

“CULTURE MATTERS”: EXPEDITED ARBITRATION AND ARB-MED IN MACAU



Hugo Luz dos Santos and Leong Cheng Hang*

*As arbitration-mediation (Arb-Med) gains traction and becomes increasingly institution-
alised, concerns about both the neutrality and impartiality of the arbitrator-mediator have been
mounting. Pundits often aver that Arb-Med disfigures core values of, and fundamental tenets
of, arbitration. We beg to differ. While scholars have not been neither coy nor bashful in
overtly decrying Arb-Med, there is a perceived paucity of research on the role that disputants’
principle of self-determination plays in the purview of Arb-Med. Put differently, the principle
of self-determination must be parsed in conjunction with disputants’ cultural background. This
stands as one central contention of this article. Against this background, this article seeks to
demonstrate that a fine-grained attention must be paid to disputants’ cultural background in
both Arb-Med process and expedited arbitration settings when they blend together. The foun-
dational principle of self-determination — a linchpin of the Arb-Med process — ought to be
painted in a glaringly different light accordingly.*

1. Introduction

The primary duty of an arbitrator is to decide quarrels and produce a binding and enforceable arbitral award. On the opposite pole, the primary responsibility of a mediator is to iron out areas of disagreement while paving the way to settle the dispute in a both brisk and fuss-free manner. Whatever the underlying rationale of the foregoing dispute resolution mechanisms, both the arbitrator and the mediator are vested with the obligation to put an end to the dispute. In this vein, the central thrust of both arbitration and mediation is to provide avenues through which parties can solve their dispute swiftly. Most importantly, and more in tune with the overriding goal to hammer out the dispute of which it was borne, both arbitration and mediation are premised on the seminal concept of self-determination. To that end — simmer down the sweltering temperature of the dispute while ushering in a new relationship dynamic between the estranged disputants — arbitration and mediation are often bundled into one single category.

* Hugo Luz dos Santos: PhD in Mediation (2019–2021). University Professor at both University of Macau (part-time) and City University of Macau/Fellow of the Forum for Conciliation and Arbitration (Oxford, United Kingdom)/Fellow of the Royal Society of Arts of the United Kingdom (London, United Kingdom) “in recognition of his outstanding contributions to the field of justice, rule of law and policy world-wide”. Leong Cheng Hang: PhD in Civil Law/Senior Instructor/Programme Coordinator of Bachelor of Law (Conducted in Chinese and Portuguese)/Programme Coordinator of Bachelor of Law in Chinese Language/Arbitrator of Macao SAR Government Consumer Council.

Put differently, the foregoing dispute resolution mechanisms are often weaved together to lay the foundations upon which a sought-after settlement will stand. In a colloquial tone, parties to a dispute are ascribed the unmissable opportunity to gain access to the multitudinous benefits of Arb-Med — the acronym that comprises/summarises both arbitration and mediation — in the remit of expedited arbitration in international settings. In that regard, it is noteworthy that the arbitrator that temporarily wears the hat of mediator is allotted the task of a stellar steward of both procedural fairness¹ and procedural justice.² This nugatory statement, albeit seemingly trivial, poses sizable challenges for Macau.

Macau³ lies on the crossroads between East⁴ and West.⁵ The relationship⁶ between Macau (East) and Portugal (West) dates to the 16th century and spanned centuries⁷ accordingly.⁸

¹ On procedural fairness in international arbitration: Fabricio Fortese and Lotta Hemmi, “Procedural Fairness and Efficiency in International Arbitration” (2015) 3(1) *Groningen Journal of International Law* 110–124; John Fellas, “A Fair and Efficient International Arbitration Process” (PLI Course Handbook, International Arbitration, no 10796, 2007) passim; Cristina Florescu, “The Arbitration Agreement and Arbitrability - Towards Achieving Efficiency in International Arbitration” (2015) *Austrian Yearbook of International Arbitration* 51–71. Hugo Luz dos Santos, “Expedited Arbitration and Arb-Med in the Far-East (Macau)” in Alan M Anderson and Herman Verbist (eds), *Expedited International Arbitration: Policies, Rules and Procedures* (Netherlands: Wolters Kluwer, 2024) passim.

² Rebecca Hollander-Blumoff and Tom R Tyler, “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” (2011) 1 *Journal of Dispute Resolution* 1ff (noting that procedural justice is closely linked to perceptions of legitimacy).

³ See BV Pires, “Origins and Early History of Macau” in RD Cremer (ed), *Macau: City of Commerce and Change* (Hong Kong: API Press, 2nd ed., 1991), pp 1–7 ff.

⁴ Historical accounts state that Portuguese establishment in Macau emerged from an informal agreement between the Portuguese Captain Chief of Maritime Journey to China and Japan (*Capitão-Mor da Viagem da China e do Japão*) and Chinese ruling authorities of Canton (Macau’s closest neighbour which exerted power over Macau back then). Being this informal agreement unbeknownst to both the Portuguese king and the Chinese emperor. See in the Portuguese doctrine: João Vieira Guedes, “Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau” (Estudos Comemorativos XX Anos do Código Penal e Código de Processo Penal de Macau, Pedro Pereira de Sena e José Miguel Figueiredo (Coordenação Científica), Macau, Fundação Rui Cunha, 2016) p 62.

⁵ Beatrice Leung, “The Portuguese Appeasement Policy in Macau’s Church and State Relations” (2010) 19 (64) *Journal of Contemporary China* 181–200 (“In the Middle Ages, Europe was not able to contact Asia due to the Muslim occupation in between. The Portuguese Prince, Henry the Navigator (1394–1460), launched exploratory voyages along the western coast of Africa and eventually Vasco da Gama reached India (1460–1524)”).

⁶ When it comes to describing the relationship between Chinese and the Portuguese back then, tolerance is a word that one should bear very firmly in mind. Although it is accurate to assert that the early Portuguese (sailors, settlers and business men) began to exercise trade with local Chinese authorities from 1557 onwards, there are a few historical accounts that signal an early tolerance towards the Portuguese in this regard dates as far back as 1535. From this date onward, the Portuguese business men and sailors were given a “sort-of” free pass to anchor their ships and perform some business activities provided they did not stay onshore; see GL Zhao and GL Liu, *A New Conspectus of Macau law, Macau, Macau Foundation* (2005) pp 2 ff and passim.

⁷ Trust and Trustworthiness, which are fuelled by a prior creation of a harmonious and healthy relationship (a hallmark of Confucian-beliefs-based Chinese culture), might help explain the long-standing (drawn-out? Long-haul? Well-trodden?) relationship between the Portuguese and the Chinese. First establish rapport and trust then (and only then) do business. Back then just like now Chinese millenary culture would not fall far behind from its founding tree (Confucianism). Back then just like now culture nurtured business and trade relationships. See on Trust and Trustworthiness in contract law and public policy: Matthew Harding, “Trust and Fiduciary Law” (2013) 33 *Oxford Journal of Legal Studies* 81 ff; Mark A Hall, “Law, Medicine, and Trust” (2002) 55 *Stanford Law Review* 463 ff; Matthew Harding, “Responding to Trust” (2011) 24 *Ratio Juris* 75 ff; Mark A Hall, “The Importance of Trust for Ethics, Law, and Public Policy” (2005) 14 *Cambridge Quarterly of Healthcare Ethics* 156 ff.

⁸ Religion — especially, Christianity brought along to Macau by Portuguese Jesuits — played a pivotal role in Macau both before and after 1573. Before the construction (in 1573) of the China-Macau border gate