REPORT ON MACAU LAW

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Editor

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THE COMMERCIAL LAW FROM A WRITTEN LAW PERSPECTIVE*

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1. INTRODUCTION

1.1 The commercial law from a written law perspective

The traditional division of the law into public and private laws corresponds to a division of social reality into two large sectors. The first sector revolves around the State and its participants, through the exercise of power of authority, in the defence of the State's own aims and the general interest of the community. The second sector revolves around the person as a member of the community, while exercising their own activities, in the defence of private aims and interests.

Within private law, the patrimonial right regulates individuals as economic subjects and their relationships while developing economic activities (such as, production, distribution, assignment, enjoyment and consumption of goods and services). The patrimonial right is the projection of the person within the economic system, being intrinsic to every person and necessary to fulfil their aims.

In Macao's private law, the patrimonial right is divided in two branches: civil property right and commercial law. The relationship between both corresponds to that which exists between the general law and the special law: civil property law is the general trunk of all private patrimonial rights, governing the entire economic life of the person in general; whereas commercial law is a special branch containing rules, other than the general ones, to cover certain issues, specific institutions and relationships.

The definition of commercial law is therefore established based on the matters it regulates. To understand the reason for its existence, we have to ask ourselves why this matter requires a different regulation from the general rules. The answer to this question cannot be absolute or perpetual because the issue of the law branches is placed in connection to historical ranks that are intrinsically contingent and changeable by nature.[1]

More specifically, commercial law is the set of rules that regulates the activity of a certain category of people: the entrepreneurs. Therefore, commercial law is the law of production, since it governs the exchanging of goods and services and also the obligations and liabilities of the subjects that participate in such a transaction.

It is in the commercial law that we find the definition and specific rules for individuals focused on production, i.e. commercial entrepreneurs.

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* Paper presented on 31 July 2003. Translated by Miguel Bailote and revised according to the process outlined in the preface by the editor.

1 Manuel Olivencia Ruiz, *Lecciones de derecho mercantil*, p 37.

COMMERCIAL COMPANIES*

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1. GENERAL IDEAS

Commercial companies consist of corporate bodies with the nature of a collective person, being the operational instruments for the conduct of a commercial enterprise by various parties. In our legal system, the company is the primary organisational form for the conduct of a collective enterprise.[1]

In no 1 of article 174, the Commercial Code considers:

> commercial companies, irrespective of their object, unlimited partnerships [*sociedades em nome colectivo*], limited partnerships [*sociedades em comandita*], private companies [*sociedades por quotas*] and public companies [*sociedades anónimas*];

and no 2 of the same legal rule tells us that companies that have as its object the exercise of a commercial enterprise can only be created in accordance with one of those types.

Hence, the Commercial Code does not convey the notion of a company, but restricts itself to emphasise two characteristic aspects of the concept of a commercial company: the formal one, which is the choice of one of the types provisioned by law; and the material one, being the exercise of a commercial enterprise. The fact that the Code does not present the notion of a company does not mean that we are faced with an omission but merely indicates that the legislator understood that the material concept of a company should be given by civil law as the common private law. It is therefore necessary to refer to the norms of the common law, civil law, for which the basic document is the Civil Code, as dealt with in article 4.[2]

In the Civil Code of 1966, which remained in force in Macau until 1 November 1999, companies were regulated as a contract, in Book II, Title II, chapter III, in articles 980 to 1021. Article 980 of that Law defined the company contract as:

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1 They may also constitute a grouping of economic interests, though only in special cases (article 489 – henceforth the legal provisions mentioned, without any indication of the legal document to which they belong, will refer to the Commercial Code).

2 It should nevertheless be noted that this relationship between civil and commercial laws in the matter of companies is quite unique, since only that which concerns the concept of the company appeals to the Civil Code; as to company discipline, this is essentially to be found in the Commercial Code, as the Civil Code did not regulate companies, contrarily to the earlier Civil Code, remitting, in the matter of regulating civil corporations to the particular regulations of unlimited partnerships [*sociedades em nome colectivo*] (article 185, no. 2 of the Civil Code).

Private companies [*sociedades por quotas*] may only be established with a minimum capital of 25,000 MOP (article 359, no. 2) and public companies [*sociedades anónimas*] require a minimum capital of 1,000,000 MOP (article 393, no. 1).

BRIEF NOTE ABOUT INTELLECTUAL PROPERTY IN MACAU*

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1. FRAMING OF INTELLECTUAL PROPERTY

It is known that in an industrial economy, industrial inventions are the tools which allow for technical, economic and industrial progress and development of the society, as well as the fulfilment of community needs in general; likewise aesthetic and cultural appreciation are nourished by artistic and literary creativity, and so on.

On the other hand, the satisfaction of the basic needs of citizens is conditioned by the offer of products and services by the companies, which, in order to distinguish themselves, have resorted to symbols that will create an automatic association of ideas in the minds of potential users with the company. Also it allows those interested in a certain product or service to more easily identify an item that interests them, and at the same time to identify its respective source. Those signs are distinctive markings, and their protection is necessary to guarantee healthy competition among the various companies and in order to respectively differentiate accreditation among potential clients.

It is the whole set of juristic rules which discipline and protect both these creative and inventive activities and the distinctive markings that we usually designate as Intellectual Property (Author's right).

The corresponding Portuguese expression *Propriedade Intelectual*, although used by the legislator in the epigraph of art 1227 of the Civil Code, is not common among us, being the rights framed in that expression, designated as copyright and Industrial Property which are subject-matter of independent regulations.

Thus, copyright is ruled by the Decree-Law n. 43/99/M, of 16 August, which approved the Juristic Regime of copyright (hereinafter 'JRC'), that revoked the Decree n. 46.980, of 27 April 1966 which had approved the Copyright Code, published in the Macau Official Bulletin n. 2, of 8 January 1972 and Law n. 4/85/M, of 25 November, which regulated, although in very incipient terms, the so-called *derivative works*.

The subject-matter of Industrial Property is ruled by Decree-Law n. 97/99/M, of 13 December, that approved the Juristic Regime of Industrial Property (hereafter referred to as JRIP), which revoked the Industrial Property Code approved by Decree-Law n. 16/95, of 24 January 1995 published in the Macau Official Bulletin n. 36, of 4 September 1995 – 1st Series, which had revoked and replaced the previous Industrial Property Code, approved by Decree n. 30.679, of 24 August 1940, according to Law n. 1.972, of 21 June 1938 and published in supplement to

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