, by the principal which is the one who made the business declaration. This right of revocation shall not be affected by any agreement or declarations providing the contrary. However, if a proxy is given for the interests of the beneficiary or of a third party, it can only be revoked with the consent of them, unless the principal has a justified reason (article 258, 2 & 3, Macau Civil Code). The modification or revocation of a proxy should be communicated to third parties with adequate means, under the penalty of being non-opposable (article 259).

The law also dealt with the problem of representation without power, establishing as principle that a juridical transaction concluded in name of another person without power of representation shall not produce any effect to the latter, unless it is later ratified by him. Nevertheless, if someone consciously induces a third party to believe in a representative without power, the legal transaction done shall produce effect in his legal sphere (article

---

[206] See Pedro Pais de Vasconcelos, Teoria Geral do Direito Civil, 2ª Ed., Almedina, 2003, p. 715; see also António Menezes Cordeiro, A representação: Sistema e Perspectivas de Reforma, in Da Modernização do Direito Civil – I Aspectos Gerais, Almedina, 2004, pp. 183.

[207] Pedro Pais de Vasconcelos, Ibid.

[208] Acccording to article 1100 of the Macau Civil Code, the death or interdiction of the principal or mandatory of a *mandatum* shall cause the contract to lose effect, except if the mandate is given for the interests of the mandatory or of a third party.

261).

§ 3. REPRESENTATION IN COMMERCIAL CONTRACTS

213. In commercial world, the terms agent and agency are used in a very broad sense, like estate agent, insurance agent, agents in a brokerage contract, agents in a distribution contract, agents in a franchise contract, agents in a commercial agency contract etc. In those contracts, the so-called agents normally act on behalf or in the interest of another person, nevertheless, unless expressly agreed, these "agents" are not vested with the powers to conclude juridical transactions in name of the principle. Therefore, although the word agent or agency appears in daily commercial practice or even in legal instruments, it is used in a very broad sense. These contracts may also involve a power of representation, but representation is for sure not their common characteristic or a requirement for their validity and enforcement. For a continental lawyer, those contracts are only sporadically linked to the phenomenon of representation described in the previous paragraphs. Owing to the enforcement of the Macau Commercial Code in 1999, many of those contracts are now typified as nominate contracts.

The following definitions and extract of rules found in the Macau Commercial Code[209] may help to give a good picture about these contracts and its relation with the phenomenon of representation.

> *A. Commission contract*
> *(Article 593, Macau Commercial Code)*
> *"A commission contract is a mandate by which a commercial entrepreneur undertakes to buy or sell goods in his own name, but for the account of another person, against payment."*
>
> *B. Forwarding contract*
> *(Article 616, Macau Commercial Code)*
> *"A forwarding contract is a mandate by which a commercial entrepreneur undertake the obligation to conclude, in his own name and for the account of the principal, a contract for carriage of goods and respective accessory operations."*
>
> *C. Agency contract*
> *(Article 622, Macau Commercial Code)*
> *"1. Agency is a contract by which one of the parties undertakes to promote for the account of the other party the conclusion of contracts, in an autonomous and stable manner and against remuneration, possibly with the designation of a certain zone or a certain circle of clients."*
> *"2. Any of the parties has the right, which cannot be renounced, to claim from other a signed document indicating the content of the*

[209] The provisions of Macau Commercial Code to be cited in the following paragraphs are adapted from the translation made by Jorge Godinho.

contract and any subsequent additions or amendments."
(Article 623, Macau Commercial Code)
"1. Without prejudice to the following paragraphs, an agent can only conclude contracts in the name of the other party if the latter has granted him, in writing, the necessary powers."
(Article 644, Macau Commercial Code)
"1. A contract agreed by an agent lacking powers of representation produces effects towards the principal if there were strong reasons, objectively assessed, taking into account the circumstances of the case, that justified the trust of a good faith third party in the legitimacy of the agent, provided that the principal has also contributed to establishing the trust of the third party."

D. Commercial concession contract
(Article 657, Macau Commercial Code)
"1. Commercial concession is a contract by which one of the parties, in his name and for his own account, undertakes to buy and resell goods produced or distributed by the other party, in a certain zone and in a stable manner, subjecting himself to a certain degree of control by the other party."

E. Brokerage contract
(Article 708, Macau Commercial Code)
"A broker is a person who places two or more interested parties in contact for the agreement of a transaction, without being connected to any of such parties by way of a legal relation of collaboration, dependence or representation."

Chapter 2. Bailment

§ 1. GENERAL

214. As a legal concept, the English word bailment has an extensive coverage. It is "*a delivery of goods by one person to another for some particular purpose on the understanding that they are to be returned upon accomplishment of the specific purpose*." [210] Therefore, contracts like *depositum* (deposit for safe custody), *commodatum* (loan for use), and *locatio rei* (hire) can be all included into the concept of bailment.

In Macau Law, such a category has no direct correspondence. Contracts like *depositum, commodatum, mutuum* and *vadium (pledge)* have indeed been further classified by legal scholars, though not without hesitation, into the category of "real contract *quoad consitutionem"*[211], following the Justinian tradition. Nevertheless, in comparison to bailment (as it is defined herewith), the category of "real contract *quoad consitutionem"* is more restrictive in the sense that it requires the delivery of the thing as the condition of its establishment. Therefore, the case of hire is never considered a "real contract *quoad consitutionem"*. Apart from the category of "real contract *quoad consitutionem"*, another concept – **personal rights of enjoyment (direitos pessoais de gozo)** - recently developed by Latin scholars[212] (and gained certain reflection in article 401 of the Macau Civil Code) might also be taken for comparison with the concept of bailment. Nevertheless, in Macau Law (article 401 of the Macau Civil Code), this category mainly deals with the priority of credit rights according to the criterion of possession (*melior est condition possidentis*), it does not establish nor has it ever intended to establish a set of standards to form a unitary category just for certain types of contracts. As far as the concrete range of application is concerned, on one hand, "personal rights of enjoyment" stress only on the source of personal (obligatory) rights, the case of pledge, which is considered as real right in Macau Law, shall not be included in this category. On the other hand, "personal rights of enjoyment" finds no difficulty in included rights in relation to immovable properties.

Since the regime of loan, lease and pledge are to be treated in other chapters, this following sections shall only deal with the remaining one, the case of *depositum*.

---

[210] Ping-fat Sze, International Encyclopaedia of Law – Hong Kong Law of Contracts, Kluwer Law International, 2001, pg. 219.

[211] For a detail discussion of real contracts, see Tong Io Cheng, "A discussion on Real Contracts", in Jornal of Macau Studies, Vol. 28, Centre of Macau Studies, 2005, pp. 18 ss; also in Tong Io Cheng, Studies on the Fundamental Theories of Civil Law and Macau Civil Law, Sun Yat-Sen University Press, pp. 206 ss.

[212] It was developed by the Italian scholar Michele Giorgianni, Contrituto alla teoria dei diritti di godimento su cosa altrui, I, Giuffré, Milano, 1940. For a reflection of this theory in Portuguese Law, see José Andrade Mesquita, Direitos Pessoais de Gozo, Almedina, 1999. For an exposition of this theory centering on Macau Law, see Ng Lai Chan, On the Rights and Duties of the Tenant, master thesis, Faculty of Law, University of Macau, 2008, pp 24 ss.

§ 2. DEPOSITUM IN CIVIL LAW AS A BAILMENT

215. In fact, whatever the definition or criteria of bailment is, the case of *depositum* is always included.

According to article 1111 of the Macau Civil Code, "*deposit is a contract by which one of the parties delivers to the other a thing, chattel or immovable, for the latter to provide custody, and restitute it upon demand*."

Unlike the Italian Civil Code, the *depositum* regulated in the Macau Civil Code extend its range to immovable properties. On the other hand, the Macau Civil Code has only regulated the primitive form of deposit. It does not provide special rules for the case of deposits in hotels or others. A deposit contract in civil area is presumed to be gratuitous, unless it is done by a depositary exercising his profession (articles 1112, 1148, Macau Civil Code).

The depositary has the duties to provide custody of the thing deposited, to restitute the thing and its fruits, and to inform immediately the depositor when he knows that some risks are threatening the thing or that a third party is invoking rights against the thing, as long as those facts are not known to the depositor (article 1113, Macau Civil Code). Although the control of the thing exercised by the depositary is considered as a detention and not possession, when the control of the thing deposited is deprived or intervened by a third party, or even by the depositor, he may invoke the means provided for the protection of possessions (article 1114). In case the deposit is onerous, the depositor has to pay all the remuneration even if he requests to have the thing back earlier than the date fixed in the contract (article 1120).

The duties of the depositor include the one to pay the retribution due, to pay the expenses arise from the deposit, and to indemnify the depositary for any damages cause by the deposit and by the fault of the depositor (article 1125, Macau Civil Code). In case the time to return the thing is not determined by agreement, the depositary has the right to return the thing at any moment; otherwise, he is only allowed to return the thing earlier than the fixed time when he has a justified reason (article 1127).

§ 3. BANK DEPOSIT

I. Bank deposit in general and money deposit

216. It should be noted that the rules about deposit are only applicable to non-fungible things. In case the thing delivered is fungible, Macau Law regards it as irregular deposit, and the rule of loan for consumption is applicable (article 1132, Macau Civil Code). The case of bank deposit naturally belongs to the category of irregular deposit defined by the Macau Civil Code. Nevertheless, this case is now specifically regulated in the Macau Commercial Code under article 840 ff. According to this provision, "*bank deposit is a contract by which a person hands to a bank an amount of money or movable valuables, for the latter to provide custody and return them when requested to do so.*"[213]

[213] Translation from Jorge Godinho, Ibid., p. 411.

If the thing deposited to the bank is an amount of money, the bank acquires the ownership of the respective amount, but bound with an obligation to return it in currency of the same kind (article 841, C. Com).

II. The deposit of securities

217. For purpose of taking part in a general meeting, the holder of bearer shares would have to deposit their shares in a bank (financial institution) eight days before the date of the general meeting. A president of the chairing committee of the general meeting who does not allow a shareholder (after the deposit of his share and other formalites) to take part in the meeting is subject to criminal responsibility (article 418, Macau Commercial Code).

Therefore, the deposit of shares in a bank is an effective measure for a holder of bearer shares to exercise his right as a shareholder. On the other hand, the bank can also accept deposit of securities for administration, which provides a wide range of services. For this purpose, Article 843 of the Macau Commercial Code has provided that: "*a bank that accepts a deposit of securities for administration shall provide custody for such securities, collect the respective interest or dividends, verify lotteries for prizes or reimbursement of capital, make collections for the account of the depositor, and generally provide protection for rights inherent to such securities*."

Finally, it might be of importance to stress that, according to the terminology of Macau Commercial Code the service of deposit boxes provided by the bank is regarded rather as a lease (aluguer), and not a contract of deposit. Article 844 of the Commercial Code states that: "*In rental of safe-deposit boxes, a bank is liable towards the renter for the fitness and custody of the premises, and for the integrity of the safe, except in case of force majeure*."[214]

[214] Translation from Jorge Godinho, Ibid., p. 412.

Chapter 3. Gaming and Betting

§ 1. NOTION AND CHARACTERISTICS

218. Gaming and betting are regulated in the Macau Civil Code as a nominate contract, yet the whole chapter has only one article (article 1171), providing on the effects of gaming and betting under different circumstances. The notion of gaming and betting[215] is not defined by the provisions of the Macau Civil Code. It is left to the court to define what are gaming and betting as well as the differences between them. The contracts of gaming and betting are generally classified as an alleatory contract, not only for one party but for both, which means that both the parties have the risk or possibility to win or to lose. Additionally, the risk in gaming and betting is artificially created by the parties[216] and constitutes its main reason or purpose to exist. This is perhaps the most important characteristic and the hints for an interpreter to recognize such a contract. Nevertheless, in any case, a contract of gaming and betting itself should be strictly distinguished from a contract of loan for consumption, be it done for the purpose of gaming or not. Since the purpose of loan (*maxime*, a loan of money for consumption) is to provide the borrower with a fund for consumption and impose to him a duty to return the amount lent to him, and that of a gaming and betting is exclusively **the game of win or loss itself**.

Gaming is the pillar industry of Macau, generating a considerable volume of revenues and providing large amount of job opportunities. Being aware of the social and economical importance of the phenomenon, scholars from different sector of knowledge have spent great efforts to the issue. In the legal sector, quite a number of researches related to the legal regime of gaming and betting may also be found in this region[217]. Nevertheless, the legal regime of gaming and betting are more the question of public law, mainly dealing with problems of license, vigilance, tax and criminal liability.

In the area of Civil Law or more specifically, contract law, the issue is more or less concentrating in the effect of the contract. This is perhaps the reason why there is only one article in the Macau Civil Code providing on this type of contracts.

---

[215] For the distinction between gaming and betting, see C. Mota Pinto, A. Pinto Monteiro & J. Calvão da Silva, Jogo e Aposta. Subsídios de fundamentação ética e histórico-jurídica, Coimbra, 1982; C. Mota Pinto, A. Pinto Monteiro & P. Mota Pinto, Teoria Geral do Direito Civil, 4ª Ed., Almedina, 2005, p. 404; Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, pp. 371.

[216] See Jorge AF Godinho, Macau Business Law & Legal System, LExisNexis, 2007, pg. 118.

[217] The follwoing works are the ones recently written and dedicated a discussion to the contract law aspects: Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, pp. 370 ss; Jorge Godinho, Ibid, pp. 115 ss; Salvatore Mancuso, Some Keynotes on Gaming Law in Macau, Journal of Juridical Science, Vol. 1, pp. 209 ss; Luís Pessanha, Os jogos de fortuna e azar e a promoção do investimento em Macau, in Seminário de reflexão sobre a promoção e protecção do investimento estrangeiro à luz da legislação moçambicana e macaense, Faculty of Law of the University of Eduardo Mondalane, 2007.

§ 2. EFFECTS

219. Historically, as far as the problem of effects is concerned, in view of the regime provided in the Portuguese Civil Code of 1966 (applicable in Macau before 1999), legal scholars have identified four types of situations, being the first three of them general rules, and the last a special rule: 1) the case of unlawful gaming and betting, which are not valid contracts, nor constitute civil obligation; 2) the case of lawful gaming, or gaming permitted or tolerated, but not the ones authorized by a special law and run by a concessionaire, which establish a natural obligation; 3) the case of gaming and betting in sports competitions in relation to the persons taking part in them, which are considered as valid contracts and produce civil obligation; 4) the case of gaming and betting authorized, regulated and run by licensed entities, which are lawful and constitute civil obligation.[218]

By pronouncing first on the unlawful betting, the provision of civil law conveyed a message that gaming and betting are ethnically discouraged and therefore its general rule is the nullity of unlawful gaming and betting (contract). In such a case, the fact of gaming and betting being unlawful are always pronounced by special legislation[219], normally with criminal nature. Only in exceptional case, the gaming and betting contract is doted with the legal effect of a natural obligation or civil obligation.

In the Macau Civil Code of 1999, the legislator has suppressed the three articles (article 1245-1247) originally existing in the Portuguese Civil Code into one (article 1171), stressing on the effectiveness (efficácia) of gaming and betting contracts, with the following provisions[220]:

1. *Gaming and betting shall be sources of civil obligations whenever special laws so provide; as well as in sports competitions in relation to the persons taking part in them; otherwise, if lawful, gaming and betting are a mere source of natural obligation.*
2. *If there has been fraud in its execution, the contract does not produce any effect to the benefit of a person who practiced it.*
3. *Special laws on matters regulated in this chapter are not affected*.

Comparing this article 1171 of the Macau Civil Code to the three articles of the Portuguese Civil Code of 1966, it is easily seen that the main body of the regime remains, while the heading, the order of expression as well as the wordings suffered some changes.

As far as the heading is concerned, owing to legislative, economic and social policy (in short, due to the importance of the gaming industry in Macau) the Macau Civil Code avoided the expression "nullity of the contract", which carries a negative message at the outset, replacing it with a neutral one "effectiveness" (eficácia).

As far as the concrete effects of gaming and betting are concerned in view of the

---

[218] See Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, p. 376.

[219] The Law 8/96/M, dated 22-7-1996, has determined as unlawful the gaming activities outside the authorized venues.

[220] Translation from Jorge Godinho, Ibid., pp. 114-115.

new provisions in the Macau Civil Code, there is a debate going on among local scholars. It is basically pacific at the point that pursuant to circumstances the contracts of gaming and betting are made, three types of effects can be identified from law: a) nullity of contract; b) valid contract, establishing civil obligation; c) valid contract, establishing natural obligation[221]. In our opinion, in view of the new provision, 1171 (2), the effect of relative nullity of ineffectiveness (in relation to the person who practices fraud) should be added. In other words, the party that practices fraud is not entitled to invoke the effect of contract and demand for fulfillment, while the party that does not practice fraud can demand the fulfillment based on the contract.

220. The polemic in local discussion rests mainly on the following questions: which are the circumstances that lead to a valid contract producing civil obligation? In order for such an effect to produce, is it necessary for special laws to pronounce or declare expressly that certain contracts of gaming and betting produce civil obligation? Or, is it sufficient that certain types of gaming and betting being authorized and regulated by special law, so that it produces civil obligation?

Some scholars defended that it is necessary for special laws to pronounce or declare expressly that certain contracts of gaming and betting produce civil obligation. The main argument of this position lies on the wording of article 1171 (1), especially on the expression "whenever special law so provide" (*que lei special o perceitue).* Since at the present moment, none of the special laws regulating the gaming activities in Macau made such a declaration, the said position leads to a conclusion that all the gaming and betting authorized by law and occurs lawfully and run by licensed casinos produce only natural obligations[222]. In other words, the creditors (be it the casino or the gambler) has no right to claim its credit in a judicially, but if the debtor willingly paid the debts, it shall no be seen as an act of generosity, and the debtor has no right to restitute what has been paid.

In contrasts, some other scholars defended that gaming and betting authorized by special laws and run by licensed casinos are civil obligations[223]. A recently published work has analyzed the issue in great detail (providing the reader with operational criteria and concrete result of interpretation), arguing from the legislative policy, the historical evolution of the regime, the preparatory work of the legislative process, the systematic structure of the related provisions as well as the requirements of doing an interpretation of law[224]. In fact, even before the promulgation of the new Macau Civil Code, this second opinion was always dominant in Portuguese legal literature. And there was no

---

[221] See Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, Ibid, pp 377 ss; Jorge Godinho, Ibid, p. 119.

[222] This is the opinion of Jorge Godinho, Macau Business Law & Legal System, LExisNexis, 2007, pg. 119; Salvatore Mancuso, Some Keynotes on Gaming Law in Macau, Journal of Juridical Science, Vol. 1, pp. 209 ss; Luís Pessanha, Os jogos de fortuna e azar e a promoção do investimento em Macau, in Seminário de reflexão sobre a promoção e protecção do investimento estrangeiro à luz da legislação moçambicana e macaense, Faculty of Law of the University of Eduardo Mondalane, 2007, p. 27, nota 64.

[223] Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, 3.1.1.1 & 9.4; Augusto Garcia, Set-off in Portugal, paper presented to the Conference of the Common Core of European Private Law, Torino, 6-7-2007, p. 6, nota 17; Tong Io Cheng, Macau Civil Law, in "A New Study on Macau Law", Edited by Liu Gaolong/Zhao Guoqiang, Vol. I, Macau Foundation, 2005, p. 228.

[224] Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, pp. 370 ss..

signs shown in the legislative process that such an important position was ever intended to be changed by the legislator.

From an empirical point of view, in a casino bet, the impact of the first interpretation is less striking only because in casino gaming, the gambler always deliver their chips before or at the moment the contract is established, it presents the characteristic of a real contract *quoad constitutionem* ("real" in relation to the delivery of the chips by the gambler), therefore, when a gambler loses, the casino shall not face the problem of claiming the debt or the refusal of fulfillment on the part of the gambler. On the contrary, if it is the gambler who wins, the problem of fulfillment immediately appear. In case the casino refuse to perform the obligation, and the player would like to enforce it in court, the qualification of a debt resulting from a gaming and betting as natural obligation shall lead to a disastrous result: the "gambler" has no right to claim his credit judicially. If it is the case, there is no legal protection at all for any "tourist" participating on the gaming and betting activities.

Here, we have no intention to repeat the hermeneutical process of the related provision about gaming and betting, because it has already been done with enough extension. For the critical problem alluded in the previous paragraph, in our opinion, as it was already expressed in other occasion, the second interpretation should be followed. Therefore, after a systematic reading of the Civil Code as a whole structure, there should be six rules for the effect of contracts of gaming and betting: i) whenever there is no special law authorizing gaming and betting among individuals, those activities are unlawful and null according to article 273 of the Macau Civil Code and *a contrario*, the first sentence of article 1171 (1); ii)whenever there are special laws authorizing gaming and betting among individuals, those contracts shall establish civil obligation according to the first sentence of article 1171 (1); iii)gaming and betting on sports competitions in relation to the persons taking part in them establish civil obligation according to the second sentence of article 1171 (1)[225]; iv) gaming and betting among individuals not regulated but permitted or tolerated by law, like the case of family "mah-jong", are valid and establish natural obligation, according to the third sentence of 1171 (1); v) according to article 1171 (2), whenever there has been fraud in the execution of gaming and betting, the contracts continue to be valid, yet the person who practiced the fraud cannot claim any benefit based on the contracts, but the other party has right to claim his credit as any other civil obligation; vi) gaming and betting run by casinos or other commercial enterprises authorized and regulated by special laws are valid contracts and establish civil obligation, according to article 1171 (3), the general principle of freedom of contract and the general effect of obligation, seen in articles 399, 400 and 807 of the Macau Civil Code.

Last but not least, it is important to stress that although we believe in the correctness and reasonableness of the above interpretation, it does not mean that the wording of the related legal provision is all the way clear.

[225] In our opinion, the declaration made in this sentence is not justified for any reason but historical practice of the previous legislation. In fact, it is up to the interpreter to qualify what is gaming and betting, and the interpreter may easily come to the conclusion that gaming and betting on sports competitions are gaming and betting, either for the one participating the competitions or the ones betting on it.

Chapter 4. Sale of Goods

§ 1. NOTION AND CHARACTERISTICS

221. It is clear that neither the Portuguese Civil Code nor the Macau Civil Code establishes any distinction between the sales of goods and sales of other kinds of property[226]. They are all treated in the regime of purchase and sale. Among all typical contracts regulated either in the Macau Civil Code or other legislations, the contract of **purchase and sale (*compra e venda*)** is perhaps the most important one. It is the first nominate contract regulated in the Macau Civil Code (articles 865 – 933). It is also expressly appointed by the same Code (article 933) as the paradigm for all onerous contracts, nominate or not, involving a transfer of property or an establishment of burden; therefore, it is applicable to the contract of exchange (*troca*)[227], to the accord and satisfaction, to the assignment of credits, to the alienation of commercial enterprise (article 1047, Macau Civil Code) as well as other new types of contracts such as leasing and factoring. Being the most important type of contract, the provision on the General Party of the Civil Code, especially the part about capacity and the whole chapter regulating the juridical transaction is, in principle, applicable to purchase and sale. The law of Macau has not created a regime of commercial purchase and sale totally separated to the civil institution, but several rules (article 575, 576 and 577, Macau Commercial Code) with special characteristics are provided for commercial entrepreneur that sells movable goods in the exercise of his enterprise[228]. In comparison to the parallel regime in the Portuguese Civil Code, the purchase and sale contract in Macau has brought in certain small innovations, namely: the simplification of formal requirements (articles 866, 923); the strengthening of protection in favor of consumers (article 909, 1,2; article 914, 2) and; eliminating the restrictions of sales from parents to children or grandparents to grandchildren[229].

The definition of purchase and sale is given in article 865 of the Macau Civil Code as the following: *"A purchase and sale is a contract by which the ownership of a thing, or another right, is transferred against the payment of a price*"[230]. Although the terminology used by Macau Law is "purchase and sale", it does not mean that there are two contracts or two juridical transactions. It just reflects the idea that in this contract involves two realities: the acquisition of the purchaser and the alienation of the seller.

By the above definition, we may immediately deduce that purchase and sale is an

---

[226] Whether such a distinction or even other distinctions should be made is a question worth a second consideration.

[227] The contract of exchange used to be appointed as a nominate contract in the Code of Seabra. In the Macau Civil Code, it is no longer seen as a nominate contract, the provisions of purchase and sale therefore remained the most important source of its regulation.

[228] See Jorge Godinho, Ibid, p. 110.

[229] See Manuel Trigo, Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999, in Nos 20 Anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, 2007, pg. 358.

[230] Translation by Jorge Godinho, Ibid, p. 234.

onerous contract, in the sense that there is an exchange of economic interest (or in more technical terms, there are patrimonial attributions for both the contracting parties). In principle, an onerous contract is also commutative[231]. This deduction is correct for a purchase and sale in its primitive form, but the Macau Law (in its article 870, 2) also admits the special case of *emptio spei*, which is aleatory by nature. Nonetheless, the most important characteristic of the purchase and sale in the Macau Civil Code is its consensual nature. The qualification of **consensual contract** is used here not only in opposition to real contract *quoad constitutionem* and formal contracts. It denotes that in general, the conclusion of a purchase and sale contract does not require registration and delivery of a thing as *"modus"* or the imposition of a special form (except for the case of purchase and sale of immovable, which is subject to the form of public deed, according to article 866 of the Macau Civil Code and article 94, 1 of the Macau Notarial Code), but just by the consent (business declarations) of the contractual parties. By this characteristic, the contract of purchase and sale has, together with the contract of gift as well as the rule of article 402 of the Macau Civil Code, established the fundamental scheme for the transfer of ownership. Since the transfer of ownership is automatic and immediate at the moment the purchase and sale contract is concluded (in case the requirements set forth by article 402 are met), it is not listed as an obligation, but an automatic effect. Although the transfer of ownership is automatic, it does not mean that the seller is at the very beginning freed from any obligation. As a contract, purchase and sale is a very important source of obligation. It does produce obligatory effects; the law (article 869) provides clearly that the seller has the duty to deliver the thing, parallel to the duty of the purchaser to pay the price. Therefore, from the perspective of effect, the purchase and sale is sometimes classified as both an obligatory contract and a real contract *quoad effectum*[232]. And starting from the obligatory effects it produces in relation to the seller and to the purchaser, the purchase and sell is also classified as a synallagmatic contract, alleging that the obligation of seller to deliver the thing and that of the purchaser to pay the price are correlative and interdependent[233]. For us, the sygnallagmatic relation in a purchase and sale contract seems somewhat disproportional, especially in the purchase and sale of immovable. From the perspective of *causa*, it is difficult to say that the purchaser pay the price because he wants the "delivery" (which involves only the passing of physical control) of the thing and not the ownership. The "real deal" or economic function reflected by a purchase and sale is exactly the transfer of ownership of the thing and the payment of the price. Nevertheless, since the transfer of ownership is preset by law as an automatic effect, it will be impossible to establish a *synallagmaticiy* between it and the payment of price.

§ 2. EFFECTS

[231] Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000, pg. 25.
[232] Luís Manuel Teles de Menezes Leitão, Direito das Obrigações, Vol. III, Almedina, 2002, pg. 15; the point of effect shall be discussed in detail in the coming paragraph.
[233] Pedro Romano Martinez, Ibid, pg. 26.

I. Transfer of Ownership

222. In the above paragraph, we have stated that the transfer of ownership is an **automatic** and **immediate (or instantaneous)** effect of a purchase and sale contract. This conclusion is drawn both from article 869 (1a), and article 402 (1) of the Macau Civil Code. The first of them, concentrating on purchase and sale, states that such a contract produce the effect of "*the transfer of ownership of the thing or the title of the right*"; the second of them, appearing as general rule regulating how the "*real effect*" is produced, states that "*the establishment or transfer of real rights over specific things occurs by the mere effect of the contract, with the exceptions mention in the law*."

The expression "**mere effect of the contract**"[234], highlighted by article 402, signifies it is the contract and the contract alone that produces the "real effect" (efeitos reais); it implies a dissociation with another interpretation of the Roman Law tradition, which believed and adopted the principle that the transfer of ownership is depending on the delivery of the thing or the registration of the acquisition. The legislative model of the Macau Civil Code in relation to the transfer of ownership (especially in the case of purchase and sale) is a result of a long historical evolution started from the classical Roman Law, which associated the ownership transfer with the transfer of possession. In the late development of Roman Law, the delivery of thing was already moving towards a process of gradual spiritualization. Up to the period of French Ancient Law, in the transfer of ownership, the requirement of delivery was normally substituted with the *traditio ficta* or *tradition feite*, which appeared in the form of a contractual clause. Finally, it was the representatives of the school of natural law (*maxime*, Grotius & Pudffendorf) that had formulated the theory of transfer of ownership depending only on the will of the parties[235], which was then adopted by the French Civil Code and the two Civil Codes of Portugal. However, this model of transfer, which gained a great success since the 19th Century through the influence of the French Civil Code, appeared in sharp contrast with the model developed by the German Civil Code, at the point that delivery and registration were considered the requirement for the transfer of ownership. Taken into consideration the historical background[236] hidden behind the consensual model of transfer, it is perhaps more comprehensive to express it as the following: **the establishment or transfer of real rights over specific things does not depend on the registration of acquisition or delivery of the thing; it occurs by the mere effect of contract**. In the Law of Things, the above aspect (though with a more extensive range, including the discussion of all real rights) is taken as the manifestation of the so-called "principle of consensuality" [237]. The direct consequence of this principle is that: any

[234] About the possible interpretation of the expression "mere effect of the contract", see Pedro de Albuquerque, Direito das Obrigações, Vol. III (Contrato de Compra e Venda. Introdução. Efeitos Essenciais e Modalidades), 2ª Ed., Lisboa, 1991, pp. 24 ss.

[235] See António A. Viera Cura, O Fundamento Romanístico da Eficácia Obrigacional e da Eficácia Real da Compra e Venda nos Códigos Civis Espanhol e Português, in Jornadas Romanísticas, Coimbra, 2003, pp. 40-46; for a brief account, see Luís Manuel Teles de Menezes Leitão, Ibid., pg. 22-23.

[236] In the modern day, the most important source demonstrating such a historical background in general is perhaps the work of Max Kaser, Compraventa y transmission de la propriedad en el derecho Romano y en la dogmatica moderna, Valladolid, 1962, pp. 10 ss; for a specific description on the historical development of the effect of purchase and sale contract in Portuguese law and its relation with Roman law see António A. Viera Cura, O Fundamento Romanístico da Eficácia Obrigacional e da Eficácia Real da Compra e Venda nos Códigos Civis Espanhol e Português, in Jornadas Romanísticas, Coimbra, 2003, pp. 33 – 108.

[237] For this principle, recently reiterated in Portugal, see A. Santos Justo, Direitos Reais, Coimbra, 2007, pg.

presupposition or vices affecting the validity of a contract also affects the title of ownership transferred therewith. Therefore, if a purchase and sale is annulled for lack of capacity, vices of intent, or declared null for simulation and physical violence, the ownership acquired by the purchaser is also considered as if it were never produced. In our opinion, this exposition of this principle shall only be complete if the following corollary is also expressed: **the transfer of ownership occurs automatically at the moment when the contract is concluded**. Since the transfer of ownership is taken as an effect of the purchase and sale contract (article 869,1a and article 402, 1), and in principle, a contract produces its effects (here including the transfer of ownership) at the moment it is concluded (in another word, when the declaration of intents are made), it is therefore legitimate to conclude that in a contract of purchase and sale, the ownership of the thing is automatically and immediately transferred at the moment the contract is concluded[238].

In relation to the principle of consensulatiy in Law of Things, the cases of hypothec and pledge in Macau Law are normally considered as exceptions[239], because the establishment of these two real rights requires either the registration or the delivery of the thing. Nevertheless, these two cases are irrelevant for our discussion because they are already beyond the scope of purchase and sale. In the self restricted field of a purchase and sale contract, talking about exceptions, it must be the exception to the proper effect of a purchase and sale transferring the ownership of a thing and transferring it at the moment a contract is concluded. Therefore, if there is a case which a contract of purchase and sale does not transfer the ownership of a thing at all, we may say it is an exception to the first rule. On the other hand, if it is still the same purchase and sale that transfer the ownership of the thing, but the transfer does not occur at the moment the contract is concluded, we have an exception to the second rule.

For the first rule, there is no exception. It is almost unanimous among legal scholars that in our law there is no such kind of purchase and sale that does not at all produce the effect of transferring ownership, but merely the obligation to transfer ownership through another act in the future. In other words, in Portuguese and Macau law, there is no such thing called "obligatory purchase and sale", which produce only the obligatory effects[240]. Even in the case of sales of undetermined things, future things or a part of a thing, the purchase and sale contract remains the only source of effect, though the moment of transfer is deferred. It is nevertheless important to notice that the social and economic function of a obligatory purchase and sale in other jurisdictions are mostly substituted by the legal regime of promissory contract in Macau[241].

For the second rule, exceptions can be found in article 402 (2) of the Macau Civil

---

33; in Macau, See José Gonçalves Marques, Direitos Reais, versão policopiada, Faculdade de Direito, Universidade de Macau, 2000, pg. 118-119.

238 Luís Manuel Teles de Menezes Leitão, Ibid., pg. 22; Pedro Romano Martinez, Ibid, pg. 31.

239 José Gonçalves Marques, Direitos Reais, versão policopiada, Faculdade de Direito, Universidade de Macau, 2000, pg. 123-124.

240 SeeRaul Ventura, O Contrato de compra e venda no Código Civil, in ROA 43 (1983, pp. 261-318, 587-643; Pedro de Albuquerque, Direito das Obrigações, Vol. III (Contrato de Compra e Venda. Introdução. Efeitos Essenciais e Modalidades), 2ª Ed., Lisboa, 1991, pp. 24 ss; Luís Manuel Teles de Menezes Leitão, Ibid., pg. 29.

241 For this topic, see Tong Io Cheng, O Regime Jurídico do Contrato-Promessa, Faculdade de Direito de Universidade de Macau, 2004, pp. 124 ss.

Code and other cases like the sale of a thing by non-owner and the purchase and sale with a condition of term (for example, with a clause of reserve of ownership)[242]. In all those cases, the moments for transfer of ownership are differed, some of them (sale of undetermined things, future things etc.) imposed by law and shall be determined by other factors, other (with the clause of reserve of ownership[243]) by the free will of the parties.

II.Transfer of Risks

223. The transfer of risks is a consequence and a corollary of the transfer of ownership. In Macau Civil Code, this matter is dealt with under the topic of non-fulfillment, in article 785. This article has basically consecrated the idea of *periculum est emptoris*, with the following provision: "*in contracts which causes the transfer of dominium over a specific thing or which establish or transfer a real right over one, the risk of loss or deterioration of the thing for a cause not imputable to the transferor shall fall upon the acquirer*."

The automatic and immediate transfer of ownership by a purchase and sale contract is in fact a very large benefit conferred to the purchaser. Once the contract is signed (concluded), he is already the owner. In other word, he does not need to wait for the seller to fulfill and "give" him the ownership by another act. Since the right of ownership is the most complete and exclusive right, it prevails over another credit rights that lead to a claim over the thing. Nonetheless, *ubi commoda ibi incommoda*, the privileges granted to purchaser are also associated with some disadvantages, and the most important of them is perhaps the transfer of the risk of loss or deterioration of the thing for a cause not imputable to the seller (include the case which no body has fault). In strict terms, it is not accurate to describe it as any "extra" disadvantages. It is just the logic of ownership itself; in fact, the Latin maxim – *res perit dominio* - has expressed this idea with enough clarity. It is the owner who bears the risk of loss or damages. Since the purchaser becomes the owner immediately after the contract is concluded, in principle, he also bears the risks at the moment he acquires this identity, even if the thing is not immediately delivered to him.

This principle is subject to exceptions. The first exception occurs when the thing has continued in the control of the seller because of a term created in his favor. In this case, the risk shall only be transferred to the purchaser upon the expiry of the term or with the delivery of the thing (article 785, 2), unless the seller falls in to delay. In case of delay of the seller, he is responsible for the loss or damages of the thing that he should have delivered, even if the facts causing the loss and damages are not imputable to him (article 796). The second exception has to do with contracts concluded with a clause of condition. Therefore, when a purchase and sale is subject to a resolutory condition, the risk of damages, while the condition is pending, falls on the shoulder of the purchaser if the thing is delivered to him; when the condition is a suspensive one and while the condition is pending, the risk of damages of the thing falls on the seller (article 796, 3).

Finally, it must be stressed that the rules about risks are only default rules set by the legislator; the contracting parties are free to change them by agreement. There is no

[242] See Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000, pg. 36.

[243] For a detail analysis of the clause of reserve of ownership, see Ana Peralta, A posição juridical do comprador na venda com reserve de propriedade, Coimbra, Almedina, 1990.

reason (under public policy) to restrict the freedom of the parties in this matter[244].

III. Obligation of the seller

224. According to article 869 of the Macau Civil Code, the only duty in relation to the seller listed as the effect of a purchase and sale contract is the duty to deliver the thing sold. Nevertheless, it does not mean that this is the only duty borne by the seller. There are secondary duties and accessory duties imposed under the principle of good faith (article 752, Macau Civil Code) such as the duty to issue invoice, the duty of warranty, the duty to inform, duty to protect, etc. Nevertheless, as a duty of performance corresponding to a right of demand of the counterparty, the duty to deliver the thing sold is in fact the most important one (other duties may be found in different types of purchase and sale[245]) existing under the purchase and sale contract in Macau Civil Code. In another word, after a purchase and sale contract is concluded, the purchaser may directly demand for the delivery with his identity of an owner, by the action of *re vindicatio*, or with the credit right corresponding to the duty of delivery.

In most cases, there is a time gap between the conclusion of the contract and the delivery of the thing sold. That is why the law has treated the delivery to be performed by the seller as a duty. Nevertheless, during the period when the contract is concluded and the thing is not delivered, the juridical position of seller in relation to the physical control of the thing is doubtful[246]. The doubt mainly lies in the point that whether such a control be qualified as possession or detention, and most concretely, whether we should presume that a *constitutum posessorium* occurred in this circumstance. From the wording of article 1188, where the regime of *constitutum posessorium* is regulated, it seems that if the seller has originally the possession of the thing at the moment the contract is concluded, the possession shall automatically pass to the purchaser by *constitutum posessorium*. Nevertheless, such an interpretation is not so sure if it is confronted to the concept of possession defined in article 1175 and the concept of detention illustrated in article 1177, both in the Macau Civil Code.

In relation to the content of this duty, article 872 (1) of the Macau Civil Code provides that the thing should be delivered in the condition it was found at the time the contract is concluded. In this sense, the seller is burdened with a duty of custody. In case the thing has deteriorated, the seller is presumed to have fault (article 788, Macau Civil Code). Only when the seller (in the position of a debtor to deliver and to custody the thing) proves that he has no fault, the rule of transfer of risk would apply.

The law (article 872, 2) also states clearly that the delivery should include all the integral parts, the pending fruits as well as the documents related to the thing or rights. Other questions such as the time and place of performance etc. are governed by the general rules of fulfillment. In case the seller fails to perform his duty of delivery, the purchaser may demand the delivery itself in an action of fulfillment and the subsequent action of specific performance. When the purchaser suffers any loss from the

---

[244] See Pires de Lima/Antunes Varela, Código Civil Anotado, Vol. II, 4ª Ed., Coimbra, 1997, pg. 51.

[245] In article 870, purchase and sale of future things, the seller is imposed with the duty to take necessary measures as to assure the purchaser acquire the thing sold.

[246] This doubt is manifested by Luís Manuel Teles de Menezes Leitão, Ibid., pg. 32, nota 42. And also by the author of this monograph, in the work "The polemics about the function and nature of possession as well as the *constitutum possessorium*", in Journal of Juridical Science, number 6, Faculty of Law of University of Macau, 2007.

non-fulfillment of this obligation, he has the right to demand damages, and the right to demand the resolution of the contract.

IV. Obligation of the purchaser

225. The main obligation of the purchaser is the obligation to pay the price (article 869, c). The obligation to pay the price is naturally a pecuniary obligation, subject to the special regime regulated in article 543 ff of the Macau Civil Code. This obligation of the purchaser corresponds to the credit right of the seller to demand for the payment. Although the law lists the payment of price as an effect of the purchase and sale contract, it does not mean that the determination of price is a condition of validity of this type of contract. According to article 273 of the Macau Civil Code, the object or content of a juridical transaction is not required to be determined at the beginning, it just need to be determinable. As far as the price of a purchase and sale contract is concerned, the law itself has established several criteria for its determination. According to article 873 of the Macau Civil Code, if the parties of a purchase and sale contract have said nothing about the price, the law shall first resort to the price that the seller normally takes at the date the contract is concluded. In case there is no such a price, the law shall resort to the market price at the moment of the contract and at the place in which the purchaser should pay. In case these criteria give no result, the price shall be determined by the court according to the principle of equity.

The time and place of payment of price is subject to specific rules. Article 875 of the Macau Civil Code determines that the price should be paid at the moment and at the place the delivery is done. If by provision of the parties or by usage, the price shall not be paid at the moment of delivery, the payment should then be paid at the domicile of the creditor at the moment of fulfillment (article 875, 2).

When the ownership of the thing is transferred to the purchaser and the delivery done, the seller cannot resolve the contract invoking the non-payment of price (876). This is so because the legislator wanted to avoid the instability about the ownership of the thing. From this rule, an argument *a contrario* shall demonstrate that the contract of purchase and sale can be resolved for non-payment of price in the following situations[247]: 1) the parties have agreement at this point; 2) the delivery of the thing is not yet done; 3) although the delivery may be done, the ownership is not transferred (this is only possible in the case of purchase and sale with a reserve of ownership).

Apart from the duty to pay the price, the purchaser is at least responsible for the expenses relating to the preparation and celebration of the contract (article 868, Macau Civil Code), as well as the tax related to the transfer of ownership. The parties can of course stipulate on the responsibility of the expenses and tax.

§ 3. TYPICAL SITUATIONS OF DEFECTIVE FULFILLMENT OF SELLER

I. General

226. The Macau Civil Code has regulated three typical situations which may cause the defective fulfillment of the seller. Of course, the typified regulation of these cases

[247] See Luís Manuel Teles de Menezes Leitão, Ibid., pg. 41.

does not exclude other possibilities of defective fulfillment according to the general rules of fulfillment and non-fulfillment, and the legal effects of each of them are different. The three situations particularly provided by the Macau Civil Code are: the sale of things of another's (article 882 ss, Macau Civil Code); the sale of things encumbered with burdens (article 896 ss, Macau Civil Code); the sale of defective things (article 905 ss, Macau Civil Code).

II. Sale of things of another's

227. As stated in the previous section, under Macau law, the sale of a thing causes the transfer of ownership (article 869, c.c.). Logically, only those who have a right may transfer it (*nemo plus iuris ad alium transfere potest, quam ipse habet*), and the one who has the right of ownership is of course the owner. Nevertheless, through delegation of power (the institution of representation and others), the one who conclude the contract of purchase and sale may be another person. Therefore, the critical point is the power to dispose.

According to article 882 of the Macau Civil Code, "*the sale of things of another's is null, as long as the seller wants legitimacy to do it*; *but he seller cannot oppose the nullity against the purchaser with good faith, just as the purchaser cannot oppose it against the seller with good faith.*"

In other words, if the seller is not the owner, and has no power to dispose at the moment the contract of purchase and sale is concluded, the contract is in principle null. For the application of article 882, several requirements are to be fulfilled. First of all, the thing sold must be specific things, otherwise, it does not correspond to the situation of sale of things of another's, but falls into the category of a generic obligation, and for such an obligation, the transfer of ownership only occurs at the moment of concentration (the process of determination of thing sold). Secondly, if the parties considered the things as future things (article 883, c.c.), or inserted in the contract a clause that the seller does not guarantee his legitimacy to sell (article 894, 2, c.c.), the regimen of sale of things of another's shall also not apply. Thirdly, if the seller sells the things in name of another person, but without power of representation, this should fall into the category of representation without power (article 261, c.c.)[248].

By the wording of the above cited provision, the legal effect of a sale of things of another's is nullity. Nevertheless, the nullity described in this article is very different from the general regimen of nullity provided in the General Part of the Macau Civil Code. In relation to the legitimacy to invoke the nullity, this specific rule of sale of things of another's prohibits the party with bad faith to invoke (oppose) the nullity against the party with good faith, unlike the general regimen of nullity that permits all interested parties to invoke. It was also believed that third parties, the real owner, as well as the court are also not allowed to invoke the nullity in this case[249]. Therefore, from the perspective of legitimacy of invocation, this so called nullity is more akin to annulment.

Being the sale declared null, the purchaser with good faith has the right to demand the restitution of price paid, even if the things sold had been lost, deteriorated or diminished with value for any other reason (article 884, c.c.).

In case the purchaser is with good faith, the seller has the obligation to acquire the

[248] More details see Luís Manuel Teles de Menezes Leitão, Ibid., pp. 105-106.
[249] Ibid., 110.

ownership of the things sold, in order to repair the nullity of the contract (article 888, c.c.). As long as the seller acquires the ownership of the things sold, the contract automatically turns valid, and the ownership transfers to the purchaser (article 886, c.c.).

III. Sale of things encumbered with burdens

228. According to article 896 of the Macau Civil Code, "*If the right transferred is subject to any burdens or limitations not mentioned in the contract which exceed the normal limits inherent to the rights of the same category, such a contract is annullable for mistake or fraud, as long as the legal requirements of annulment are verified in the case.*"

In case the contract is listing clearly all the burdens and limitations, or if the parties provided in the sense that the purchaser accepts the things sold with any burdens and limitations, there contract shall not subject to the effect of annulment according to the above cited provision.

When there is nothing said in the contract about the issue of burden or limitations, two situations must be distinguished: burdens or limitations inherent to this category of rights and burdens or limitations not inherent to this category of rights. The things sold being pledged judicially or encumbered with any type of real guarantees (retention, hypothec etc..), leased to a third party etc, are the typical cases that correspond to the sale of things encumbered with burdens. In those cases, the contract is annullable. There are however, limitations and burdens which are considered normal; such as the restrictions resulting from the relation of neighborhood, the burdens of legal servitudes etc.

The effect of this kind of sale is annulment, either remitting to mistake of fraud, which means that the requirements of mistake and fraud must be verified. Besides the right given to the purchaser to invoke annulment, the seller bears the obligation to remove the burdens and limitations, so that the contract can turn valid; the time to remove the burdens is to be fixed by the court under the request of the purchaser (article 898, c.c.).

In case the purchaser suffered any damages, he has the right to claim for indemnity (articles 900 -901 c.c.). In case it is shown that the purchaser would have purchased the things with burdens in a lower price even if they have known about the burdens, the purchaser shall have only the right to demand a reduction of price as well as the damages caused by the mistake or fraud (article 903, c.c.).

IV. Sale of defective things

229. The topic on sale of defective things has once been a highly polemic issue in Portuguese academic debate. For our discussion to start with some foundations, it will be better to have the legal provision (article 905, c.c.) transcript as the following: "*1. If the thing sold suffers a vice that devalues it or impeaches it from accomplishing the objective that it is supposed, or not having the qualities assured by the seller or necessary for the accomplishment for that objective, whenever it is not modified by the provisions of the following articles, what is provided in the previous section should be observed with due adjustment*."

Literally, it means that, if the thing sold is already defective at the moment the contract is concluded, we are facing a situation of mistake of the purchaser. Therefore, according to article 905 c.c, remitting to article 896 c.c. and article 240 c.c., the consequence is: the declaration of the purchaser is annullable.

On the contrary, "*if the thing, after being sold and before its delivery, becomes deteriorated, acquires vices or loses qualities, or the sale concerns a future thing or an undetermined thing of certain genera, the rules in relation to non-fulfillment of obligations are applicable*." (article 911, c.c.)

According to the above two provisions, a purchaser encountering a sale of things with defects may result in different treatments. If he purchased a thing with defect already at the moment of sale, the treatment shall be the annulment of contract. If he purchased a thing through the internet, and the seller delivered him a defective one, the treatment will be non-fulfillment of the seller. And the interests of the distinguishing these two treatments are the range of indemnity. In the first case, the indemnity only covers the so called negative interests. In the second case, the indemnity includes the so called positive interests. In view of this unequal treatment, many scholars tried to surpass it with interpretation of law, and considered that the two cases should be treated equally[250]. It should be noted that in the international or regional level, both the Vienna Convention on the International Sale of Goods (CISG) or the CE Directive 1999/44/CE have already adopted an equal treatment to the above cases[251]. However, Macau has not ratified the CISG, although China is a member of it. What makes the issue more sensitive is that, contractual dispute between Macau companies or citizens and companies or citizens in Mainland China are considered inter-regional issues, and they are not regulated by the internal law of China or Macau. There are already attempts in Mainland China to analyze the possibility of applying CISG in those cases[252], but parallel efforts are not yet seen in Macau. Actually, the attempt to harmonize the unequal treatment in case of sale of defective things has appeared in Portugal for years, and one of them[253] even propose a project to modify the Portuguese Civil Code in the issue. Yet the draftsmen of the Macau Civil Code decided to maintain the original formula of the 1966 Portuguese Civil Code.

Although the Macau Civil Code has not advanced to adopt a new model of the sale of defective things, it did spend some show its sensitiveness in the problem of protecting consumers. For example, in its article 909, the legislator has modified the rule about notification of defects, extending the time limit for notification from six months to one year, and in the case of the thing being immovable, the limit extends to five years. Similarly, for the guarantee of good functioning, the period of guarantee also extends from six month to one year (article 914, 2, c.c.).

---

[250] See João Baptista Machado, Acordo negocial e erro na venda de coisas defeituosas, in BMJ, n° 215, 1972, pp. 45 ss; Romano martinez, Cumprimento Defeituoso – Em Especial na Compra e Venda e na Empreitada, Almedina, 1994, pp. 52 ss, e 294ss.

[251] The introduction in this paragraph has taken as main reference the description of Luís Manuel Teles de Menezes Leitão, Ibid., pp 109-111.

[252] See Li Wei, Comments on CISG, Law Press, 2002.

[253] Romano martinez, Cumprimento Defeituoso – Em Especial na Compra e Venda e na Empreitada, Almedina, 1994, pp. 465 ss.

Chapter 5. Hire of Work and Services. Building Contracts

§ 1. GENERAL

230. The classical contract of *locatio conductio* in Roman law has provided the incipient for the later classification of lease of things *(locatio conductio rei)*, hire of services *(locatio conductio operarum)* and hire of work *(locatio conduction operis faciendo)* in the middle age[254]. This trinomial classification was later succeeded by modern legislations with different variants. The Spanish Civil Code maintained the trinomial classification of *locatio conductio*, providing in its artilce 1542 that "*a contract of lease may concern things, work or services*." Among the three, lease of work and lease of services are treated together in article 1544. In the Italian Civil Code, lease (article 1571) is separated from contract of work and services (article 1655). In the German Civil Code, lease (article 581), work (article 631) and services (article 611) are three contracts each with a separate legal regminen.

In the case of Macau Civil Code, lease of things is a uniform contract (articles 969 ff), while the "contracts of the hire of services" or simply "service contracts" is built as a common category to include mandate contract, deposit contract, work contract (article 1081) and other non-nominate contracts (1082) with certain characteristics. Since mandate contracts and deposit contracts are already dealt with in Chapter 1 and Chapter 2 of Part II, and lease contracts are to be dealt with in the next chapter, this chapter shall deal only with the "atypical" service contracts and work contracts.

The definition of service contract given by law (article 1080) is: "*a contract by which one of the parties is obliged to hand over to the other the result of his intellectual or manual work, with or without retribution*." When a service contract is not governed by special law, the provisions of mandate contract are applicable after necessary adjustment (article 1082)[255]. The traditional concept of hire of work, named as "*empreitatda*" in the Macau Civil Code, now became a subcategory of the hire of service.

Normally, an atypical service contract is described as a contract by which a party promises an activity as to work (creating an **obligation of means**) and hand over the result, while a contract of work is described as a contract by which the contractor promises a result (creating an **obligation of result**). Therefore, the contract between a medical doctor and his patient is a service contract, since he promises only to provide his professional service, and shall be remunerated after the consult is done whether the patient is cured or not. On the contrary, a contractor which promises to build a house is a contract of work, the price of the contract shall only be paid when the house is built and delivered to the owner of the work.

However, the wording of the definition for service contract is tricky, because the

---

[254] See Max Kaser (translation by Rolf Dannenbring), Roman Private Law, 4th Edition, 1984, University of South Africa, pg. 228; also Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000, pg. 300.

[255] This treatment, taking the mandate contract as the paramount of service contract, is not without criticism. See Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000, pg. 331.

legislator used the term "result", which easily leads an imprudent interpreter to imagine and believe, through a purely literal interpretation, that a service contract is a contract producing an obligation of result; while in reality, the majority of prudent interpreters working with Portuguese and Macau Civil law would read it as a contract producing an obligation of means[256]. The logic of this second and dominant interpretation lies in the point that when the law uses the expression "*hand over the result of his intellectual or manual work*", it does not mean that the debtor has to hand over the exact result that creditor has in his mind, but the result, whatever it is, after a diligent work of the debtor. In a service contract, "the result *in obligatio* can be consumed in the service provided, even though the purpose intended by the creditor is not achieved[257]."

After the above interpretation, an apparently strange situation may still occur: a work contract is a subcategory of service contract; if the obligation produced by a service contract is an obligation of means, how would its subcategory (supposed to have all the properties of its upper category adding some properties of its own) produces an obligation of means? In other words, if a work contract is also a type of service contract, the obligation produced by a work contract should at least be the type of obligation admitted by a service contract.

This situation is only possible if an obligation of means and obligations of result are not two types of obligations contradicting each other. A historical interpretation shows us that the idea of work contract in Portuguese Law was first derived from the service contract in its Ordinance period, with little influence of the Roman concept of *locatio-conductio*[258]. When a service contract is being restricted in its "objecto" – works, referring mainly to corporeal things – and made more demanding in the result of the "service" or activities done by the debtor, it became a works contract. In a literal sense, the word "result" can either interpreted being consumed by the activities or service of the debtor (therefore not necessarily the result intended by the creditor) in the case of atypical service contracts, or like it is in the case of a work contract, be interpreted as strictly corresponding to the result intended by the counter-party and agreed in the contract.

After all, it is true that all "results" are achieved through certain "means". Therefore, the provision in Macau Law defining the service contract, in principle, is not contradicting with its subcategory – the work contract. But still, the division line between an atypical service contract and a work contract is not all the way clear. For example, it is difficult to say whether a contract by which a dentist promises to fabricate a tooth and fix it to the patient is a contract of work or contract of service[259].

§ 2. WORK CONTRACTS (INCLUDING BUILDING CONTRACTS)

[256] See Jorge Leite, Direito do Trabalho, Vol. I, Serviços de Acção Social da U.C., Seriços de Texto, Coimbra, 1998, pp. 230-231; Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000, pg. 300.

[257] Jorge Leite, Direito do Trabalho, Vol. I, Serviços de Acção Social da U.C., Seriços de Texto, Coimbra, 1998, pp. 231.

[258] Pedro Romano Martinez, Ibid, p. 359.

[259] The above discussion is mainly inspired by Pedro Romano Martinez, Direito das Obrigações (Parte Especial) – Contratos – Compra e Venda, Locação, Empretada, Almedina, 2000, pg. 300.

231. Work contracts (empreitada) are defined in article 1133 of the Macau Civil Code: "*A work contract is a contract by which one of the parties is obliged to the other to accomplish certain work, against a price*."

A work contract is normally qualified as consensual, onerous, commutative and *synallagmatic*. The object of the contract, the work to be accomplished, refers solely to corporeal things[260]. Once a work contract is concluded, it generates a series of rights and duties to both the contractor (*empreiteiro*) and the owner of work (*dono de obra*).

The first and most important duty of the contractor is to execute the work according to the agreement and without defects (article 1134, Macau Civil Code). This execution should follow the principle of punctuality in the fulfillment of obligation. The principal duty to execute the work is still accompanied with the ancillary duties of cautiousness and safeness, as imposed by the principle of good faith. The second duty of the contractor is to provide the materials and utensils necessary for the execution of the work. In case there is an agreement about the quality of the materials to be used, the requirements of quality should be followed (article 1136, Macau Civil Code). The third duty is to deliver the work to the owner within the pre-determined time period, and to conserve the work before it is handed to the owner. Against the duties imposed, the contractor acquires of course the right to demand the price at the time and under the conditions stipulated by the contract. According to article 744 of the Macau Civil Code, for purpose of securing his credit resulted from the price or other compensation due to the non-fulfillment of the owner of the work, the contractor enjoys a right of retention against the work he created, be it a chattel or immovable.

The most important duty of the owner of the work is of course the duty to pay the price according to the agreement. When there is no agreement about the time of payment, it should be paid at the act of accepting the work (1137, Macau Civil Code). In some cases, the owner is also required to provide necessary cooperation, like giving the necessary instructions, making available the use of a piece of land or other relevant materials etc. Additionally, the owner has of course the duty to accept the work if it is done according to the agreement, otherwise he shall fall into delay. And if he discovers a defect in the work after his acceptance, he has duty to inform the contractor in a short period of 30 days (article 1146, Macau Civil Code), otherwise he may lose the rights to demand the removal of the defects, the reduction of the price and the indemnity (articles 1147, 1148, 1149, 1150, Macau Civil Code).

The fundamental rights of the owner are the rights to obtain the work and the rights to supervise the execution of the work.

The Macau Civil Code also regulates on the possibility of a sub-contract of work (article 1152), which is considered another contract dependant to the primitive contract of work.

Finally, it would be important to point out that a building contract is perfectly subsumable to the concept of work contract. In fact, since the idea of a work contract was first adopted in the Portuguese legal system till its succession in Macau Civil Code, the main area of application of this contract is always the work of construction, *maxime*, the construction of building and other infrastructures.

[260] Pedro Romano Martinez, Ibid, p. 361.

§ 3. LABOR CONTRACTS

232. In the Macau Civil Code, labor contract (contrato de trabalho) is also governed as a nominate contract (article 1079), although its regime is regulated by special legislation.

The concept of labor contract was constructed in the nineteenth century with reference to the model of *locatio conductio operarum*[261]; alias, the classical category which also gave rise to the service contract in modern law. In view of such a background, it is not difficult to understand why the definition of labor contract given by the Macau Civil Code is so similar with the definition of a service contract.

According to article 1079 of the Macau Civil Code, a labor contract "*is a contract by which one person is obliged to the other to provide, against retribution, his intellectual or manual activities under the authority and direction of the latter*."

Putting aside the fact that a labor contract is retributive by definition, whereas a service contract may be retributive or not, the only substantive difference between the two types of contract rests on the existence of the "authority and direction" for the employer. The expression "authority and direction" implies a **situation of juridical subordination**[262], reflecting in the rights of the employer to give orders and instructions to the employee (in correspondence to the duty of the employee to obey) in order to control the way how the work is done. This situation of subordination is of course only related to the work and exists in the working place and working hour. An employee failing to obey the orders of the employer given within the limits of subordination is subject to sanctions imposed by law.

At the moment, the most important source of law regulating the labor relations in Macau is the D.L. 24/89/M, with a heading of "Regime Jurídico das Relações de Trabalho" [263].

---

[261] See Jorge Leite, Direito do Trabalho, Vol. I, Serviços de Acção Social da U.C., Seriços de Texto, Coimbra, 1998, p. 85.

[262] See Jorge Leite, Direito do Trabalho, Vol. I, Serviços de Acção Social da U.C., Seriços de Texto, Coimbra, 1998, pp. 220-225.

[263] For a comprehensive introduction of this regime, see José Carlos Bento da Silva/Miguel P. A. Quental, Manual de Formação de Direito do Trabalho em Macau, Centro de Formação Jurídica e Judiciária, 2006, pp. 33-45; also Augusto Teixeira Garcia, Lições de Direito do Trabalho, versão policopiada, Faculdade de Direito da Universidade de Macau, 1992/1993; José Pinheiro Torres, Do Contrato de Trabalho a Termo na Lei Portuguesa e de Macau, in BFDUM, no. 4, Faculdade de Direito da Universidade de Macau, 1997, pp.61 ss; José Pinheiro Torres, Notas dispersas sobre o regime jurídico das relações laborais – Oportunidade e necessidade da sua remodelação, in BFDUM, no. 7, Faculdade de Direito da Universidade de Macau, 1999, pp.129 ss.

Chapter 6. Lease[264]

§ 1. GENERAL

233. The "*nomen iuris*" in Macau Civil Code (article 969) for a contract of lease is the Portuguese term "*locação*". The term "*locação*" obviously indicates its Roman law origin, *locatio-condutio*. While *locatio-conductio* in Roman law covered the hire of work, hire of service and the hire of things, the contract of lease regulated by the Macau Civil Code deals exclusively with the case of hire of things (*locatio conductio rei).* The Portuguese predecessor of Macau Civil Code had eliminated the suffix *conductio rei* because the term "locação" (corresponding to *locatio*) had already been reserved for the hire of things, at the moment, no other nominate contract deserved the name "locação"[265].

According to article 969 of the Macau Civil Code, "*lease is a contract by which one of the parties is obliged to provide to the other the temporary enjoyment of a thing, against retribution.*"

The flexible legal structure of lease, which leads to the dissociation of the right of enjoyment from the ownership, has turned it one of those contracts most frequently used in daily life, in very sensitive sectors (like housing), reason why the contract of lease is always deemed a legal tool with great economic and social importance [266]. Among all nominate contracts regulated in the Macau Civil Code, the legal regimen of lease is perhaps the one in most detail. It comprises a general part with 60 articles (969 – 1028) and a specific part on immovable lease, with 27 articles (1029-1056). The general part deals with the topics of rights and obligations of the parties, the object of lease, the rent, the transfer of contractual position, sub-lease, and the termination of lease contract; while the specific part deals with the special rules on termination of immovable lease, the immovable lease for residential use, immovable lease for commercial use, immovable lease for use of liberal professions, and rural immovable lease.

Although the notion of lease given by the Macau Civil Code may include chattels and immovable, the centre of gravity of this legal regimen is obviously on immovable lease. Originally, like any other type of contracts, the contract of immovable lease shall follow the principle of private autonomy, granting the contractual parties all the possible freedom a contract may grant. Nevertheless, after the First World War, European countries affected by the war had been facing great social crisis. Many families had lost their home and the inflations were high. Under such a context, the Governments of those countries had decided to limit the contractual freedom on immovable lease contracts with a purpose to stabilize the housing conditions of those who lost their home. The restrictive measures on contract of lease taken by European countries after war generally include the automatic renewal and imperative renewal of lease contracts, the blockage of rent and control on rent adjustment, the privileges given to lessee about the burdens of the leased

[264] This chapter, particularly sections 3 to 6, is finished with the assistance of Ng Lai Chan.

[265] Jorge Henrique da Cruz Pinto Furtado, Manual do Arrendamento Urbano, 3ª Ed., Almedina, 2001, pp. 13 ss.

[266] See Malarie/Aynès, Droit Civil. Les Contrats Spéciaux, 6ª Ed., Paris, 1992, p. 23; Cfr. Pedro Romano Martinez, Ibid, p. 145.

object[267]. In fact, it is difficult to justify why an issue probably demanding a constitutional protection should be configured as a burden lying on the shoulders of some citizens: those who own a house and decided to hire them out. If the Government wants to provide housing for every citizen, it should be the Government itself that provide policies and money to build public housing.

The restrictive nature of lease contract is inherited by the Portuguese Civil Code of 1966, and to some extent passed to the Macau Civil Code of 1999 (for example, the provisions stipulating the automatic renewal of contract, the control of rent adjustment etc.).

The general character of this monograph shall not permit us to do a thorough discussion on every aspect of the lease contract in Macau. Therefore, the following sections shall only focus on certain general rules of lease contracts provided by the Macau Civil Code; whilst the various types of immovable lease are only sporadically mentioned or discussed in our general exposition, and other new forms of commercial lease shall be left aside.

§ 2. FORM, TERM AND RIGHTS TO LEASE AN OBJECT

234. The formal requirement of a contract determines its validity (article 212, Macau Civil Code). As far as lease contract is concerned, the general principle of freedom of form shall apply. While for the case of immovable lease, the law expressly provided that such a contract is required to be concluded in writing (article 1032,1, Macau Civil Code). However, even if an immovable lease contract is concluded without observing such a form, one party may invoke the existence of the contract through other evidence, as long as the lack of form is imputable to the other party (Art. 1032, 2, Macau Civil Code).

The maximum contract duration of lease is 30 years; any lease stipulating a duration beyond 30 years shall be reduced to one with the maximum duration (article 973, Macau Civil Code). Lease with a term less than 6 years is classified as a sort of general administrative act of the lessor upon one's property. If the term has not been fixed in the contract, a supplementary duration shall be applied. In case of a lease of chattels, the supplementary duration shall be equal to the time unit fixed for the retribution. In case of immovable lease, the supplementary duration is one year (article 974, Macau Civil Code).

By definition, a lease contract only requires the "*lessor"* to provide the temporary enjoyment to the lessee (article 969, Macau Civil Code); therefore, the validity of a lease contract does not presuppose the lessor to have the right of ownership. Those who are in the condition to provide a temporary enjoyment to others are legitimate to conclude a lease. Therefore, the lessor could either be the owner, the holder of a right of usufruct, the one with legitimate possession or even detention (the case of a borrower). In case the enjoyment of the lessee is affected owing to the defects of right of the lessor, the latter falls into non-fulfillment, but the contract of lease is not null since the moment it was

[267] These measures, generally restrictive against the lessor and protective towards the lessee, are together termed as "*legislação vinculística*" in the area of lease contract. For further discussion on this issue, see Jorge Henrique da Cruz Pinto Furtado, Manual do Arrendamento Urbano, 3ª Ed., Almedina, 2001, pp. 147 ss.

concluded (article 980, 2, Macau Civil Code).

§ 3. RIGHTS AND OBLIGATIONS RESULTING FROM A CONTRACT OF LEASE

235. As far as the rights of the lessor are concerned, the most important one is for sure the right to demand the payment of rent. On the contrary, the main obligations of the lessor are to deliver the leased object to the lessee, as well as to assure that the lessee can enjoy the thing (object) according to the per-determined purpose (Art. 977 c.c.). The burdens arising from the leased object shall be undertaken by the lessor unless there is a special law regulating the contrary or the parties expressly provide otherwise. In the latter situation, the agreement of the parties shall only be valid when it is done in writing with the signatures of both of them and a list of all the burdens involved (Art.s 984-985 c.c.).

The responsibility of doing regular maintenance to the leased premises is on the lessor. In case the lessor fails to performance this obligation, the lessee is entitled to substitute him to proceed on the necessary work and consequently, the lessee will have the right of reimbursement (Arts. 989-992 c.c.).

The first right of the lessee is to demand the delivery of the leased premises and the right to enjoy it (article 977, *a contrario*). Additionally, he is also entitled to make urgent repair (article 990, Macau Civil Code), to defend the possession of the premises (article 982, Macau Civil Code), to withdrawn the improvements done when the contract has ended (article 1228, Macau Civil Code), to demand the lessor to do necessary repair and improvements (article 989, Macau Civil Code), to demand for the reimbursement resulting from an urgent repair (article 992, Macau Civil Code), and the special potestative right to revoke the contract before its term (article 1044).

As far as the obligations of the lessee is concerned, the law (article 983, Macau Civil Code) has stated that the lessee is particularly obliged to: a) pay the rent on time; b) permit the lessor to examine the lease; c) use the leased premises properly and only use it for the purpose stipulated in the contract; d) allow any execution of works relating to the emergent repair of the premises or ordered by the public authority; e) not to transfer or sublease the premises to any other person without the consent of the lessor excepting the case of commercial lease of immovable or lease of immovable for exercising free-lance profession; f) in case of sublease, not to receive from the sub-lessee a rent exceeding 20% of the original rent fixed in the contract; g) when the contract is terminated, return to the lessor the leased premises as it was delivered; f) a delay on restituting the premises shall give rise to an obligation of compensation owed to the lessor (Art.s 983, 1025, 1027 c.c.).

§ 4. RENT

236. The payment of rent should be done at the first day when the contract turns effective (article 993,1, c.c.), although the parties may change this rule by agreement. The place for fulfillment of a rent payment is an exception to the general rule. The law (article 993, 1, c.c.) determines that it shall be paid at the lessee's domicile unless the parties expressly provide otherwise. In general, the anticipated payment of rent shall not exceed the amount of one month of rent; in exceptional case, the anticipation of payment

may go up to an amount of two months of rent (Art. 994 c.c.). Delayed rental payments might cause the dissolution of the contract and indemnity. If the lessee does not pay the rent on time, the lessor has the right to receive an indemnity with an amount of half of the delayed rental payment; nevertheless, if the lessor chooses to dissolve the contract, he shall lose the right to demand damages. The indemnity will be double once the delay is over 30 days. However, either the right to demand damages or and demand the resolution of contract shall cease to work as long as the lessee pays the rent within 8 days of the delay. If the lessee is not paying one month of rent due, the lessor has the right to refuse the payment of posterior performance; as a result, the lack of payment shall enlarge and cover all rents due. The right to demand the resolution of contract shall prescribe once the lessee has made a judicial deposit of the delayed rental payment as well as the indemnity due within the time limit granted to him for defense (Art. 1019 c.c.).

§ 5. TRANSFER AND SUBLEASE

237. A transfer of contractual position is distinguished from a sub-lease.

In the first case, through an agreement, the transferor passes to the acquirer all his rights and duties arising from a lease contract, in other words, he gives up his position as a contractual party. The transfer can be done by a lessor or a lessee, according to the legal regimen of transfer of contractual position. The rule of "*emptio non tollit locatum*" is consecrated in article 1004 of the Macau Civil Code; therefore, one who acquires the right of ownership of a premises leased to somebody else automatically becomes the lessor. It is not necessary for the new owner of the premises to conclude a new contract with the lessee.

In the second case, the lessee remains a contractual party of the original contract; he is still the only one responsible for the payment of rent and other obligations imposed by law and by the contract. A sub-lease occurs when someone conclude with another a contract of lease based on his rights of lessee acquired through a previously concluded contract of lease. Therefore, a sub-lease is also a contract of lease; nevertheless, the lessor of the sub-lease is the lessee of another pre-existing lease contract, and the sub-lease depends on the rights acquired by the sublessor from that previous contract. In order for a sub-lease to be valid, the authorization of the lessor is required (article 1008, Macau Civil Code). The sub-lessor is not allowed to stipulate a rent exceeding 20% of the rent he is paying to the lessor of the previously concluded lease contract, unless he has reached an agreement with the latter on this matter (article 1010, Macau Civil Code).

§ 6. TERMINATION OF LEASE

238. The parties can terminate the lease at any time by mutual agreement (Art. 1016 c.c.). Any of the parties can dissolve the lease on the ground that the other party does not fulfill his obligations. If it is the lessor who would like to dissolve the contract invoking the non-fulfillment of the lessee, the dissolution of contract must be declared by a judicial decision (article 1017, Macau Civil Code).

A lease contract with fixed duration can be denounced by either party at its term. Nevertheless, if a lease contract is not denounced according to the formalities provided by law, it is automatically renewed for a duration equals to the original one. The party intending to denounce a lease contract should give notice to the other party in advance. The minimum time required for the advancement of notice differs according to the duration of the lease. In a contract of immovable lease, the lessor is not allowed to denounce the contract before a term of two years (Arts. 1038-1039 c.c.)[268]. On the contrary, the law permits the lessee of a residential lease to revoke the lease unilaterally at anytime during the term of the contract. In case of unilateral revocation, the lessee has to notify the lessor 90 days in advance unless a shorter period is provided in the contract; meanwhile, he has to pay compensate the lessor with an amount equivalent to one month of rent (Art. 1044 c.c.).

Moreover, a lease contract shall also terminate for the loss of the leased premises or because of expropriation for public purpose (Art.s 1022, 1035 c.c.)

[268] The calculation of this period of two years and the time required for the notice in advance is a highly polemic issue in Macau courts. See Proc. No. 63/2005 and 52/2007, both of the Court of Second Instance of Macau. For a critical analysis of these two decisions, see Ng Lai Chan, On the Rights and Duties of the Tenant, master thesis, Faculty of Law, University of Macau, 2008, pp 41 ss.

Chapter 7. Compromise Settlements

239. According to article 1172 (1) of the Macau Civil Code, "*a compromise settlement is a contract by which the parties prevent or terminate a dispute through reciprocal concessions*."

The concessions made by the parties may involve the establishment, modification or extinguishment of rights different from the ones in dispute (article 1172, 2).

The parties cannot compromise on the rights that they cannot dispose, nor the questions regarding illegal juridical transactions.

The compromise can be made judicially or extra-judicially. In the first case, the formal requirement is provided by article 242 of the Civil Procedure Code of Macau. In the second case, if the compromise settlement produces an effect to which a public deed is required, the settlement itself shall be done in a public deed. In other cases, the form of a written document is sufficient for a compromise settlement (article 1174).

Chapter 8. Suretyship (Fiança)

§ 1. NOTION AND CHARACTERISTICS

240. A suretyship (fiança) is a personal guarantee by which the surety (fiador) guarantees the satisfaction of the credit, being personally obliged towards the creditor (article 623). A suretyship is ancillary or dependant to a principal obligation. In Macau Law, suretyshipis is treated as a personal guarantee of obligation, located in a specific Chapter dedicated to Specific Guarantees of Obligations. In the formal system of Macau Civil Code, it does not even appear within the category of nominate contract.

The qualification of suretyship as a guarantee is in fact ambiguous from the perspective of contract law, because it is a qualification according to the function and not the juridical nature of the regime. The problem of juridical nature is only indirectly reflected by the article 624 of the Macau Civil Code, a rule providing on the requirements of its establishment, which states that "*the intent to provide surtyship should be expressly declared by the form required for the principal obligation.*"

Here, it seems that Macau Civil Code does not pronounce directly whether a suretyship has a contractual nature or appears in the form of a unilateral juridical transaction. However, this doubt can be soon clarified by the fact that a unilateral juridical transaction is governed by the principle of *numerus clausus (*article 451). It is therefore generally accepted that a suretyship always results from a contract[269], be it a contract between the surety and the creditor or a contract between the surety and the debtor. Since there are chances that a principal obligation be established without special formal requirement (freedom of form), being a suretyship ancillary to the principal and obliged by the same formal requirement, its form may also be free. Therefore, it is totally possible that a suretyship be established through verbal agreement. When the suretyship is established with a contract between the surety and the creditor, the intent of the debtor can be ignored. In other words, the suretyship can be established even the debtor has no knowledge of it or opposes it (article 624, 2, Macau Civil Code).

237. Being an **ancillary obligation** is the most important characteristic of a suretyship. This means that the obligation of the surety is dependant to the principal obligation. Such a characteristic is reflected in numerous aspects: a) in relation to the formal requirement, the form of the suretyship follows that of the principal obligation; b) in relation to the ambit or dimension of the obligation, the surety obligation cannot go beyond the principal obligation, or be established in with more onerous conditions (article

[269] Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, pg. 484-485; This opinion is basically shared by Luís Manuel Teles de Menezes Leitão, Direito das Obrigações, Vol. II, Almedina, 2002, pg. 320; and Manuel Trigo, Lições Preliminares de Direito das Obrigações, versão policopiada, Faculdade de Direito da Universidade de Macau, 1997/1998, pg. 310.

627, 1, Macau Civil Code); c) in relation to the validity of the transaction, in principle, being the principal obligation invalid, the surety obligation is also invalid (article 628); d) the extinguishment of the principal obligation results in the extinguishment of the surety obligation.

Apart from being an ancillary obligation, a suretyship is alo a subsidiary obligation, because the surety is only obliged to fulfill in case the debtor fails to do so. The surety is legitimate to refuse the fulfillment whenever the creditor whose credit is not satisfied has not investigated all the goods of the debtor (article 634, Macau Civil Code).

With the establishment of a suretyship, a triangular relation shall appear. It is therefore important to analyze the relations surety- creditor and surety-debtor.

§ 2. RELATIONS BETWEEN CREDITOR AND SURETY

241. In case the debtor fails to fulfill, the creditor has the right to demand the surety in the extent of the suretyship (the maximum of it shall only coincide with the principal obligation). Confronted with the demand, the surety could immediately invoke the so-called "benefits of excursion", to refuse the fulfillment if the creditor has not previously demanded the debtor for fulfillment and executed all his properties (article 634, 1, Macau Civil Code).

Even if the properties of the debtor have been previously executed and the credit is not satisfied, the surety can still refuse to fulfill if the non-satisfaction of the credit is due to the fault of the creditor himself (article 634, 2, Macau Civil Code).

Towards the same obligation, if there is other real guarantee established by third parties earlier then or at the same time of the suretyship, the surety has the right to demand the creditor to execute the real guarantee first.

The rule conferring the "benefits of excursion" is not imperative by nature; therefore, the parties may exclue its application through agreement. Moreover, even the surety has the benefits, the creditor is not prohibited to demand him in an action. In this case, the surety has the right to demand also the debtor to defend the action or to bear the responsibility (article 637,1, Macau Civil Code). Nevertheless, if the debtor is not demanded to defend the action, the law presumes that the surety has given up his benefits of excursion, unless he has declared the contrary in the procedure (article 637, 2, Macau Civil Code). Of course, the surety may also renounce his benefits expressly by a declaration.

Apart from the interaction between creditor and surety when the debtor fails to fulfill, the means of defense are also an important factor to affect their relation. According to law, the surety may raise against the creditor all means of defense which belong to the principal debtor, such as the nullity or prescription of the debt, unless for those defenses which are purely personal (such as incapacity of the debtor). The renouncement of any

defense by the debtor shall not produce any effect to the surety.

§ 3. RELATIONS BETWEEN THE DEBTOR AND THE SURETY

242. The most important relation between the debtor and surety is the sub-rogation of the surety to the rights of the creditor, in terms of article 640, Macau Civil Code. In order to realize his right of sub-rogation, the surety who fulfilled the debt should inform the debtor, so that the latter will not do the performance again by mistake (article 641, 1, Macau Civil Code). But even if the surety fails to inform the debtor and lost his right or sub-rogation, he may claim against the debtor through unjust enrichment (article 641,2, Macau Civil Code). On the contrary, in case it is the debtor who made the performance, he should also inform the surety, otherwise he is responsible for the loss of the latter (article 642, Macau Civil Code).

The debtor maintains all the defenses he had towards the creditor, unless any of those defenses are not known to the surety for a non-justified reason (article 643). This rule is in fact the concretization of the principle of good faith.

The surety may request to release the suretyship or to demand the debtor for guarantee if the risk has notoriously increased after the suretyship is given; or if the creditor has obtained a executable sentence against the surety; or after the establishment of suretyship, certain facts make the debtor or owner of the thing given to guarantee the debt cannot be sued in Macau; the verification of a term or condition previously established by the debtor etc. (article 644, Macau Civil Code).

§ 4. CO-SURETYSHIP AND EXTINGUISHMENT OF SURETYSHIP

243. If several persons give surety to the same debt, each of them is responsible for the complete debt in front of the creditor, unless there is an agreement distributing their responsibility. The one who acquits the debt has recourse against the other sureties.

A suretyship extinguishes when the principal debt extinguishes. In case the principle debt has a term, once it is due, the surety who has the benefits of excursion may demand the creditor to exercise his right against debtor within a period of two month after the debt is due. If the creditor fails to do so, the suretyship also loses its effect. Similarly, if the principal debt depends on interpellation, the surety may also demand the creditor to do the interpellation, under the penalty of the creditor losing the suretyship.

Chapter 9. Pledges

244. Like surteship, pledge (*penhor*) is regulated in the Macau Civil Code as a form of guarantee. Under the context of distinguishing rights *in rem* and rights *in personam*, the rights created by pledge is classified as a real right of guarantee. The contractual aspect is rarely discussed in a work dealing with pledge, or even in the legal regime of pledge in Macau. This angle of observation of the legislator is shown clearly by the notion given to pledge by our law (article 662, 1): "*A pledge grants to the creditor the right to the satisfaction of his credit, as well as interest, if any, with priority over other creditors, for the value of a certain movable good or credits or other rights, belonging to the debtor or to a third party, provided that they are not susceptible of being mortgaged*". Well, instead of telling what a pledge is, the law explains what kind of right a pledge produces and how this right behaves.

Macau Law has regulated on three types of pledge, namely: pledge of things (articles 665 ff, Macau Civil Code), pledge of rights (articles 675 ff, Macau Civil Code), and the pledge of commercial enterprise (articles 144 ff, Macau Commercial Code).

It is nevertheless important to recall that in early law, pledge (*pignus*) was mainly seen as the forth type of real contracts[270]. And in the Code of Seabra of 1867, in its article 858, it was provided that "*the contract of pledge only produces effect between the parties by delivery*" of the thing.

The centre of gravity of Portuguese law (later developed as Macau Law) in defining a pledge has clearly shown us that the legislator had deliberately diluted the contractual aspect of pledge, as well as its requirement of "delivery", which used to made it a real contract *quoad constitutionem*. The general notion of pledge given by law carefully avoided the word contract and the requirement of delivery[271]. In the specific regime of the three cases of pledge, only pledge of thing specifies the "delivery of thing" as a requirement. However, this attitude of the legislator in formulating the notions of pledge should not be read as a sign to give up the contractual nature of pledge or its "real" character. It just showed the adhesion of the legislator to the development of the concept of real right of guarantee flourishing in the twentieth century. By doing so, the legislator has avoided pronouncing directly on whether a pledge is a real contract.

Since the promulgation of the 1966 Portuguese Civil Code, the contractual aspect of pledge is seen as something automatically implied. In legal writings, scholars continuously recognize pledge as a contract[272], and *in maxime*, as a real contract *quoad constitutionem*. Of course, this second quality shall only be valid (if the concept of real contract is still valid) in the case of pledge of things. In fact, it is in the contract of pledge that the "real" factor (delivery of thing) performs a concrete institutional function of publicity and security.

---

[270] See Reinhard Zimmermann, The Law of Obligations – Roman Foundations of the Civilian Tradition, Oxford University Press, 1990, p. 220; Tong Io Cheng, A Discussion on Real Contract, in Journal of Macau Studies, number 28, Macau Foundation, 2005, pg. 18-25

[271] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, p. 524.

[272] See Antunes Varela, Das Obrigações em Geral, Vol. II, 6ª Ed., Almedina, 1995, p. 525; Carlos Mota Pinto, Teoria Geral do Direito Civil, 4ª Ed. Por António Pinto Monteiro e Paulo Mota Pinto, 2005, Coimbra Editora, p. 396.

A contract of pledge of things does not require any specific form other than the delivery of the thing (article 665, Macau Civil Code). A pledge of right takes the form required for the transfer of the rights at stake (article 675, Macau Civil Code). A pledge of commercial enterprise should be done in a document containing the following elements: a) the identity of the entrepreneur and the creditor; b) identity of the enterprise or branch over which it is made; c)amount of the debt or elements that allow its determination; d) place and date of payment. Failing to indicate the above elements shall cause the pledge null (article 146, Macau Commercial Code).

Chapter 10. Loan

§ 1. General

245. In the Macau Civil Code, there are two types of contracts denoted with the English term "loan" at the same time. One is the *mutuum* (mútuo, in Portuguese), denoted in English as loan for consumption; and the other is *commodatum* (comodato, in Portuguese), denoted in English as loan for use. Both the *mutuum* and the *commodatum* are traditionally (or even today, by some scholars) seen as real contracts *quoad constitutionem*. As real contracts, the delivery of the thing is a condition of validity for both of them; in other words, without the delivery of things, there will be no contract of *commodatum* and *mutuum*. This conclusion has lead to a paradox in doctrinal debate for a long time, because it is difficult to justify why the consensus of the parties to lend and borrow a thing, for example, should not be entertained by law[273]. As a result of this discussion, a *mutuum* or *commodatum* concluded just by declaration of the parties without proceeding to the delivery of thing is sometimes qualified as a non-nominate contract and sometimes qualified as a promissory or preliminary contract.

§ 2. *Commodatum*

246. "*Commodatum* is a gratuitous contract by which one of the parties delivers certain movable or immovable thing to the other, for his use, while the latter bears an obligation to restitute the thing." (article 1057, Macau Civil Code).

The gratuitousness is a property of *commodatum*. In case retribution is stipulated in exchange of the use, the contract at stake shall more probably be qualified as a lease of thing and not a *commodatum*. The delivery of thing to the borrower is for him to use it, but not for his fruition. In case the purpose of usage of the thing cannot be determined from the contract, the borrower can use it for any lawful purpose (article 1059, Macau Civil Code). A *commodatum* is sometimes qualified as a imperfect bilateral contract, because it creates obligations both for the lender and borrower, yet the obligations of the two parties are not interdependent or *synallagmatic*[274].

Since the thing is delivered for use of the borrower due to the generosity of the lender, the lender has no responsibility even if the thing delivered is defective or the right over the thing being restricted (article 1062, Macau Civil Code). Nevertheless, the lender should not do anything to obstruct or restrict the use of the borrower, though he has no duty to assure the borrower the use of thing. Although the physical control of the thing by the borrower is not seen as a possession but a detention instead, in case the right to use the thing is deprived or obstructed (even if the deprivation or obstruction comes from the lender himself), the borrower may invoke the defense granted for the protection of possession (article 1061, Macau Civil Code).

---

[273] See Tong Io Cheng, A Discussion on Real Contract, in Journal of Macau Studies, number 28, Macau Foundation, 2005, pg. 18-25.

[274] See Pires de Lima, Antunes Varela, Código Civil Anotado, Vol. II, 4ª Edição, p. 742.

In other jurisdictions, it was discussed in the doctrines that if the ownership of the thing is transferred to a third party during the term of the *commodatum*, whether this third party may demand the thing from the borrower immediately or not[275]. Judging from the obligatory nature of the relation created by this contract, it is believed that the new acquirer may demand the restitution of the thing from the borrower. For us, this right of the borrower to restitute the thing prevails or not mainly depends on one thing: the doctrine of notice. Therefore, if the new acquirer knew the existence of the contract at the moment or before his acquisition, the borrower may use the same defense he has to oppose the original lender. The legal base for him to raise this defense is still article 1061 of the Macau Civil Code, *commodatum ante usum completum non revocatur.* In case he did not know the existence of the contract, the borrower can do nothing but to hand over the thing. In fact, the whole logic of distinguishing rights *in rem* and *in personam* can be reduced to the said doctrine of notice.

The obligations of the borrowers include: a) to provide custody and conserve the thing borrowed; b) provide the thing for the lender to do inspection; c) not to apply the thing for a purpose diverse to the one originally fixed; d) use it prudently; e) tolerate the improvements that the lender intends to do on the thing; f) not provide the thing for use of a third person, unless the lender so authorized; g)inform the lender immediately whenever he knows that there is a defect in the thing or any risk threatening the thing, or a third party invoking a right against the thing, as long as the lender does not know those facts; h)restitute the thing at the end of the contract (article 1163,Macau Civil Code).

In relation to the improvements of the thing, the borrower is equivalent to a possessor with bad faith (article 1066, Macau Civil Code).

§ 3. *Mutuum*

247. "*Mutuum* is a contract by which one of the parties lends to the other money or fungible things, being the other obliged to restitute something else of the same genera and same quality." (article 1070, Macau Civil Code).

The object of a *mutuum* is money or fungible things. For us, the most important characteristic of this contract is that the ownership and possession of the things passes to the borrower by delivery. This treatment totally avoided the problem of risk. "If the borrower loses the money or the goods received, this is entirely his own affair and does not have any effect on his obligatio arising from the mutuum.[276]"

A *mutuum* may be onerous or gratuitous. When it is onerous, the retribution of the loan is the interest. In case of doubt, a *mutuum* is presumed to be onerous (article 1072, Macau Civil Code).

In a *mutuum*, if the interest stipulated by the party is three times higher than the legal rate, it is considered as a *laesio* (*usurário*) contract, which is annullable according to article 275 of the Macau Civil Code.

If the term of contract is not fixed in an onerous *mutuum*, any of the parties has the right to terminate the contract, giving a notice of 30 days in advance (article 1075, 2).

---

[275] See Shi Shangkuan, Obligations in Special, CUPL Press, 2000 (reprint), p. 267.

[276] Reinhard Zimmermann, The Law of Obligations – Roman Foundations of the Civilian Tradition, Oxford University Press, 1990, p. 154.

Chapter 11. Government Contracts

§ 1. NOTION OF ADMINISTRATIVE CONTRACT

248. The notion of administrative contract[277] is given by article 165 (1) of the Código de Procedimento Administrativo de Macau as the following: "*the agreement of intents by which an administrative juristic relation is established, modified or extinguished.*"

From this definition, two elements with contrasting implications may be extracted: agreement of intent and administrative juristic relation. The element "agreement of intent" brings in the message that an administrative contract is a contract, formed with the declarations of will from the Government on one hand and an individual on the other hand. The element "administrative juristic relation" shows us that this contract is not merely dealing with private issues among individuals, but creating or modifying relations that has to do with the public authority; the Government acts in a sovereign position, vested with imperative powers to accomplish public interest. Therefore, administrative contracts are regulated by administrative law instead of private law.

It is nevertheless difficult to distinguish between a private contract concluded by the Government and a private party and an administrative contract. In the first case, the Government acts as if it is a private party; the prerogatives of public law are not used, so that the other party is not imposed. For this type of contracts, the regulations of contract law in general are applicable. In administrative contracts, the public interest prevails against the agreement of the parties; the Government is vested with unilateral powers that go far beyond the private autonomy. In practice, the search of the so-called exorbitant clauses - which give the public administration powers to supervise and direct the execution of the contract as well as the powers to cancel the contract unilaterally - is normally used to indentify an administrative contract.

§ 2. THE PUBLIC ELEMENT OF ADMINISTRATIVE CONTRACTS

249. The administrative contracts are characterized by its public elements, which find they basis on public interest, and manifest through the juridical supremacy position of the Government in the contract. Such a supremacy position of the Government makes the two parties in the contract juristically unequal.

In order to have a better understanding of the administrative contracts, it is important to clarify concretely what are the powers of authority that makes an administrative contract a contract of public law. For this purpose, scholars have developed several typical powers of authority characterizing an administrative contract that can easily find legal support in the positive law (the provisions of Código de Procedimento

[277] For a comprehensive discussion of this topic directly referring to Macau Law, see José Eduardo Figueiredo Dias, Manual de Formação de Direito Administrativo de Macau, Centro de Formação Jurídica e Judiciária, 2006.

Administrativo de Macau)[278]. They are namely:

a) The power of modifying unilaterally the content of performance – in concrete, this is the power for the Government to adapt unilaterally the content of a contract according to the change of public interests. Therefore, in administrative contracts with a long execution period, this power is of particular importance, since the longer the execution period is, the greater the possibility of fluctuation in public interests. This power of unilateral modification of the content of performance is normally done through administrative act, and is not without price. When the public party modifies the contract terms unilaterally, it has also the duty to re-establish the financial equilibrium of the contract and compensate the damages caused. This philosophy is seen in article 167 a) and c) of the CPAM.
b) The power to direct the execution of contract – this power is seen in article 167 b) of the CPAM, which reflects in the possibility of the public party to give orders, directives and binding instructions to the private party in the execution of the performance. The exercise of this power is normally seen in contracts where the private party provides services or work to the Government. In case the order or instructions of the Government are not executed, the remedy is to raise an action in the administrative court in terms of article 113 of the CPACM (Código de Processo Administrativo Contencioso de Macau).
c) The power to extinguish the contract unilaterally – this power is seen in article 167 c) of the CPAM. The exercise of this power must be based on public interest, and the public party exercising this power must duly justify his act (because it is exercised through an administrative act). The Government extinguishing an administrative contract is required to compensate the counter party the damages caused and the *lucrum cessans*.
d) The power of supervising the execution of the contract – the power of supervising the execution of the contract is seen in article 167 d) of the CPAM, the supervision may occur in the technical aspect, the financial aspect or the juridical aspect.
e) The power of applying sanctions in case of non-fulfillment – this power is provided in article 167 e), but as a requirement of its execution, it is necessary that the power to apply sanction be stipulated in the contract. Therefore, when the private party fails to fulfill the contract (definitive non-fulfillment, delay or defective fulfillment), the Government may apply a fine directly, without claiming it to the court.

§ 3. FUNDAMENTAL TYPES OF ADMINISTRATIVE CONTRACTS

250. The CPAM has typified a series of administrative contracts frequently used in this region, yet this list is not a closed list; the law does not exclude the possibility of the Government concluding other types of administrative contracts. On the other hand, the

[278] The following description has mainly taken as reference the work of José Eduardo Figueiredo Dias, Ibid, pp. 318 ss.

provision of the CPAM does not provide the whole regime of those contracts, but just listed the names instead. Most of the time, it is in the avulse legislations that the regime of those contracts are found.

In article 165 of the CPAM, the following types of administrative contracts[279] are enumerated:

a) Contract for the hiring of public works (Empreitada de obras públicas)[280];
b) Concession of public works (Concessão de obras públicas)[281];
c) Concession of public services (Concessão de serviços públicos)[282];
d) Concession for the exploration of game of fortune (Concessão de exploração de jogos de fortuna ou azar)[283];
e) Continuing supply contract (Fornecimento continuo);
f) Provision of services for purpose of immediate public utility (Prestação de serviços para fins de imediata utilidade publica).

[279] For a synthetic description of each of those contracts in Macau, see Eduardo Figueiredo Dias, Ibid, pp. 328 ss; for a parallel introduction in the situation of Portuguese law, see Diogo Freitas do Amaral, Curso de Direito Administrativo, Vol. II, Almedina, 2001, pp. 523 ss.
[280] The regime of this contract is seen in D.L. 74/99/M.
[281] The regime of this contract is seen in L. 3/90/M.
[282] The regime of this contract is seen in Lei 3/90/M.
[283] The regime of this contract is mainly seen in Lei 16/2001 and Regulamento Administrativo 6/2002.

Chapter 12. Contract of Civil Partnership

251. Partnerships are legal entities with personal bondage. The members of a partnership are obliged to contribute goods or services for the common exercise of certain economic activity which is more than the mere fruition. The purpose of associating together to explore the activity is for the sharing of profits resulting from it or for the gathering of assets (see article 184,1, Macau Civil Code).

According to the Macau Civil Code, partnerships are classified into civil partnerships and commercial partnerships (article 184, 2). It should be noted that before the promulgation of Macau Civil Code, civil partnership was regulated in the Portuguese Civil Code of 1966 as a specific contract (article 980ss). The law did not clarify whether a contract of civil partnership establishes an independent legal entity (or juridical person) or not. Opinions of the legal scholara were also divided.[284] In the preparation of Macau Civil Code, the draftsmen have taken a clear position in the positive sense. Therefore, civil partnership is clearly recognized as a juridical person by the Macau Civil Code (article 184, 1).

Commercial partnerships are companies. All companies are with the common objective to exercise a commercial enterprise, and shall adopt one of the types stipulated by the commercial law. According to the Macau Commercial Code (article 174), there are four types of companies, namely: "*sociedades em nome colectivo", "sociedades em comandita", "sociedades por quotas"* and *"sociedades anónimas"*.

When a partnership recognized by law does not have the objective of exercising a commercial enterprise, nor does it adopt one of the company types stipulated by the commercial law, it is a civil partnership (article 184, 3). It is nonetheless very wrong to consider the types of civil partnership an open category. In fact, both the category of commercial partnership and the category of civil partnership are subject to the statutory control (*numerus clausus*).

The establishment of partnerships is done through contracts of partnership, and should follow the principle of *numerus clausus* (both of them are the general requirement of the establishment of juristic person or legal entity). In other words, the persons who would like to create a partnership should declare their intent in a contract and adopt one of the types provided by law. While the types of commercial partnership are rigidly fixed by the Macau Commercial Code, the types of civil partnership are defined or to be defined by avulse legislation. At the current moment, the only types of civil partnerships defined in Macau by avulse legislations are the case of partnerships among accountants and partnership among auditors (D.L. 71/99/M, Statute of Account Auditors, article 48; D.L. 72/99/M, Statute of Registered Accountants, article 28[285]). Strangely, the partnership of lawyers, though already under discussion for years, is not allowed yet. Therefore, lawyers in Macau all works and undertake liabilities under his own name, even though a number of them may share the same office or being employed by another

[284] See Tou Wai Fong, The Innovations Brought by the Macau Civil Code, in 10.° Aniversário Assoiação dos Estudantes da FDUM, AEFDM, 2000, p. 54

[285] These two provisions state clearly that the companies of account auditors and companies of registered accountants are to be established compulsorily as civil partnerships; yet for tax purpose, they are treated as commercial partnerships (in another word, companies).

lawyer.

The contract establishing a civil partnership (or other types of partnership) has been appointed by certain jurisdictions as multi-lateral contract, because the dependant position of the contractual parties in this type of contract is not equal to that of a *synallagmatic* (bilateral) contract, in the sense that the invalidity or lack of fulfillment affecting one contractual party may not equally affect other contractual parties[286]. It should be noted that the characteristic of a multi-lateral contract is not reflected in the Macau Civil Code. At the level of juridical transaction and fulfillment, the general rules contained in the Macau Civil are considered applicable in principle. However, the specialties of this type of contract in relation to the special relations between contracting parties (including the *exception non adimpleti contractus*, other responsibilities of non-fulfillment etc.) and the formal requirements of this contract are not ignored. Through the technique of remission, the legal regime of "sociedade em nome colectivo" contained in the Macau Commercial Code (articles 331 ff) is applicable to civil partnership, except those rules that are incompatible to the nature of the latter or those that presume the exercise of a commercial enterprise (article 185, 2, Macau Civil Code).

[286] Raúl Ventura, Apontamentos sobre Sociedade Civis, Almedina, 2006, p. 49.

Chapter 13. Quasi-Contracts

§ 1.UNJUST ENRICHMENT

252. In Macau Civil Code, unjust enrichment[287] is explicitly regulated as a source of obligation[288]. Traditionally, unjust enrichment is classified as *quasi contract*, however, such a classification is no longer recognized by the Macau Law. The only link of contract and unjust enrichment is that they are both a source of obligation.

"Those who enriched at the cost of other without just cause are obliged to restitute what they have gained unjustifiably.[289]" According to this provision, there are three conditions for a restitution of unjust enrichment to occur[290]:

a) **the enrichment of one person** - enrichment here means obtaining a patrimonial advantage; it can be described as either the increase of patrimonial value, a decrease of debt, the consumption of other persons' goods or exercising other persons' patrimonial rights.

b) **the enrichment must be without justifiable cause** – in this condition, the key problem is to define what is a justifiable cause, or simply, what does the law mean by cause? It is not difficult to remember that at the occasion of defining the notion of contract, we wrote that in the area of contract, Portuguese Law has given up the idea of cause or *causa*. However, it does not mean that the concept of *causa* has been absolutely abandoned by Portuguese Law. In the chapter of unjust enrichment, the antique formula "*causa*", a heritage of Roman Law, gains its position. As we can see from the above cited provision, here the law explicitly employed the concept of just cause. Nonetheless, in no where of the Macau Civil Code can we find the concept (cause or just cause) defined. Obviously, this job was left to the legal doctrines and jurisprudence (the court judgment).

According to Antunes Varela[291], the notion of *cause* in unjust enrichment varies according to the nature of the juristic act that serves as the source of enrichment.

First of all, it can mean the *cause of performance* (causa de prestação), or the reason why a performance is made. For example, when A deliver certain thing to B with the intention to fulfill his obligation; in case the obligation does not exist, the performance is lack of *cause*.

Secondly, it can mean the *cause of obligation or transaction* (causa de obligação ou negocial). In case the obligation results from a juridical transaction (negócio jurídico),

---

[287] For an exhaustive analysis of this matter, see Luís Manuel Teles de Menezes Leitão, O Enriquecimento Sem Causa no Direito Civil, Centro de Estudos Fiscais-Direcção Geral das Contribuições e Impostos – Ministério das Finaças, 1996.

[288] See article 467 – 476 of the Macau Civil Code.

[289] Article 467 of the Macau Civil Code, translation made by the author.

[290] See João de Matos Antunes Varela, Das Obrigações em Geral, Vol.I, 10ª Edição, Almedina, 2000, pg. 480 -496.

[291] Ibid.

the cause of the obligation consists in the *typical purpose or objective of the transaction*; whenever such objective fails to achieve, the obligation lost its cause. For example, in the case of a purchase and sale contract, in case the contract turned void, both the obligation of the purchaser to pay the price and the obligation of the seller to deliver the object shall have no cause. In case the seller annuls the contract for being incapacitated, then only the obligation of the purchaser to pay the price shall lost the cause. Nevertheless, since the juridical transactions in our legal system in general do not follow the *principle of abstraction*, the typical purpose or objective is thus integrated into the content of the juridical transaction itself; therefore, the cause of obligation is an *internal cause*, and the defects of the *cause* shall lead to the nullity or the resolution of the juridical transaction as a whole.

Finally, it can still mean the *cause of other patrimonial transference(causa das restantes deslocações patrimoniais)*. For example, in the case of industrial accession, when a thing belonging to one person is unified to another thing belonging to other person, and it is impossible to separate the unified thing into two; the law then attributes the ownership of the unified thing to one of the two owners. On the other hand, the one who is not attributed the ownership of the unified thing shall receive a compensation from the one who enriched. Here, although the attribution of ownership has reason (the impossibility of separation etc.), however, the enrichment of one at the cost of the other has no reason.

c) **at the cost of other/s** – for the unjust enrichment to occur, there must be a correlation between the patrimonial lost of one party and the enrichment of other party. For example, in the above cited case of accession, the patrimonial lost of one person corresponds to the enrichment of other.

Whenever the above three conditions are fulfilled, the transfer of patrimony from one person to the other can be qualified as unjust enrichment, and required to be restituted. However, in our law, many of the cases where the transfers of patrimony lack of a justifiable cause, the law provides already a special treatment, namely, for the restitution or compensation of the l. And in all those cases where the restitution is treated by special law, the application of the rules of unjust enrichment shall be excluded. In our law, this is called the *subsidiary nature of unjust enrichment*[292].

§ 2. NEGOTIORUM GESTIO

253. Like unjust enrichment, the **management of the affairs of another**[293] (*negotiorum gestio)* was also classified as quasi contract in the previous Portuguese Civil Code (Code of Seabra). Now, it is regulated in the Macau Civil Code from article 458 to article 466, also as a source of obligation. Article 458 defines that, "*negotiorum gestio occurs when one person undertakes the administration of the affairs another, in the interest and on account of the owner of the affairs, without being authorized to do so*."

[292] See article 468 of the Macau Civil Code.

[293] More details see L. M. T. Menezes Leitão, A Responsabilidade do Gestor perante o Dono do Negócio no Direito Civil Português, Lisboa, C.E.F., 1991; Júlio Gomes, A Gestão de Negócios. Um instituto jurídico numa encruzilada, Coimbra, Separata do BFD Suplemento 39, 1983.

(For example, a person helps his neighbor to feed the dog whilst the latter was hospitalized). Unlike other legal systems (e.g. the Spanish Civil Code, article1888), our Civil Code, on defining the notion of negotiorum gestio, employed the formula "in the interest and on account of the owner of the affairs", which, according to our doctrines, corresponds to the *animus aliena negotia gerendi,* or the intention to manage the affairs of another[294].

The one who perform the *management (gestio)* is called the *officious manager (gestor do negócio);* and the one which the management directs to is called the *owner of the affairs (dono de negócio)*.

Our law has a strict requirement on the conduct of the officious manager (article 459, which listed a number of duties to be observed by the manager). Generally, the officious manager, when the management is duly performed, has the right to be reimbursed for all the expenditures made for the purpose (article 462, item 1, of the Macau Civil Code). However, in most of the case, the management itself shall not be remunerated, unless it is related to the performing of professional activities of the officious manager (article 464 of the Macau Civil Code).

[294] This interpretation, however, is not unanimous, for example, Luís Manuel Teles de Menezes Leitão and others believe that it should include the *utiliter.* See L. M. T. Menezes Leitão, Direito das Obrigações, Vol. I, 2a Edição, Almedina, 2002, pg. 458.

Index

The numbers refer to the paragraph numbers.

Acceptance: 17, 60, 64-65, 71, 75-76, 159, 168-169, 227
Administrative contract: 10-11, 245-247
Administrative law: 11, 15, 245
Agency: 16, 57, 210, 213
Agreement: 17, 21-22, 29-30, 46-47, 56, 66, 81, 101, 113, 129, 135, 148-149,157-158, 162, 164-165, 172-174, 176, 184-185,188, 192, 199, 201, 208, 212-213, 215, 223, 225, 227, 231, 234, 236, 238, 240, 245
Aleatory contracts: 33
Annulment: 107, 108, 116, 119, 129, 131-132, 144-148, 168, 186
Arbitration: 152, 157, 208,
Assignment: 171-173, 175-176, 221
Astreinte: 182
Auction: 73

Bad faith: 180, 211, 243
Bailment: 214-215
Bankruptcy: 16
Bank: 216-217
Bill of exchange: 14-15
Building contracts: (In the Title)
Burden of proof: 35, 68, 91, 95-96, 98-102, 153
Business: 13, 16, 54, 66, 84-85, 87, 111, 115, 138, 231, 233
Business declaration: 62-66, 69, 71, 75-76, 78, 81-82, 91, 94, 111, 115-116, 129, 131-134, 138, 144, 151, 158, 164,182,206, 210-212, 221

Capacity: 11, 56, 80, 85-86, 97, 116-117, 119, 120-122, 125, 144, 186, 210, 221-222, 238
Carriage: 16, 57, 213
Cheque: 83, 206
Collective bargaining: 10
Commercial law: 12-16, 248
Company: 14, 48-49, 85, 165, 248
Compensation: 36-37, 155, 201, 209, 227, 249
Compromise: 129, 235,
Condition: 11, 17, 19, 28, 47, 51-52, 56, 65, 71-72, 75, 96, 100, 108, 112, 116, 136, 141, 144, 149, 159-163, 165, 167, 170, 186, 208, 211, 214, 222-225, 227, 233, 237, 239, 242, 249
Conduct: 4, 38, 50-51, 64, 76, 110, 142, 155, 183, 191, 226,

211, 250
Consensual contract: 28-29, 82, 221
Consideration: 6, 42, 48, 77, 123, 151-152, 158, 164, 188, 191, 211, 222
Construction: 41, 61-62, 93, 104, 227
Consumer: 58, 153, 157, 221
Conveyancing: 44, 46-47
Counter-offer: 76
Crime: 142
Custom: 2, 4, 12, 55, 187

Damages: 35-37, 107-109, 155, 164, 186, 197-198, 209, 215, 223-224, 246
Date: 100, 148, 163, 197, 215, 217, 225, 241
Death: 96, 163, 233
Deed: 64, 82-83, 85, 91, 137, 172, 210, 221, 235,
Default: 187-188, 223
Defect: 56, 96, 125, 128, 130, 133-134, 144-145, 199, 227, 243, 249
Delay: 96, 153-154, 163, 185, 187-188, 191, 193-198, 200, 209, 223, 231-232, 246
Delivery: 29, 56, 149, 156, 165, 186-187, 197-198, 201, 206, 208, 214, 220-225, 241-244
Deposit: 57, 198, 200, 214-217, 226, 232
Discharge: 203
Disproportion: 221
Document: 28, 64, 82-83, 85-91, 96, 98, 170, 174, 206, 213, 224, 235, 241
Duress: 125, 133, 144, 211

Effects of the contract: 151
Employment: 117, 212
-Employee: 208, 228
-Employer: 37, 208, 228
Equity: 155, 225
Evidence: 84, 87-96, 98-99, 102, 190
Exceptio non adimpleti contractus: 30-31, 36-37, 56, 149, 207
Exchange: 12-16, 32, 111, 172, 221, 243
Exemption clause: 152
Extinction: 76, 91, 181, 183

Fault: 35, 37, 65, 96, 101, 104-105, 107-108, 148, 191-192, 194, 197, 206, 208-209, 215, 223-224, 238
Fiduciary: 48
Force majeure: 208, 217
Forgery: 91
Formalities: 91, 170
Fraud: 119, 125, 132-133, 144, 170, 211, 219-220

Game: 218, 247
Gift: 30, 135, 137, 221
Goods: 15, 48, 67, 72, 123, 148,

165-166, 179-180, 187, 198, 201, 213-214, 221, 237, 244, 248-249
Good faith: 30, 50-52, 55, 104-105, 110, 119, 131, 134, 138, 148, 152, 158, 162, 180, 183, 186, 207, 209, 211, 213, 224, 227, 239
Gratuitous promise: 78
Gratuitous contract: 32, 79, 243
Guarantee: 3, 5, 42-43, 56-57, 142, 149, 154, 173, 176, 178-180, 187, 199, 202-204, 207, 236, 238-239, 241

Hire: 22, 214, 226
House: 32, 180, 182, 226-227

Identity: 72, 85-86, 187, 223-224, 241
Implied terms: 151
Impossibility: 128, 180, 191-195, 198, 249
Insurance: 13, 15, 33, 57, 165-167, 213
Intention: 15, 18, 32, 48, 63, 66, 69, 81, 113, 129, 312, 135, 148, 180, 220, 249, 250
Interest: 9, 12, 20, 32, 42, 44, 49, 96, 115, 119, 138-139, 145-146, 165-166, 182, 186, 188-190, 192-194, 197-198, 204, 208-211, 212-213, 217, 221, 241, 244-246, 250
- Public interest: 4, 11, 145, 166, 245-246
International: 10, 12, 48, 54, 65, 67
Interpretation: 4, 43, 56, 62, 79, 84, 94, 126, 128, 137, 141, 149, 153-154, 158, 192, 195, 220, 222, 224, 226
Invitation to treat: 73

Jurisdiction: 8, 11, 46, 48, 53, 55, 59, 222, 243, 248

Laesio: 143-144, 244
Land: 41-42, 206, 227, 234
Lapse of time: 208
Law of property: 39, 44
Lease: 30, 32, 176, 214, 217, 226, 229-231, 233-234, 243
Limitation of actions: 208
Liquidated damages: 155
Loan: 13, 32, 165, 214, 216, 218, 242, 244

Maintenance: 231
Marriage: 56, 83, 119, 159
Minor: 96, 117, 119-120, 123, 145, 210
Mistake: 112, 125-133, 144, 158, 188, 211, 239
Mistress: 135, 137
Mortgage: 85, 241

Natural obligation: 33, 80, 154, 201, 208, 219-220
Negligence: 129, 153-154

Negotiable instrument: 83, 85
Negotiation: 64-66, 71, 73, 103-104, 109, 114-115, 129, 132
Negotiorum gestio: 20-21, 35, 38, 150, 210, 250
Nominate contract: 22, 36, 56, 58, 78-79, 149, 151, 165, 166, 170, 187, 210, 213, 218, 221, 228, 236
Non-nominate contract: 166, 226, 242
Notary: 28, 82-86, 91, 96, 206
Notice: 4, 47-48, 65, 71-72, 129, 179, 199, 208, 222, 243-244
Novation: 202
Nullity: 47, 107, 116, 136, 144-148, 153, 168, 192, 219, 238, 249

Object of the contract: 227
Offer: 17, 64-76, 113, 135, 137, 142, 153, 165, 185, 187, 198, 207
Option: 186

Partnership: 22, 248
Patrimony: 122, 179, 180, 182, 186, 206, 249
Paulian action: 32, 178, 180
Payment: 29, 91, 96, 165, 170, 177, 185, 213, 221, 225, 227, 231-232, 241
Penalty clause: 152, 155-156
Performance: 20, 30-33, 39, 78, 80, 96, 107, 139, 141, 142, 146, 152, 154, 158, 162-163, 165, 168, 172, 174-177, 181-182, 184-195, 197-200, 205-208, 224, 231, 239, 246, 249
Pledge: 42, 201, 204, 214, 222, 241
Power of attorney: 85, 165
Price: 19, 67-68, 129-131, 221, 225-227, 246, 249
Privity of contract: 164-165, 177
Procedure: 4, 16, 58, 88, 92, 96-99, 147, 153, 157, 200, 206, 236, 238
Promise: 20, 35, 65, 78, 96, 129, 135, 142, 150, 165, 167-169, 187, 192, 198, 202, 206-207, 226, 235
Promissory note: 206
Proof: 35, 68, 88, 91-92, 94-96, 98-102, 153
Property: 27, 29, 39, 44, 46, 48, 56, 78, 129, 132-133, 165, 172, 174, 180, 209, 221, 230, 243
Public law: 10, 218, 245-246
Public service: 11, 72, 247
Public policy: 141, 154, 161, 223

Quality: 188, 198-199, 227, 241, 244
Quasi contract: 249-250

Ratification: 170, 175, 210
Real contract: 28-30, 32, 214, 220, 221, 241-242
Real right: 6, 29, 39-44, 46-48, 56, 141, 192, 214, 222-223, 241
Registration: 42, 47-48, 123, 148, 164, 222
Release: 176-177, 184, 187, 192, 202-203, 239
Remedy: 207, 209, 246
Representation: 56, 116, 126, 210-213
Rescission: 167
Restitution: 42, 107, 146, 180, 192, 208, 231, 243, 249
Revocation: 74, 76, 157, 212, 234
Rights *in personam*: 39, 241
Rights *in rem*: 39, 241, 243
Right of retention: 42, 227
Roman law: 5, 6, 12, 21, 23, 29, 45, 50, 126, 129, 165, 222, 226, 249

Sale: 16, 19, 22, 28, 30, 32-33, 47, 57, 67, 72, 83, 96, 112, 129, 130, 137, 167, 172, 198-199, 221-225, 249
Sale of goods: 67, 198
Seal: 82
Servitude: 41, 91
Settlement: 235
Signature: 64, 83, 91, 96, 231
Silence: 63
Solemn contract: 82
Specific performance: 154, 182, 206, 224
Statute: 55, 248
Sub-contractor: 177
Suretyship: 204, 236-240

Tax(es): 15, 170, 218, 225
Tenant: 96, 129, 132
Termination: 36, 144, 181, 210, 212, 234
Terms of contract: 150-151
Term: 4, 11, 20-21, 29, 39, 46, 48, 62-66, 75, 91, 100, 103, 103, 108, 116, 129, 131-132, 139, 146, 150-151, 156, 163-165, 167, 181, 192, 194, 198-199, 206-207, 209, 210, 213, 221-223, 226, 230, 232, 234, 239-240, 242, 243-245
Title: 49, 88, 148, 164, 172, 190, 206, 222, 232
Tort: 21, 35-37, 150, 194
Transfer of property: 78, 180, 221
Trust: 48-49, 213

Unilateral contract: 29-32, 78
Unilateral promise: 20, 35, 150
Usage: 28, 41, 63, 158, 225, 243
Usufruct: 29, 41, 91, 96, 204

Void: 28, 33, 81, 106-107, 135-138, 141-142, 144, 154-155, 208, 219-220, 249

Warranty: 13, 224
Work: 7, 11, 30, 32, 37, 60, 96, 126, 149, 157-158, 164, 177, 198, 201, 206, 212, 220, 226-228, 231-232, 241, 246-148
Writing: 22, 55, 60, 63-64, 71, 125, 127, 151, 213, 229, 231, 241