

# THE CODIFICATION OF COMMERCIAL LAW IN MACAU\*

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### § 1. Introduction

Macau is a Special Administrative Region of PR China in which commercial law has been codified. The Commercial Code of Macau has been approved by Decree-Law 40/99/M, of August 3, amended by Law 6/2000, of April 27<sup>1</sup>. It provides Macau with a

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\* Concise version of *Business Law: A Code Study (The Commercial Code of Macau)*, Coimbra, 2004.

<sup>1</sup> See the scientific papers of the *Study Journeys* dedicated to the Project of Commercial Code in Boletim da Faculdade de Direito de Macau, n.º 9, with contributions of Teixeira Garcia (overview) José Costa (enterprise), António de Jesus Pedro (competition law), J.A. Pinto Ribeiro (company law), M. Nogueira Serens (firms), Frederico Rato (economic interest groupings), Henrique Saldanha (consortium contract), A. Menezes Cordeiro (banking contracts), A. Pinto Monteiro (distribution contracts), A. Santos Ramos (insurance contracts), Sheng Jiemin and Jiang En Ci (general features), Filipe Cassiano Santos (leasing), Manuel Trigo (closing remarks). See also Augusto Teixeira Garcia, *Da Reforma do Código Comercial*, in Boletim da Faculdade de Direito de Macau, vol. 7, pp. 71 ss; Luís de Lima Pinheiro, *O direito comercial marítimo de Macau revisitado*, ROA 2002 (62), 425-438. An English translation of this Code by J. Godinho is available at <http://www.imprensa.macao.gov.mo/bo/i/99/31/codcomen/>. See also J.H. Fan / A.D. Pereira, *Macau* (Supp. 27) in *International Encyclopaedia of Laws* (gen. ed. Prof. Dr. Blanpain), *Commercial and Economic Law* (ed. Jules Stuyck), The Hague, Kluwer Law International, 2005.

special body of law for commercial entrepreneurs and enterprises. This codification has included many issues, which could be set apart in a few different Codes. For ex., why codify company law into the Commercial Code when it is feasible to have an autonomous Company Code? The same goes for the regulatory framework of commercial contracts. Does it have any special meaning to codify commercial law, comprehending so many issues? There are many arguments for and against the codification of commercial law.<sup>2</sup> In our opinion, despite the inclusion of some issues is questionable (e.g., competition law), the Commercial Code of Macau is a good effort of unifying into a single piece of legislation several instruments of commercial law. Moreover, the entrepreneurial matrix of commercial law that it follows provides a strong unitary criterion for codification.<sup>3</sup>

Moreover, according to the European Civil Law tradition, the general framework of business law is to be found in the Civil Code of Macau, approved by Decree-Law 39/99/M, of August 3. Civil law is subsidiary law in relation to commercial law, meaning that, as provided in art. 4 of the Commercial Code, the provisions of this Code apply by analogy to cases not foreseen in the Commercial Code, and in their absence the rules of the Civil Code that do not contradict the principles of commercial law shall apply to such gaps of regulation. Hereinafter, unless otherwise stated, the articles belong to the Commercial Code of Macau.<sup>4</sup>

Another important source of Macau business law is provided by the new legislation on intellectual property, which is addressed *infra* at Part V. In fact, as member of the World Trade Organization, Macau has enacted new legislation on intellectual property rights (IPR), in order to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights. On one hand, Decree-Law 97/99/M, of December 13, has approved the new Code of Industrial Property (CIP) concerning patents (including the protection of new plant species), industrial designs and models, trademarks (including services marks), geographical indications (including appellations of origin), and the configuration topography of integrated circuits. On the other hand, Decree-Law 43/99/M, of August 16,

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<sup>2</sup> See A. Ferrer Correia, *Sobre a reforma da legislação comercial portuguesa*, ROA 1984, 44, pp. 5. On codification, in general, see António Pinto Monteiro, *La Codification en Europe: le Code Civil Portugais*, Boletim da Faculdade de Direito, LXVIII, Coimbra, 1992, pp. 1-16.

<sup>3</sup> On the entrepreneurial matrix of commercial law see Orlando de Carvalho, *Crítério e estrutura do estabelecimento comercial, I – O problema da empresa como objecto de negócios*, Atlântida, Coimbra, 1967, Idem, *Empresa e lógica empresarial*, Coimbra, 1997 (sep. do BFD – Estudos em homenagem ao Prof. Doutor A. Ferrer Correia, vol. III); A. Ferrer Correia, *Reivindicação do estabelecimento comercial como unidade jurídica*, in *Estudos Jurídicos*, Atlântida, Coimbra, 1969, 255; Idem, *Lições de Direito Comercial*, vol. I (c/ colab. de Henrique Mesquita e António Caeiro), ed. copioogr., Coimbra, 1973; V.G. Lobo Xavier, *Direito Comercial* (Sumários das lições ao 3.º ano jurídico), ed. copioogr., Coimbra, 1977/1978; J. M. Coutinho de Abreu, *Da empresarialidade – As empresas no direito*, Coimbra, Almedina, 1996; Idem, *Curso de Direito Comercial*, vol. I, 4.ª ed., Coimbra, 2003, pp. 16 ss.

<sup>4</sup> On the structure of Macau SAR established by the Basic Law see José Casalta Nabais, *Região Administrativa Especial de Macau: Federalismo ou Regionalismo?*, Boletim da Faculdade de Direito, LXXVII, Coimbra, 2001, pp. 433-448.

has approved the new Copyright Law. In view of the WTO/TRIPS obligations, Macau copyright law has been harmonized with the Paris Act of 1971 of the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome in 1961.

## **§ 2. Background, systematic and the entrepreneurial matrix of the Commercial Code of Macau**

The Commercial Code is based upon the tradition of European Civil Law countries, and represents an important legacy of Portuguese legal heritage in the Region. In fact, it codifies several doctrinal models, such as the theory of the enterprise as object of property rights and contracts and the theory of abuse of personality of limited liability companies. Moreover, this Code follows closely Portuguese commercial legislation in several concerns, such as, e.g., the Code of Commercial Companies, the Product Liability Act, the Agency Act, and the Leasing Act. It could be argued that the Commercial Code of Macau provides overregulation of business activities. However, many of its provisions can be set apart by business actors, as they are not mandatory.

In systematic terms, the Code is divided in 4 books. Book I concerns the exercise of commercial enterprise in general (e.g., obligations of merchants, protection and negotiation of enterprises). Book II regulates the exercise of a collective enterprise and the cooperation in the exercise of an enterprise (company law and related entities). Book III concerns the external activity of an enterprise (i.e., commercial contracts such as, for example, agency, franchise, leasing, and independent guarantees). Book IV concerns negotiable instruments (e.g., bills of exchange).

The Commercial Code of Macau has followed the «entrepreneurial approach» to Commercial Law overcoming the traditional approach of acts of commerce. These seem to be now a residual category in terms of regime, being defined as the “acts that are especially regulated in the law as a result of the special needs of commercial enterprise, namely those mentioned in this Code, and analogous acts” as well as the “acts practised in the exercise of a commercial enterprise” (art. 3, 1). The preamble of the Code reads that: “The Code chose the commercial enterprise as the fundamental category, on the basis of which the whole new regulation of commercial activity is built. Similarly, that of the commercial entrepreneur assumes particular importance. These categories occupy, in terms of importance, the role that the categories of commercial act and merchant had in the Commercial Code of 1888, which, while not disappearing, are relegated to a secondary role. The Code has also here followed the most modern trends of comparative law, placing

the Territory in the vanguard of the most modern systems of commercial law. / The choice of the commercial enterprise as the founding category of the new system of commercial law has determined a new structure for the Code, which involved the separation of the regulation of companies and other forms of exercise of collective enterprise or co-operation in the exercise of enterprise, and the introduction of a book entirely dedicated to negotiable instruments.”<sup>5</sup>

## **Part I – Commercial entrepreneurs and enterprises**

### **§ 3. Notion of 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 (art. 1).

Commercial entrepreneurs usually exercise a commercial enterprise. However, in case an economic operator adopts one of the four types of commercial companies provided in the Code (unlimited partnerships, limited partnerships, private companies and public companies) such company is deemed to be a commercial company, irrespective of its object (art. 174, 1), i.e., even if no commercial enterprise is exercised - for the notion and elements of commercial enterprise see *infra* § 6.

### **§ 4. Capacity, impediments and legitimacy of commercial entrepreneurs**

The rule of commercial capacity is that any person, individual or collective, with civil capacity can be a commercial entrepreneur (art. 5). Those lacking civil capacity (e.g., minors) cannot exercise a commercial enterprise by themselves (art. 6) and consequently cannot be a commercial entrepreneur, unless their legal representative is authorized by the court to acquire an enterprise or to continue to run it for them (art. 7).

As for *impediments and incompatibilities*, some persons cannot be commercial entrepreneurs (art. 9): collective persons not having material interests as their objects (for example, associations) and those who are legally forbidden to exercise a profession connected to the exercise of a commercial enterprise (for example, judges). Also the status of commercial entrepreneur is not acquired by the SAR Macau, despite it can exercise a commercial enterprise and such exercise is subject to the Code (art. 10).

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<sup>5</sup> On the reception of the entrepreneurial matrix into Portuguese commercial law see Orlando de Carvalho, *Critério e estrutura do estabelecimento comercial, I – O problema da empresa como objecto de negócios*, Atlântida, Coimbra, 1967.

Concerning the *legitimacy* of the commercial entrepreneur married in a regime of conjunction of assets, despite half of his earning belong to his spouse (Civil Code, arts. 1603 ff.), it is not required the assent of the spouse to, in the normal course of the activity, transfer or create charges over goods that compose the commercial enterprise, or which are the result of its activity, irrespective of their nature (art. 11). However, consent of the spouse is required to authorize for example the transfer or lease of the common commercial enterprise (Civil Code, art. 1548, 1).

### **§ 5. General obligations of commercial entrepreneurs (firm, bookkeeping, accounting, register)**

Commercial entrepreneurs have certain obligations (art. 12), such as: to adopt a firm (1), to have commercial bookkeeping (2), to register certain acts in the commercial register (3), and to render accounts (4).

5.1. *Firm*. The firm is the commercial name that the commercial entrepreneur must use in the exercise of his enterprise to sign the documents related to it (art. 14, 1). In short, it is the commercial identification of the commercial entrepreneur and therefore he/she can sue or be sued under his firm (art. 14, 2).

The firm has to be registered in the competent office so that a right of exclusive use is granted (art. 20). It allows the holder of the firm to prohibit any competitor from using such a similar firm and to obtain compensation for damages caused by such use (art. 21).

Firms can be composed of names, nicknames, fantasy or activity designations, or a combination thereof (art. 22). Then, special provisions apply, according to the kind of commercial entrepreneurs, to the composition of the firm (e.g., firms of private and public companies need to be added the word "Limitada" or "Sociedade Anónima" or if written in Portuguese the abbreviation "Lda" or "S.A.", respectively). Moreover, the registration of the firm will only proceed if several principles concerning the composition of the firm are complied with, namely the principles of truth, novelty or exclusivity, distinctive capacity, and lawfulness (arts. 15 to 18). For example, the *principle of distinctive capacity* means that the firm must be distinct, in the sense that it must allow the public to know about the activity of the commercial entrepreneur and to identity him within that activity. The transfer (sale, lease, etc.) of the firm as such is not possible. It can only be transferred together with the commercial enterprise that it relates to and provided that it is transferred (art. 31, 6).

**5.2. Commercial bookkeeping.** This obligation must be performed in a way adequate to provide “chronological knowledge” of all the operations of the enterprise, as well as the periodic preparation of balance sheets and inventories (art. 38). Commercial entrepreneurs must keep at least a *book of inventories* and *balance sheets*; the *book of minutes* is also a compulsory book for commercial entrepreneurs that are collective persons (art. 39, 1 and 2).

Bookkeeping rules apply to the form book of inventories and balance sheets, daily books, and books of minutes (arts. 42 to 44). There are requirements concerning the *external* form of bookkeeping. For example, blank spaces, interpolations, amendments or erasures, are not allowed (art. 46, 1); microfilming is authorized (art. 47). Moreover, the books and related correspondence and documents must be kept for 10 years counting from the last entry made in the books, and after this period has elapsed, they can be destroyed (art. 49-1, and 50). Entries that are made in the book of commercial accounting are *evidence*, in certain terms, of facts related to the enterprise (art. 51). Despite the principle of *confidentiality* of commercial bookkeeping, examination of books can be ordered, *ex officio* or upon request of a party in legal proceedings, in several cases, namely in cases of suspension of payments, bankruptcy, or where a shareholder of the company has the right of direct examination of the company's books (art. 52) which shall be performed in certain conditions of execution (art. 53).

**5.3. Accounting.** Commercial entrepreneurs must prepare annual or exercise accounts of their enterprises within three months from the end of each exercise; these accounts shall include the *balance sheet*, the *profit and loss account* and the *annex*, in terms that provide a faithful representation of the assets, financial situation and results of the enterprise (art. 54). There are detailed provisions on the preparation of balance sheet, profit and loss, and annex. For example, it is forbidden the compensation between accounts of assets and liabilities, or between accounts of profits and losses (art. 55, 6). The appraisal of heading elements of annual accounts is ruled by accounting principles, such as, for example, the *principle of prudence*, which means that only profits already gained by the closing date can be indicated in the balance sheet (art. 58, 1c, 2); also, concerning the amortization of fixed assets and current assets, that principle can be said to lead to an appraisal at a lower market value (art. 59).

**5.4. Registration** of acts of commercial entrepreneurs is, contrary to bookkeeping and accounting, intended to make public their legal situation for the purpose of security of

legal commerce (art. 61). With this same purpose, certain acts can also be subject to publication (art. 62).

## **§ 6. Notion and elements of commercial enterprises**

*Commercial enterprises* are defined as “any organization of productive factors for the exercise of an economic activity aimed at production for systematic and lucrative exchange” (art. 2, 1).

To begin with, it is an *organization of means*. The value of organization is essential, because for the purpose of negotiation a commercial enterprise can only be considered to exist as such if the factors (or elements) of production are coordinated in such a way that is likely to mean for the public the existence of a new commercial enterprise, regardless of whether it is working or not (art. 102).

Then, commercial enterprises have *productive factors or means* such as corporeal things (for example, buildings, machines, tools, furniture, raw materials, merchandises, etc.), incorporeal things (for example, patented inventions, utility models, trademarks, names, etc.), and other goods such as labour provision. But, if these elements are not organized (or assembled) by capable know-how and identified by distinctive signs, the enterprise is not feasible and therefore does not exist. Moreover, in several cases an administrative license may be required for an activity to be exercised (e.g., the Casino Gaming Act provides that only public companies that meet certain requirements, namely to have a corporate capital of at least 200,000,000 MOP that must be fully accomplished, are eligible applicants for licenses - see Law 16/2001, arts. 10 and 17, 1 and 2).

On the other hand, it is required the exercise of an *economic activity* aimed at production for systematic and lucrative exchange. The Commercial Code provides an exemplificative list of activities that illustrate the concept of economic activities that are exercised by commercial enterprises: the industrial activity for the production of goods or services, the activity of intermediation in the circulation of goods, the activity of transportation, the banking and insurance activity, as well as all their auxiliary activities.

## **§ 7. The enterprises as object of property rights and transactions (transfers & leases)**

Commercial enterprises can be object of rights and object of contracts, namely transfer and lease. On one hand, the Commercial Code has provided that enterprises can be object of property right (art. 95), and possession (art. 97). Property and possession law common means of protection, namely by claim for return or restitution or direct action, can be used to protect either ownership or possession (arts. 96 to 99). Moreover, all means of

acquisition of property apply to the acquisition of the enterprise provided they are compatible with its nature (art. 100), including the prescriptive acquisition in the terms of real state (art. 101).

The enterprise as such can be object of transactions, and the Code provides special regulation namely for transfer (arts. 104 to 113) and lease (arts. 114 to 131). Similar to the legal notion of enterprise (which is very close to the doctrinal notion of commercial enterprise in objective sense of Portuguese law), the regulation of these contracts follows closely Portuguese law<sup>6</sup>, and adopts certain legal solutions of the Italian civil code, namely the obligation of non-competition and the provision on the transfer of debts related to the enterprise (arts. 2557 and 2560). These business transactions must be done in writing and the signatures of the parties must be recognized by the notary. In case real state is involved, public deed and registration are necessary (art. 103).

*7.1. Transfer of enterprise.* A commercial enterprise as such can be transferred by means of disposition either against payment or gratuitous. Accordingly, the Civil Code regulations of sale or donation contracts have subsidiary application (art. 104).

As for the goods of the enterprise that are transferred within the transaction, there are those that have to be transferred for the transfer of the enterprise to occur (*minimal transfer*), those that are naturally transferred unless otherwise provided (*natural transfer*) and those that can be added in the transfer despite they are not essential to the existence of the enterprise nor make part of the natural content of transfer (*eventual transfer*). As provided in art. 105, in case transferred goods are not discriminated, all goods, tangible or intangible, that compose the enterprise and are used for its purpose are considered to be transferred to the acquirer (e.g., in case of transfer of a publishing enterprise, the publishing rights are transferred to the acquirer of the enterprise, unless it causes the author a considerable prejudice - art. 87, 1 and 2, Copyright Law; trademarks and registered names and emblems of establishments which may be assigned with the establishment, or part of the establishment to which they belong - Code of Industrial Property - CIP, arts. 227, 1, and 250, 1); an express declaration of transfer may be legally required (e.g., in case of transfer of the firm - art. 31, 1); and some goods can be excluded from the scope of transfer, provided that the existence of the enterprise is kept or that the acquirer has the availability of such goods during the necessary time for the acquirer to consolidate his acquisition (*minimum transfer*).

In what concerns the obligations of the parties, the transferor is obliged to *deliver* the enterprise to the acquirer by practicing all acts that are required, according to the

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<sup>6</sup> See J.M. Coutinho de Abreu, *Curso de Direito Comercial*, I, cit., pp. 207 ss, **273 ss.**



circumstances and good-faith, to enable him to *run the enterprise*, namely to deliver the nominative list of clients, suppliers and financiers, collaborators, unpatented trade and manufacture secrets, and to make available the enterprises' bookkeeping and correspondence for consultation and copy during five years (art. 106). This obligation of delivery is reinforced by an *obligation of non-competition*, according to which during five years after the transaction the transferor cannot exploit, directly or indirectly, any other enterprise – unless he is already running it - that can deviate clients from the transferred enterprise, considering namely their object and location; for the same reasons, this obligation is extended to those who have personal relations with the transferor and to dominant shareholders who transfer their participations (art. 108). In case the obligation of non-competition is breached, the transferee has within three months of knowing or being able to know about that, the right to demand the termination of the breaching activity, namely the closure of a new commercial enterprise that the transferor creates (art. 109).

Concerning contracts concluded before the transfer of enterprise, they are transferred to the acquirer provided that they do not have personal nature and the parties did not exclude it (art. 110, 1). As for *personal contracts*, unless otherwise agreed by the parties, special legal provisions may provide the succession in contracts, such as, for example, the cases of *commercial rental* (Civil Code, art. 1047), *employment* contracts (art. 111, 1), *leasing* contracts (art. 899, 1), and the enterprise's related credits - which legal assignment has efficacy towards third parties upon registration of the transfer (art. 112, 1 and 2). Nevertheless, concerning the enterprise's related debts, there is a special rule providing that the acquirer of the enterprise is liable for debts resulting from its running prior to the transfer, if they are entered in the compulsory bookkeeping records (for the general regulation of transfer of debts, see art. 590 *et seq.* of the Civil Code). In this case there is joint liability, because the transferor is not liberated from such debts prior to the transfer, unless otherwise expressly agreed by the creditors. Moreover, the transferee has a right of return against the transferor for payment of such debts, unless otherwise agreed (art. 113, 1 to 3).

**7.2. Lease of enterprise.** Lease of commercial enterprise is defined as the contract by which the leaser grants to the tenant the total or partial enjoyment of a commercial enterprise for a certain period of time and against payment (art. 114). It is a special form of the lease contract regulated in the Civil Code and therefore the provisions of this Code have subsidiary application (art. 116).

During the lease period, the tenant has, except in case of *force majeure*, an obligation to run the commercial enterprise in order to preserve the efficiency of the organization and the destination of the enterprise (art. 117). This obligation has a *negative* side, limiting the powers of the tenant concerning acts of disposal and charges over the goods of the enterprise, which in principle he can only practice with the authorization of the owner (art. 118). Moreover, the tenant is prevented, unless otherwise agreed, from exercising a competing enterprise (art. 120), subletting the enterprise, transferring his position in the contract or allowing a third party to enjoy the enterprise (art. 128) and must return it in functioning to the landlord (art. 121).

The landlord has the obligation to deliver the enterprise and to guarantee its effectiveness (art. 122). Accordingly, he is also subject to the obligation of non-competition (arts. 123 and 124). As for debts, the lease entitles creditors of the landlord to claim their immediate payment in order to safeguard against the risk of insolvency of the debtor (art. 125). In case the landlord transfers his enterprise, the enterprise lease is kept (art. 129; it's the rule *emptio non tollit locatum* provided in art. 1004 of the Civil Code). Finally, upon termination of the lease, creditors may immediately claim payment of the debts contracted by the tenant in the exercise of the enterprise (art. 130).

### **§ 8. Protection of creditors of entrepreneurs**

Commercial debts of commercial entrepreneurs are presumed to be contracted in the exercise of their enterprises (art. 81). For these debts contracted (or presumed to be contracted) in the exercise of an enterprise will be liable the assets that compose the enterprise and, in their lack or insufficiency, the private assets of the entrepreneur; however, in order to protect the value and integrity of enterprises, if the execution of the assets of the enterprise implies its liquidation, creditors must first execute the entrepreneurs' private assets (art. 82). The protection of creditors is reinforced by the fact in case a foreign enterprise is exercised in Macau, local creditors have priority in payment over creditors from abroad in executing the local assets of the enterprise (art. 83).

### **§ 9. Product liability**

The Commercial Code provides the so-called product liability. This regulation is based upon the Portuguese Product Liability Act, approved by Decree-Law 383/89, of November 6, implementing into national law EC Council Directive 85/374/CEE of July 25 on product liability.<sup>7</sup>

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<sup>7</sup> See J. Calvão da Silva, *Responsabilidade Civil do Produtor*, Coimbra: Almedina, 1990

Commercial entrepreneurs that are deemed producers are liable, regardless of fault, for damage caused to third parties by the defects or products that they put into circulation (art. 85, 1). Any stipulations excluding or limiting liability towards the injured party are considered not written (art. 92).

A commercial entrepreneur shall be considered producer if he manufactures a finished product or presents himself as such apposing a distinctive sign of his to the product, of even if he simply imports such product for distribution (art. 85, 2 and 3). As for the definition of products, it includes any movable goods, even if incorporated in another movable or immovable good, excluding untransformed products from the land such as fishing or hunting (art. 86).

Product liability is based upon the concept of defective product, i.e., a product that, when put into circulation, it is not safe meaning that it does not offer the safety that legitimately is to be expected, considering all the circumstances, such as namely its presentation, characteristics, and the use that can reasonably be made of it (art. 87, 1). The defective nature of the product is referred to the moment in which it is put into circulation, because it does not become defective simply because a more advanced product has been later put into circulation (art. 87, 2).

Despite a product is considered defective, product liability can be excluded in several circumstances, namely where the defect of the product is a consequence of its conformity with imperative norms or that the scientific and technical state of the art could not detect it at the moment of entry into circulation of the product (art. 88, d/e).

Damages eligible for compensation include those resulting from death or personal injury as well as damages to goods, with the exception of the defective product, in so far as they are consumer goods used for that purpose by the injured party (art. 91).

## **§ 10. Unfair competition**

The Commercial Code provides the prohibition of *unfair acts of competition* in a *general clause* according to which it applies to any act of competition that is objectively against the norms and honest usage of an economic activity (art. 158).<sup>8</sup> This general clause is illustrated by a series of typical acts of competition that are deemed to be, in certain circumstances, unfair competition, such as acts of confusion (risk of association by consumer is sufficient to ascertain the confusion - art. 159, 2), misleading advertising, aggressive sales, wrongful comparisons, slavish imitation and parasitism (despite the basic principle of freedom of imitation, only limited in general terms by the existence of a

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<sup>8</sup> On unfair competition see, e.g., J. Oliveira Ascensão, *Concorrência Desleal*, Coimbra, Almedina, 2002; A. Menezes Leitão, *Estudos de Direito Privado sobre a Cláusula Geral da Concorrência Desleal*, Coimbra, Almedina, 2000.

legal exclusive right, such as patent, trademark or copyright - art. 164, 1), breach of confidential entrepreneurial secrets (including all and any technical or commercial information that: 1. has practical use and provides economic benefits to the holder; 2. is not of public knowledge; 3. the holder of the secrets took appropriate measures to guarantee its confidentiality - art. 166, 2), instigation and exploitation of contractual breaches (e.g., having access to the entrepreneurial secrets of competitors - art. 167, 2), exploitation of economic dependence and sales at a loss (see arts. 159 to 169).

The scope of this regulation is a broad notion of competition acts: competition acts are those practiced by marketers with competition purposes regardless of their entrepreneurial nature and of the fact that marketers act in the same branch of activity (arts. 156, 1, and 157). Moreover, competition purposes are presumed whenever the acts are objectively adequate to promote or to ensure the distribution in the market of the goods of the marketer or of a third party (arts. 156, 2).

As for remedies against unfair competition, upon request of an injured party or in class actions by entities representative of the category of interested parties (art. 173), the Court may order the termination of unfair competition practices, and the unfair competitor may have to compensate damages caused with fault, which is presumed in case there is an act of unfair competition (arts. 171 to 173).

## **Part II – Commercial Companies**

### **§ 11. Notion and elements of companies**

Company law is a very important dimension of commercial law.<sup>9</sup> Nevertheless, is grounded in civil law. According to the notion of company provided in the Civil Code, companies are person-based legal persons whose members bind them selves to enter with goods or services to the common exercise of a certain economic activity, which is not of mere enjoyment, in order to share the profits arising from such activity or to achieve

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<sup>9</sup> On company law see A. Ferrer Correia, *Lições de Direito Comercial*, vol. II (c/ colab. de Lobo Xavier, Henrique Mesquita, Sampaio Cabral e António Caeiro), ed. copioqr, Coimbra, 1968; V.G. Lobo Xavier, *Sociedades comerciais (Lições aos alunos de Direito Comercial do 4.º ano jurídico)*, ed. copioqr., Coimbra, 1987; A. Menezes Cordeiro, *Manual de Direito das Sociedades*, Coimbra, Almedina, 2004; M. Nogueira Serens, *Notas sobre a sociedade anónima*, 2.ª ed., Coimbra Editora, Coimbra, 1997; J. Pinto Furtado, *Curso de direito das sociedades*, 5.ª ed., Almedina, Coimbra, 2004; A. Pereira de Almeida, *Sociedades comerciais*, 3.ª ed., Coimbra Editora, Coimbra, 2003; J. Oliveira Ascensão, *Direito comercial*, vol. IV – *Sociedades comerciais*, 2.ª ed., Lisboa, 2000; Pedro Maia / Soveral Martins / Elisabete Ramos / Paulo T. Domingues, *Estudos de direito das sociedades* (coord. Coutinho de Abreu), 6.ª ed., Almedina, Coimbra, 2003; AA.VV., *Problemas de direito das sociedades*, IDET, Almedina, Coimbra, 2002; Raúl Ventura, *Sociedades por quotas*, Coimbra, Almedina, 1996; Idem, *Novos estudos sobre sociedades anónimas e sociedades em nome colectivo*, Almedina, Coimbra, 1994; Engrácia Antunes, *Direito das sociedades comerciais*, Coimbra, Almedina, 2000. J.M. Coutinho de Abreu, *Curso de Direito Comercial*, Vol. II (Das sociedades), 2002.

savings (art. 184, 1). The Civil Code also provides that there are civil companies and commercial companies (art. 184, 2 and 3): civil companies are those that do not exercise a commercial enterprise nor expressly adopt one of the types of commercial companies; commercial companies are all the others, even if they only adopt one the types of commercial companies, irrespective of their object – the so-called formal commercial companies -, as stated in the Commercial Code (art. 174, 1).

A company is generally based upon a *group of persons*, the so-called members, partners or shareholders. Nonetheless, the Commercial Code allows commercial companies to be created by a single shareholder and to become a single shareholder company (see arts. 27 and 390).<sup>10</sup> The founders of the company can be natural or legal persons. Then, the company is provided with assets which originally correspond to the entries that members bind themselves to provide or that they have already provided.

As for the object of the company, i.e. the activity it will exercise, it must be an economic activity (not political, religious or strictly cultural) capable of generating profits, although not of mere enjoyment. The purpose of creating a company is to make profits for sharing among members. The other side of the purpose of profit making and sharing is the submission of shareholders to losses in case the company is terminated and they cannot recover their investment in the company.

## **§ 12. Companies and related entities**

There are certain entities, namely economic interest groupings (arts. 489 ff.), consortium (arts. 528 ff.), and associations in participation (arts. 551 ff.), which are sometimes called companies. However, these entities are different from companies. In fact, contrary to commercial companies, the main purpose of economic interest groupings cannot be profit making and sharing (art. 491, 1); savings achievement rather than profit making and sharing is the purpose of consortium (arts. 528 and 529)<sup>11</sup>; and in association in participation there is no common exercise of economic activity (art. 551).

## **§ 13. Types of commercial companies**

There are four types of commercial companies: unlimited partnerships, limited partnerships, private companies, and public companies (art. 174, 1). Companies that exercise commercial enterprises have to adopt one of these types of companies (art. 174, 2). This obligation places a limit to freedom of contract, because it is not possible to mix

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<sup>10</sup> On single shareholders companies see, e.g., A. Ferrer Correia, *O problema das sociedades unipessoais*, in *Estudos de direito comercial*, vol. I, Coimbra, 1969; Ricardo Costa, *A sociedade por quotas unipessoal no direito português – Contributo para o estudo do seu regime jurídico*, Almedina, Coimbra, 2002.

<sup>11</sup> On consortium contracts see, e.g., A. Sousa Vasconcelos, *O contrato de consórcio no âmbito dos contratos de cooperação entre empresas*, Coimbra Editora, Coimbra, 1999.

regulations of two different types and create a new type of company, nor is it possible to stipulate in the articles of association clauses that are against imperative norms that establish the typical features of each legal type of commercial company. The rationale of this limitation to the freedom of contract (Civil Code, art. 399) is *legal certainty*, in order to protect creditors of the company, the public in general and even shareholders.

#### **§ 14. Typical features of (private and public) companies**

*Liability of shareholders* towards the company and the creditors of the company: while in public companies each member is liable towards the company only for his own entry and he is not liable towards creditors of the company (arts. 393, 3, and 410, 1), in private companies each member is also jointly liable for the entries of all members but he does not respond for debts of the company unless otherwise stipulated until a certain amount in the act of association (arts. 356, 1, and 357, 1);

*Transmission of shares*: unless otherwise provided in the articles of association, transmission of shares of private companies is free, but requires communication to the company to have effects in relation to it (art. 367); in public companies, it is free both for bearer as for nominative shares, although concerning nominative shares the articles of association can require for example the consent of the company (art. 424).

*Minimal number of members*: 1 for private companies (single shareholder, art. 390) but no more than 30 (art. 358, 1), and 3 for public companies (art. 393, 1);

*Minimum capital*: the capital cannot be lower than 25,000 *patacas* in private companies (art. 359, 2), and 1,000,000 *patacas* in public companies (art. 393, 1).<sup>12</sup>

#### **§ 15. The constitution procedure of commercial companies**

The constitution of a company<sup>13</sup>, regardless of its type, requires a set of acts and formalities. Normally, there are three main acts: the act of incorporation, the registry in the Commercial Registry, and the publication of the act in the Official Bulletin of the SAR Macau. Public companies can also be created through public subscription.

15.1. The act of incorporation is the company contract (in case it is created by a single shareholder it will not be a contract but rather a unilateral legal affair or transaction (or a legislative act if created by the legislator). Several requirements apply to the form and content of the act of incorporation (art. 179). Concerning *form* requirements, it shall be done by written document in one of the official languages (Chinese and Portuguese) and

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<sup>12</sup> On corporate capital see, e.g., P. Tarso Domingues, *Do capital social – Noção, princípios e funções*, 2. ed., Coimbra Editora, Coimbra, 2004.

<sup>13</sup> See, e.g., Albino Matos, *Constituição de sociedades*, 4ª ed., Almedina, Coimbra, 1998.

the founding shareholders' signatures have to be certified by the notary who will file as copy of the act. However, in case a member enters into the company with real property, the act shall be done by public deed.

As for *minimum content*, several elements have to be mentioned in the act of incorporation, such as: 1. the date of its conclusion; 2. the identity of shareholders or of their representatives in the act; 3. the declaration that shareholders intend to create a company and the type of company they want to create (civil or commercial and in the latter case the type of commercial company); 4. capital participation subscribed by each shareholder; 5. the articles of association that regulate the functioning of the company, mentioning the type, firm, object (or economic activity), registered office, amount of capital (in *patacas*) and method and time of its payment, the composition of the administration and, where it is the case, the supervision of the company; 6. in private companies, it must also be specified the share of capital held by each shareholder (art. 356, 3), and concerning public companies, the articles of association must also include the nominal value and number of shares, the nature of the instruments representing the shares, either nominative or to bearer, and rules of conversion, as well as the types of share, ordinary or preference, and the various categories of shares if equal rights are not attached to all of them, the authorization for bonds issuing, the amount up to which the administration can raise the capital without a resolution by shareholders (art. 395); 7. the appointment of the administrators as well as, in case they exist, the single supervisor or the members of the supervisory board; 8. a declaration issued by a lawyer stating that he did not find any irregularities in the procedure of incorporation, in case it is done by private document.

These elements must be included in the incorporation act of the company, otherwise it is invalid and the company will enter into liquidation, unless the breaches are corrected (art. 191), and certain persons will be held liable (art. 192). It is possible however to *add* other elements in the articles of association, such as the duration of the company, causes of exclusion and exoneration of shareholders (arts. 371, 1, and 372, 1), clauses of compulsory profit sharing percentages (art. 377, 2), supplementary payments in money and their maximum global amount in the proportion of shares (art. 374, 1, 2 and 3), term of managers' appointment (art. 384, 2), issuing of bonds by the administration board of public companies (art. 437, 1), quorum for functioning and majorities for passing resolutions (art. 453), administrators term of office shorter than 3 years (art. 454), or granting the president of the board of administration a casting vote in the resolution thereof (art. 458).

Moreover, the articles of association can also provide *special rights* of shareholders, such as, for example, the right to administrate the company and/or the right to profits in a percentage higher than the participation in the capital. Special rights can only be created in the articles of association, and they cannot be suppressed nor modified without the agreement of the respective holder (arts. 184 and 227; special rights are different from agreements concluded by shareholders outside the company, which do not however bind the company and in certain cases they are void, namely when a shareholder binds himself to always vote in accordance with the instructions of the company, or to exercise or abstain from exercising the voting right in return for special advantages - art. 185).<sup>14</sup>

Nevertheless, there are *limits* to the granting of special rights to shareholders, and certain elements *cannot* be included in the articles of association. For example, it is not valid to stipulate payment of interest to shareholders (art. 195, 2), special rights to information (art. 195, 3), exemption of the obligation to cover losses (art. 197, 2), or a right to distribution of goods of the company not as profits (art. 198, 1).

15.2. Registration of a company shall be applied for within 15 days from the date of the act of incorporation by the administrator and the company secretary; nonetheless, any shareholder has legitimacy to apply for registration (art. 187, 1 to 3). The company will only have *legal personality* with the registration of its act of incorporation (art. 176).

The relations among shareholders *prior to registration* are regulated by the articles of association as well as by the legal provisions of the respective type of company, unless they presuppose registration; however, *inter vivos* transfers of shares or amendments to the articles of association require unanimous agreement of all shareholders (art. 189). As for relations with third parties prior to registration, those who represent the company or authorize its representatives to act shall be personally liable for those acts; such liability is joint (with those who act on behalf of the company or authorize them to act prior to registration) and unlimited, and does not depend upon previous exhaustion of the assets of the company (art. 190).

Upon registration, the company assumes, in certain terms, the rights and obligations that arise from acts on its behalf prior to its registration; moreover, the company has the obligation to refund the registration expenses, taxes and fees, and can take up all other expenses of the registration procedure to those who paid it (art. 188).

## **§ 16. Personality and capacity of commercial companies**

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<sup>14</sup> See Paulo Pitta Cunha, *Os direitos especiais nas sociedades anónimas: as acções privilegiadas*, Coimbra, Almedina, 1993.



Upon registration of the act of incorporation the company acquires legal personality (art. 176). It is therefore a legal entity different from shareholders.<sup>15</sup> Concerning limited companies, it grants an important commercial privilege: *the privilege of limited liability*. Nonetheless, in certain cases, the subjective and asset autonomy of the company may not be considered towards its shareholders, i.e., the “corporate veil” can be “lifted” or “pierced”.<sup>16</sup> For example, the transferor of an enterprise cannot circumvent the obligation of non-competition by hiding behind a company and its legal personality (see art. 108, 1). Other situations of abuse of legal personality may be covered namely by the principle of abuse of right (Civil Code, art. 316).

The capacity of companies is determined by *the principle of specialty* meaning the purpose of the company, i.e., commercial companies have capacity to have rights and obligations that are necessary, useful or convenient to the achievement of their aims, unless otherwise provided by legislation or resulting from the nature of legal persons (art. 177, 1). For example, by nature, companies can not have rights or obligations such as those arising out of marriage or adoption.

The purpose of commercial companies is to make profits and to share them by their members. Accordingly, if a certain act can be considered to be necessary, useful or convenient to making profits, then the company can practice it. This means that in principle the company can not practice gratuitous acts, i.e. acts by which the company gives to another person an advantage without return. Those acts are deemed to be null and void because they breach an imperative provision (Civil Code, art. 285).

However, certain gratuitous acts can be practiced by the company if they are considered usual, according to the circumstances of the season and the conditions of the commercial company itself (art. 177, 2). In these situations the company has an interest in the donation, because it is capable of promoting the sales of its products or its image (for example, promotional gifts to clients or cultural and humanitarian donations), or to increase productivity (for example, gratifications to workers). For similar reasons, the company can provide personal or real guarantees to obligations of other persons if there is an own interest of the company that is declared and reasoned in writing by the administration (art. 177, 3). For example, if the third person is an important client of the company, the company has an interest in providing a guarantee, even gratuitous, to an obligation of its client in order to help him to keep on business. However, in no case can the company provide guarantees to protect extra-corporate interests of its members.

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<sup>15</sup> See A. Soveral Martins, *Da personalidade e capacidade jurídicas das sociedades comerciais*, in *Estudos de direito das sociedades*, cit., pp. 69 ss, J. Espírito Santo, *Sociedades por Quotas e Anónimas – Vinculação: Objecto Social e Representação Plural*, Coimbra, Almedina, 2000.

<sup>16</sup> See A. Menezes Cordeiro, *O levantamento da personalidade colectiva no direito civil e comercial*, Almedina, Coimbra, 2000; see also Coutinho de Abreu, *Das sociedades*, cit., pp. 161 ss, 174 ss.

Finally, the object of the company does not limit its capacity. However, the company can invoke the limitations of its object against a third party, proving that he knew or could not ignore (art. 236 - this level of knowledge cannot be evidenced only by the publicity given to the articles of association), according to the circumstances, that a certain act was out of the object of the company, provided that it did not assume it by express or implied resolution of the shareholders. In short, in those circumstances, the act will not produce effects towards the company, and moreover the administrator may be held liable.

### **§ 17. Corporate shares and bonds**

The ownership of corporate shares establishes the relations between shareholders and the company. In fact, shares represent a unitary bundle of present and potential rights and obligations of members of the company. Shareholding is originally obtained by the creation of a company or by increase of its capital. It can also result from *mortis causa* or *inter vivos* transfers of shares or by merger. There are several types of shares.

17.1. The capital of private companies is divided in shares and the sum of the nominal value of the shares represents the capital (arts. 356, 1, 359, 1). The value of each share is expressed in *patacas* (MOP), must be equal or higher than 1000 MOP, and constitute a multiple of 100 (art. 360, 1). Each shareholder cannot subscribe more than one share in the act of incorporation, regardless of its proportion in the capital of the company (art. 360, 3). Shares to which special rights are attached are always independent and indivisible (art. 360, 4). Moreover, shares cannot be embodied in negotiable instruments nor be designated as stock (art. 356, 2).

In *public companies* the capital is divided into shares that are indivisible (art. 414), have all the same minimum value of 100 MOP and can be represented by instruments (art. 393, 2). Special rights can be granted to a category of shares and they are transferable with the shares (art. 415). Public companies can only acquire own shares that correspond to no more than, in principle, 10% of their capital (art. 426) by resolutions of shareholders that sets the conditions of acquisition (art. 427).

There are two types of shares of public companies: ordinary shares and preference shares (art. 408). *Ordinary shares* grant voting and profit sharing rights. There can be different categories of ordinary shares according to the rights that are attached to each category. *Preference shares* do not grant voting rights but instead they confer a priority right to profit sharing and reimbursement in the distribution of the balance of liquidation. The articles of association can authorize the company to issue this type of shares up to half

of the company capital (art. 420, 1). These shares entitle their holder to a priority dividend no less than 5% of the nominal value of the shares.

As for *instruments* representing shares, unless otherwise is provided in the articles of association, they can be nominative or to bearer, but, in case the shares are not fully paid or cannot be transferred by reason of a legal provision or if the shareholders have right to pre-emption in their transfer according to the articles of association, those instruments have to be nominative (art. 411). Conversion of instruments is possible (art. 412) and they can have coupons for collecting dividends (art. 413). The nature of instrument also concerns transfer of shares, because they are transferred by the transfer of the instruments in which they are incorporated (art. 424). On one hand, nominative instruments are transferred *inter vivos* by endorsement written on the instrument itself and entry in the book of shares registration. On the other hand, bearer instruments are transferred by mere delivery and the exercise of the rights depends on their possession.

17.2. *Bonds* are different from shares.<sup>17</sup> Bonds are negotiable instruments that public companies can issue in certain conditions and within determined limits (arts. 433 and 434). They grant, in a single issue, equal credit rights for the same nominal value, but they can also be issued, for example, in terms of granting a supplementary interest or a reimbursement premium, either fixed or dependent upon the company profits (see arts. 439 and 440), and they can be convertible into shares, with or without an issue or conversion premium (art. 433, 2). The elements that must be mentioned in instruments representing bonds are enumerated in art. 448. In principle, bonds issuing is a matter for resolution of shareholders which must be passed by special majority in case bonds convertible into shares are thereby issued (art. 437; concerning the special majority see art. 453). Moreover, bond issuing resolutions must provide a minimum content of elements, such as, for example, the global amount of the issue and the interest rate, and in case of convertible bonds issuing namely the issue or conversion premium (art. 438).

### **§ 18. Rights and obligations of shareholders**

Shareholders have a number of rights towards the company. Besides the general right of equal treatment (art. 194), every shareholder has the following basic functional rights: *rights of participation* in the organs of the company (general assembly, administration and

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<sup>17</sup> See António Silva Dias, *Financiamentos das sociedades por emissão de obrigações*, Quid Ivris, 2002; Fátima Gomes, *Obrigações convertíveis em ações*, UC, 1999. Another means of corporate financing is through shareholders' supplies (see also, e.g. Alexandre Mota Pinto, *Do contrato de suprimento – O financiamento da sociedade entre capital próprio e capital alheio*, Coimbra, Almedina, 2002).

supervision); *financial rights* such as the right to profit sharing, preference rights<sup>18</sup> and the right to his shares in liquidation; and *control* rights, namely the right to information and the right to initiate legal proceedings.

Concerning basic obligations, original shareholders have the obligation of *entry* with capital (money or goods capable of seizure) - or with industry, i.e. services, in the types of companies that expressly allow it -, and every shareholder has the obligation to share in losses (art. 196); moreover, every shareholder has also a duty to act in conformity with the corporate interest and to respect the articles of association and company law (otherwise he may be expelled). Other obligations may be provided in the articles of associations (for example, accessory provisions).

### **§ 19. The obligation of entry**

The obligation of entry depends on the nature of entries. In private and public limited companies entries can only be made in *money or in kind*, i.e. goods that can be judicially seized (art. 201, 1 and 2). In case it is done in *kind*, the goods have to be identified, described and appraised by means of a report to be prepared by an auditor or a firm of auditors, which shall be attached to the act of incorporation; the criteria used in the appraisal must be mentioned (art. 202). Creditors of the company can exercise the right of the company to demand full performance of entry from shareholders (art. 205, 1-a).

In principle, entries must be fully paid at the moment of the act of incorporation (art. 203, 1); however, it can be delayed according to the type of the company (n. 2). Entries in kind can only be delayed if the company has an interest in that and provided that the date of performance is specified in the incorporation act (n. 3).

Concerning *private* companies, the payment of shares due in money can be delayed, for a period of no more than three years, up to half of their nominal value, provided that the value of the sum of the amount paid in money and the nominal value of shares paid in kind is equal or higher than the minimum capital of 25,000 MOP (art. 361, and 359, 2). All shareholders are, in the proportion of their shares, jointly liable for the payment of shares not performed in due time, and the share will be divided and added to their shares in accordance with the proportion of their payments, the former shareholder not having right to reimbursement for any payment he might already have done (art. 362, 1, 4 and 5).

Concerning *public* companies, the payment of capital due in kind cannot be delayed; the same applies to the payment of a premium of issue (art. 394). However, 25% of capital (minimum 1,000,000 MOP) must be paid at the moment of the act of incorporation (art.

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<sup>18</sup> For example, the right of preference in case of increase of corporate capital. See Pedro Albuquerque, *Direito de preferência dos sócios em aumento de capital nas sociedades por quotas e anónimas*, Coimbra, Almedina, 1993.

394, 1), and full payment cannot be delayed for more than 5 years (art. 409, 1 and 2). Each shareholder is only liable for payment of the shares that he has subscribed (art. 410, 1).

## **§ 20. The obligation to act according to the interest of the company**

This obligation is implicit in several provisions of the Commercial Code and can reasonably be construed upon the regulation of the so-called dominant shareholders.<sup>19</sup> A dominant shareholder is defined as an individual or a collective person who, by himself or together with other companies of which he is also the dominant shareholder, or with other shareholders to whom he is connected by agreements outside the company<sup>20</sup> (see art. 185), detains a majority participation in the company capital, or has more than half of the votes, or has the power to elect the majority of the members of the administration (art. 212, 1).

In a strict contractual approach, the corporate interest would be dictated by the dominant shareholder in the exercise of his voting rights. However, the power of the dominant shareholder is limited in order to protect the interest of the company. In fact, a dominant shareholder who by himself or through the above mentioned persons uses the power of domination so as to prejudice the company or other shareholders, shall be liable for the damage caused to the company or to the other shareholders (art. 212, 2 and 3). This liability of dominant shareholders can be grounded upon several circumstances, such as, for example, to conclude, either directly or with the intermediation of another person, a contract with the company that he dominates, in favourable and discriminatory conditions, to his own benefit or to the benefit of a third party.

## **§ 21. Right to profits**

Shareholders have the right to profit sharing.<sup>21</sup> The wording profit is used in the Commercial Code with several meanings: final or liquidation profit, balance profit, exercise profit and sharable profit. For purposes of profit sharing, it matters the notion of sharable profit, according to which, shortly, profit sharing can only be claimed when at the end of the exercise the assets of the company are higher than the sum of the capital plus

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<sup>19</sup> On the issue of corporate interest see Coutinho de Abreu, *Das Sociedades*, cit., p. 286 ss; see also J.N. Marques Estaca, *O interesse da sociedade nas deliberações sociais*, Coimbra, Almedina, 2003. A basic reference on this issue is Jaeger, *L'interesse sociale*, Giuffrè, Milano, 1964.

<sup>20</sup> On agreements outside the company see, e.g., Maria da Graça Trigo, *Os acordos parassociais sobre o exercício do direito de voto*, UCP Editora, Lisboa, 1998.

<sup>21</sup> See V.G. Lobo Xavier / Coelho, M. Ângela, *Lucro obtido no exercício, lucro de balanço e lucro distribuível*, Revista Direito e Economia, Coimbra, n.º 8, Coimbra, 1992, 261; F. Cassiano Santos, *A posição do accionista face aos lucros de balanço – O direito do accionista ao dividendo no Código das Sociedades Comerciais*, Coimbra Editora, Coimbra, 1996.

legal and contractual reserves and provided that losses from previous years have been covered and compulsory reserves replenished (art. 198, 2 and 3).

Concerning the *percentage* in profit sharing, shareholders share the profits and the losses of the company in accordance with the proportion of the nominal value of their respective participations in the capital (art. 197, 1). For example, a share of 20% of the capital entitles its holder to 20% of sharable profit. However, no distribution of profits can be made without a prior resolution of the shareholders deciding profit sharing (art. 199, 1), and profit sharing resolutions have to comply with several requirements, which depend on whether the company is a private or a public company.

As for *private companies*, no less than 25% of the profits of exercise must be retained as legal reserves of the company, until it reaches an amount equal to half of the capital (art. 377, 4). Moreover, the articles of association can stipulate that a certain percentage between 25% and 75% of the distributable profits of the exercise is compulsory distributed to shareholders (art. 377, 2).

Concerning *public companies*, the destination of distributable profits is decided by shareholders (art. 431, 1). To achieve distributable profits it is necessary firstly to comply with legal and contractual reserves. As for legal reserves, until it reaches an amount equal to a quarter of the capital, no less than 10% of the profits of the exercise have to be retained as legal reserves (art. 432, 2). Then, the shareholders resolution must also comply with the articles of association imposing the distribution of a percentage which can be of no more than 25% of distributable profits of the exercise (art. art. 431, 2).

## **§ 22. Right to information**

Shareholders have the general right to information<sup>22</sup> as provided in art. 209. This right is designed in special to provide shareholders with the necessary information for them to take part in general meetings and exercise their voting rights therein. It can consist of inspecting (and getting copies of) the company's books (minutes of the general meetings and records of attendance; registration of liens, charges and guarantees, registration of shares) and all other documents that must be made available to shareholders before general meetings; it can also consist of requesting from the administrators (and others, such as supervisors) any information relating to the issues to be dealt with in the general meeting.

The right to information also entitles shareholders to submit a written request to the administration for written information about the management of the company. However,

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<sup>22</sup> On the right to information see N.M. Pinheiro Torres, *O direito à informação nas sociedades comerciais*, Almedina, Coimbra, 1998.

this right can be restricted by the articles of association and, concerning limited liability shareholders, can be made dependent upon a certain percentage of capital not higher than 5% (art. 209, 2; if the requested information is not provided, shareholders can request the court to order the company to provide them the information (n. 4).

Moreover, shareholders have a right to directly request judicial examination of the company in case they have serious grounds to suspect gross irregularities in the activity of the company (art. 211). In any case, they have an obligation not to use the obtained information in a way that harms the company and they are liable for damages arising thereof (art. 209, 3).

### **§ 23. The right to take part in corporate resolutions and organs**

This is the right of participation in the organs of the company, either at general assembly to discuss and approve resolutions (deliberations), or at the administration and supervision to respectively manage or supervise the activity of the company. Every company must have, at least, the general assembly and the administration; secretary and supervision are compulsory organs only of certain companies that meet some special requirements, namely to have 10 or more shareholders, issue bonds or be a public company (art. 214).

### **§ 24. General assembly**

The general assembly is the organ of the company in which shareholders meet to adopt resolutions on a variety of matters (art. 217, 1). Art. 216 enumerates a list of matters that fall in the competence of the general assembly, such as, namely, the election and removal of the administration and the supervisory board, apportioning the results of exercise (see arts. 197 ff.), increase and reduction of the capital, amendment of the articles of association (see art. 269), and dissolution of the company (see arts. 315 ff.); moreover, the general assembly has residual competence to pass resolutions that do not fall within the competence of other company organs according to legal provisions and the articles of association. Moreover, several norms of the Commercial Code provide specific competences of the general assembly to, for example, concerning public companies, acquisition and transfer of own shares (arts. 427 and 428), issuing of convertible bonds (art. 437, 2), or resolutions on matters of management (art. 449).

There are ordinary and extraordinary sessions of the general assembly (art. 220). *Ordinary* sessions are called by the assembly chairman (president) and must take place within three months following the end of each exercise in order to decide on the balance sheet, the profit and loss account, the report of the administration concerning the exercise,

the apportionment of results, and the election of the administrators and, if it is the case, the members of the supervision board. *Extraordinary* sessions can be called also by initiative of the president of the chairing committee or upon request of namely shareholders representing 10% of the capital.

Shareholders have the right to participate, discuss and vote in the sessions of the general assembly (understood in broad terms) and to be represented therein (art. 218). But, whenever there is a *conflict of interest* of the shareholder with the company concerning the issue of the resolution, the shareholder cannot vote either personally or through a representative and represent another shareholder in a vote (art. 219). Moreover, according to the rule of unity of vote, shareholders who have more than one vote cannot vote in different ways, otherwise their votes will be counted as abstentions (art. 226).

Shareholders pass resolutions in meetings but also in writing, either by unanimity or majority. There are several types of resolutions (art. 217). Reasons of *business celerity* justify the overcoming of formal requirements of general assemblies in order for shareholders to pass resolutions. The determinant element is that shareholders are not deprived of their rights of participation in the formation of the will of the company. Where it can be done in general meetings that did not comply with call and other formalities, or even in writing, the law eases the procedural requirements with a view not to create formal obstacles to the functioning of the company.

## § 25. Invalid resolutions

In terms of legal regulation, resolutions are legal transactions of the companies based upon the votes of shareholders by which they express their will. Resolutions can only be passed as provided by law. If shareholders resolutions do not comply with the law they are invalid: void or voidable, according to articles 228 and 229. In certain cases, despite they are not invalid, they have not efficacy. That's the case of resolutions that suppress or change special rights (for ex., a special right of management), created in the articles of association, without the agreement of its holder (arts. 184; see also arts. 227 and 415, 1).

The regulation of invalid resolutions is based upon the distinction between defects in the resolution procedure or *procedure defects*, and defects in the resolution content or *content defects*.<sup>23</sup> In two groups of cases of procedure defects, resolutions are void (art. 228). First, resolutions passed in a general meeting that was not called, even in case where only the call notice has not been signed by the competent person (in principle, the

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<sup>23</sup> See V.G. Lobo Xavier, *Anulação de deliberação social e deliberações conexas*, Atlântida, Coimbra, 1976; Idem, *O regime das deliberações sociais no Projecto do Código das Sociedades*, Temas de direito comercial, Almedina, Coimbra, 1986; J. Oliveira Ascensão, *Invalidades das deliberações dos sócios*, in *Problemas do Direito das Sociedades*, cit., IDET; L. Brito Correia, *Direito comercial*, 3.º vol. – *Deliberações dos sócios*, AAFDL, Lisboa, 1992; Pedro Maia, *Deliberações dos sócios*, in *Estudos de direito das sociedades*, cit., pp. 173 ss.



chairman – art. 222, 5) or it does not mention the meeting date, place and agenda or order of the day (art. 228, 1-a, 2; however, the resolution is not invalid in case a universal assembly takes place according to art. 217, 2). Secondly, resolutions taken in writing in case any shareholder did not exercise in writing the right to vote according to art. 217, 3. Then, in several groups of cases of content defects, resolutions are also void (art. 218, 1-c/d/e). Other cases of void resolutions for procedure defects include, namely, resolutions of single shareholder private companies approving transactions between the company and the single shareholder that are not object of prior accounting auditor report (art. 391) and resolutions of bonds issuing without the majority required (art. 437, 2).

As examples of *void resolutions for content defects* we can mention resolutions concerning acts for which the company has no capacity (art. 177), resolutions breaching the provisions on legal reserves (art. 198, 2 and 3), or resolutions in private companies distributing more than 25% of the exercise profits in case legal reserves are not yet fulfilled (art. 377, 2), or, in public companies, distributing more than 90% of profits of exercise (art. 432, 1). As examples of *voidable resolutions for content defects* we can mention resolutions excluding a private company shareholder in cases other than those mentioned in the articles of association (art. 371, 1), and resolutions distributing a percentage of the distributable profits lower than the percentage provided in the articles of association for compulsory distribution (art. 377, 2). Examples of voidable resolutions for *procedure defects* are, namely, resolutions taken in general meeting whose call notice did not mention the firm, registered office and registration number of the company, or did not indicate any documents that are available for shareholders consultation at the registered office (art. 222, 1-a, 2), resolutions adopted in a general meeting that has not been conducted by the chairman elected for that purpose (art. 223), and, in general, resolutions passed without the majorities required (arts. 382 and 453).

## **§ 26. Administration and administrators**

The administration is the organ of management and representation of the company.<sup>24</sup> The specific competences of this organ are defined for each type of company. A general obligation of the administration is to organize the annual accounts and to prepare a report on the exercise and a proposal for the apportioning of the results (arts. 254 and 255). Any person with full legal capacity can be an *administrator* (art. 234, 1).

In *private* companies, the administration can be composed by one or more persons, regardless of whether they are shareholders or not (art. 383, 1), who are appointed in the

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<sup>24</sup> See Alexandre Soveral Martins, *Os poderes de representação dos administradores de sociedades anónimas*, Coimbra Editora, Coimbra, 1998

act of incorporation or elected by resolution of shareholders for an undetermined period of time unless otherwise provided in the articles of association (art. 384, 1 and 2). The company is bound by the acts that administrators, within the limits of their powers, practise on its behalf; if the company has a board of administration such acts must be approved by the majority of administrators (art. 386, 1 and 4). Administrators are entitled to remuneration to be fixed by shareholders resolution (art. 387, 1). Their appointment can terminate either by own renunciation (art. 388) or by dismissal by shareholders resolution; in case the administrator has a special right of management, court decision upon just cause is required (art. 389).

In *public* companies, the administration is entrusted to a board of administration.<sup>25</sup> The general competence of the board of administration is to manage the activities of the company and to represent it. Moreover, it has *specific competences* to pass resolutions on several issues such as, namely, annual reports and accounts; acquisition of, transfer of and charges over any goods; granting personal and real guarantees by the company; opening or closing business premises; or modifications in the organization of the enterprise (art. 465). Moreover, there is still a residual competence concerning any other matter on which any administration requires a resolution of the board.

Administrators have a general obligation to act with diligence in the interest of the company (art. 235, 2). Their acts on behalf of the company bind the company; however, the company can oppose against third parties that the administrator exceeded its powers or went beyond its object, if the company proves the bad faith or negligence of the third party (which cannot arise out of publicity of the articles of association) and did not assume the act of the administrator by express or implied resolution of shareholders (art. 236).

Moreover, administrators are presumed to act with fault for purposes of liability (which is joint and several) towards the company for damage caused to it by acts or omissions practiced in breach of legal or corporate duties (art. 245, 1). Then, clauses excluding or limiting the liability of administrators are void (art. 246, 1). Third, administrators are liable towards the creditors of the company if, in breach of a legal or corporate provision which is mainly or exclusively aimed at their protection, the assets of the company become insufficient for the payment of the respective credits (art. 249, 1). Finally, administrators are also liable, in accordance with general rules, towards

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<sup>25</sup> See Pedro Maia, *Função e funcionamento do conselho de administração da sociedade anónima*, Coimbra Editora, Coimbra, 2002.

shareholders and third parties, for damage caused directly to them in the exercise of their functions (art. 250).<sup>26</sup>

### **§ 27. Supervisory board**

The supervisory board is composed of three members, unless the articles provide a single supervisor, and the supervisory organ must be exercised at least by an accounting auditor or a firm of accounting auditors (art. 239, 2 and 3). Administrators, employees or certain relatives can never be supervisors; the same applies to auditors or auditing firms that are shareholders of the company (art. 240).

The supervisory board supervises the company, in special its administration, by checking namely the regularity and updating of books and related documents as well as the accuracy of the annual accounts and the criteria of assets appraisal; the supervision organ has other competences, namely to give an opinion on the balance sheet, the profit and loss account, the proposal for the application of results, and the report of the administration (art. 242; see also art. 256). In order to perform the competences of the supervision organ, its members are empowered namely to obtain from the administration all the elements, books for example, that are necessary for examination; at the same time, however they have certain obligations, namely to attend general assemblies and keep confidential any information they have knowledge of (art. 243, 1 and 2). In case supervisors do not fulfil their obligations, they can be dismissed upon just cause by resolution of shareholders (art. 241, 3).

### **§ 28. Dissolution and liquidation**

Article 315 provides an extensive list of causes of dissolution, such as, namely, shareholders resolution, extinction of object, bankruptcy or judicial order. Moreover, special legal rules (for ex., art. 187, 4, company liquidation due to non registration; art. 191, 2, liquidation due to nullity of the act of incorporation) as well as the articles of association can provide special causes of dissolution.<sup>27</sup>

Upon dissolution the company enters into *liquidation* (art. 316). During the process of liquidation, the company continues to be a legal person. However, it must add the expression "in liquidation" to the firm (art. 318). Time limit is 2 years for extrajudicial liquidation otherwise it proceeds by judicial means (art. 319). Administrators have to submit to the approval of shareholders the inventory, balance sheet and profit and loss

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<sup>26</sup> See A. Menezes Cordeiro, *Da responsabilidade civil dos administradores das sociedades comerciais*, Lex, Lisboa, 1997; M. Elisabete Gomes Ramos, *Responsabilidade civil dos administradores e directores de sociedades anónimas perante credores sociais*, Coimbra Editora, Coimbra, 2002.

<sup>27</sup> See Raúl Ventura, *Dissolução e liquidação de sociedades – Comentário ao Código das Sociedades Comerciais*, Coimbra, Almedina, 2003.

account, as of the date of registration of the dissolution (art. 317). Once the accounts are approved, liquidators enter into play, and administrators have to give them all the necessary elements for the liquidation (art. 317, 2 and 3). However, in principle the administrators continue as liquidators (art. 320), and have equivalent functional powers but they cannot initiate new operations nor borrow funds unless authorized by shareholders resolution (art. 321).

Liquidators have to present annual accounts, as well as a final or closing account, a report on liquidation and a proposal for the distribution of the remaining assets (arts. 322). Upon approval of the final accounts, the net assets are distributed among shareholders according to the articles of association or, in case nothing is provided thereof, to reimburse the amount of capital participations effectively paid according to the fraction of capital of each shareholder (art. 323). Finally, the resolution closing the liquidation has to be published and the company is thereby extinguished (art. 324).

### **Part III - Commercial Contracts**

#### **§ 29. Overview.**

Part III of the Commercial Code of Macau concerns the so-called external activity of an enterprise. Beyond special commercial obligations, such as the legal value of usage (art. 565) and the rule of joint liability (art. 567), the Code provides an extensive regulation of several types of commercial contracts that correspond to the external activity of one of the contracting parties. Many of these contracts are the core business activity of the commercial enterprises that conclude them (e.g., carriage, lodging, advertising or insurance companies). That is the case of enterprises that carry activities of, for ex., carriage (arts. 749 ff.) lodging (arts. 798 ff.), advertising (arts. 720 ff.) or insurance (arts. 962 ff.). Moreover, the Code provides broad regulation for banking and other financial contracts, such as, namely, bank deposit (art. 840), rental of safe-deposit boxes (art. 844), opening of bank credit (art. 850), bank advance (art. 854), transactions in current account (art. 860), bank discount (art. 866), factoring (art. 869), and leasing (art. 889), as well as guarantee contracts such as commercial pledge, fiduciary transfer in guarantee, floating charge, and the independent guarantee (arts. 911 to 961).

This extensive regulation of commercial contracts does not however exhaust the contracting universe of business life. To begin with, most contracts regulated by the Civil Code (e.g., purchase and sale, or rental) are also used in commercial life, despite they are not (nor should they have to be) regulated in the Commercial Code. Then, this Code

sometimes provides only special commercial regulation to contracts which are already regulated in the Civil Code (e.g., the contract for sale or return or the commission contract as a modality of mandate). Finally, other important contracts for business law are regulated outside the Commercial Code, namely labor contracts and agreements concerning intellectual property rights (e.g., copyright, patents, or trademarks).

Some categories of commercial contracts are here selected and studied. Those are supply and distribution contracts (agency, concession and franchising), and three types of financial contracts (leasing, factoring, and independent guarantees).

### § 30. Distribution agreements

1. The Commercial Code of Macau provides a comprehensive regulation of distribution agreements from a private law perspective, including agency, concession and franchising contracts. In fact, apart from agency contracts, concession and franchising contracts are usually considered atypical contracts in other jurisdictions, but in Macau they have entered into the universe of legislative regulation, acquiring legal form.

The regulation of distribution agreements is provided in book III of the Code. Our analysis will focus on distribution agreements, including agency, concession and franchising contracts. We follow the doctrinal approach that includes these three contract types within the category of distribution agreements as a legal category with unitary features.<sup>28</sup> The matrix of this category is provided by the regulation of the agency contract, which is clearly influenced by the Portuguese Agency Act.<sup>29</sup> Moreover, the matrix value of the agency contract is evidenced by the application of one of the most important aspects of regulation - the termination of the contract - to concession and franchising agreements.<sup>30</sup>

As for legal regulation, we will notice the importance of legal principles such as good faith and due diligence in order to the full achievement of the contract aim, as well as clauses of confidentiality and non-competition (e.g., see arts. 629 and 630, 665, 693 and 702). Moreover, the interests of business commercial life justify not only the regular

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<sup>28</sup> See António Pinto Monteiro, *Direito Comercial – Contratos de Distribuição Comercial (Relatório)*, Coimbra, 2002, pp. 69 ss, with more references. On these agreements in other languages see also, e.g., Baldi, *Il contratto di agenzia. La concessione di vendita. Il franchising*, 5.<sup>a</sup> ed., Giuffrè, Milano, 1992; Martinek / Semler, *Handbuch des Vertriebsrechts*, Muenchen, 1996, Martinek, Michael, *Moderne Vertragstypen*, München, II. *Franchising, Know-how-Verträge, Management- und Consulting Verträge* 1992.

<sup>29</sup> Decree-Law n.º 178/86, of July 3, amended by Decree-Law n.º 118/93, of April 13, to implement Council Directive 86/653/CEE, of 18 December 1986. See notably António Pinto Monteiro, *Contrato de Agência – Anotação ao Decreto-Lei n.º 178/86, de 3 de Julho*, 5.<sup>a</sup> ed. act., Coimbra, 2004. On the Portuguese Agency Act see also, e.g., Carlos Lacerda Barata, *Sobre o contrato de agência*, Coimbra, 1991; Pedro Romano Martinez, *Contratos Comerciais – Apontamentos*, Coimbra, 2001.

<sup>30</sup> See A. Pinto Monteiro, *Direito Comercial - Contratos de Distribuição Comercial*, cit., pp. 33, analyzing the functions, features and modalities of distribution agreements. The regulation of the Agency contract provided in the Commercial Code follows closely the Portuguese Agency Act, which has been enacted upon the project elaborated by the Prof. Pinto Monteiro (*Contrato de Agência (Anteprojecto)*, Boletim do Ministério da Justiça, n.º 360, pp. 43 ss).

presence of the element of remuneration in these contracts, but also forms of objective dimensions of justice, such as objective causes of rescission (e.g., occurrence of disasters; non fulfillment of the obligation of minimum sales), and special duties of care and objective causes of efficacy (apparent representation).

Moreover, competition rules are of special importance concerning distribution agreements. The Commercial Code of Macau provides regulation of competition among entrepreneurs. In fact, the regulation of distribution contracts, such as commercial concession and franchising, provides the validity, in certain circumstances, of obligations of non-competition. Concerning commercial concession contracts, it is allowed that the concessionaire may accept an obligation of non-competition after the termination of the contract (art. 665). As for franchising contracts, it is allowed the clause of exclusivity, according to which, within the zone determined in the contract, the franchisee can neither manufacture nor sell goods nor render services in competition with those of the franchiser, nor can the latter, directly or indirectly, compete with the former, except written agreement to the contrary (art. 683).

2. Supply and distribution chains are very important in business life. Enterprises need to make sure that they can have continuous access to raw materials and other goods that they use either for production or direct sale. Therefore, they conclude supply agreements that provide a framework for entrepreneurial interactivity.

However, distribution agreements are qualitatively different. More than supply, they contract the integration of an enterprise in the production and distribution network of another. This is done mainly by concession and franchising agreements, with the feature that the principal exercises control over the distributor (more in franchising, less in concession) and provides technical assistance. Instead of opening a branch, the principal grants a concession or a franchising, and thus penetrates into new markets without having to support the costs of establishment. Intellectual property rights and entrepreneurial secrets are quite important in these economic operations. The work of preparing the field is usually done by independent agents, who will look for clients in a certain market to its principal.

Enterprises need to assure sources of supply of goods, be it raw materials, resale products, or simply water and electricity, that they use in their activities. For example, a restaurant needs continuous supply of water and electricity, as well as periodic supply of fish, meat and other goods for preparing meals. The supply contract is the adequate contracting way to do this. In fact, supply contracts are those by which a party binds himself to supply goods to another, continuously or periodically, against the payment of a

price (art. 581). Two types of supply are included in this concept: periodic supply and continuous supply. This distinction is important for concerns such as determination and payment of price (arts. 583 and 584). The quantity of supply is usually determined by the needs of the clients, but sometimes the parties may stipulate minimum and maximum quantities (art. 582). Moreover, the supply contract is a framework within which the contracting parties conclude other contracts. The most typical one is purchase and sale. But others can take place. In any case, the supply contract is governed by the regulation of the type of contract to which the individual performances of supply correspond, to the extent that they are compatible with the articles on the supply contract (art. 592). Those special provisions relate to special concerns placed by supply contracts.

An issue of special concern in supply contracts is the *suspension* of supply, for it can be quite harmful to the client. It is provided that supply cannot be suspended without reasonable advance notice of the supplier, except in case of fortuitous events or *force majeure* (e.g., the destruction of an electricity cable by a typhoon); also, minor non-performances of clients do not justify the suspension of supply without adequate advance notice (art. 587).

Supply relations can last for a long time. Often they originate situations of dependence, in which the client simply continues with the same supplier due to a pre-emption agreement. In fact, it is usual for suppliers to include these clauses in supply contracts so that they assure client fidelity. However, this raises some questions, not only in terms of strict contract law but also in what concerns the protection of free competition. For these reasons, pre-emption agreements cannot be extended for more than five years (art. 588, 1). However, often supply contract are concluded for an undetermined period of time and therefore the limitation of pre-emption agreements does not seem to have a great effect.

*Exclusivity* is another concern of supply contracts. There can be exclusive dealing in favor of the supplier and/or the client. Exclusive dealing in favor of the supplier means that the client cannot receive performances of the same nature from third parties nor, unless otherwise agreed, promote with his own means the production of the goods which form the object of the contract (art. 589). Exclusive dealing in favor of the client means that the supplier cannot directly or indirectly perform any supplies of the same nature within the zone for which the exclusive right was granted and for the duration of the contract; however, if the client has assumed an obligation to promote the sale of goods for which he has exclusive rights within the zone assigned to him, he is considered liable for any damage in case of non-performance of such obligation, even if he has performed to the minimum limit set in the contract (art. 590). It means that the supplier can demand a compensation for damages arguing that despite the minimum limit set in the contract was

achieved the client could have reached an higher amount had he acted with due diligence and care.

Finally, an issue of importance is the termination of the contract. Contracts concluded for undetermined periods of time can be denounced upon advance notice. A period of advance notice is not established. It can be stipulated by the parties, or fixed by usage or in consideration to the nature of the supply (art. 591). Another cause of termination is rescission, which can take place regardless of the duration of the contract in case one of the parties does not accomplish individual performances in terms that, by its seriousness, there can be reasonable doubt concerning the proper fulfillment of the remaining performances (art. 586).

### **§ 31. Agency contract**

1. Agency performs several economic functions that are embedded in the legal notion of agency. Agents perform an important economic function because they help other enterprises to penetrate into new market and to remain therein. In fact, enterprises use local agents, who will look for business chances in a local market. This economic function is present in the legal definition of the agency contract.

The agency contract is defined as the contract by which one of the parties (the *agent*) undertakes, against remuneration, to promote the conclusion of contracts for the account of the other party (the *principal*) in an autonomously and stable manner, possibly with the designation of a certain zone or a certain circle of clients (art. 622, 1). According to this notion, the agency contract can be analyzed in several elements.<sup>31</sup>

To begin with, the agent obliges himself to *promote* the conclusion of contracts for the account of the other party. This promotion obligation implies a complex activity of analyzing the market, in order to find contracting parties for the principal, and preparing the contract terms. In special, it imposes a relation of faithfulness and close cooperation by which the agent is empowered to request urgent measures to safeguard the interests of the principal (art. 623, 3), as well as an obligation to inform the principal namely about the clients' solvency, the market situation and perspectives of evolution, to render accounts (art. 628-b/c/d), and to respect confidentiality concerning the secrets of the principal (art. 629).

At the same time, the relation of faithfulness and close cooperation also entitles the agent certain rights, namely to obtain from the principal all the elements that are necessary to the exercise of his activity (art. 633-a), as well as to receive immediate notice

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<sup>31</sup> See A. Pinto Monteiro, *Contrato de Agência*, cit., pp. 44 ss.



in case the principal cannot conclude the number of agreements that has been agreed or expected according to the circumstances (art. 635).

The relation of faithfulness does not however justify an obligation of non-competition upon the agent, by which the agent could not exercise, after the termination of the contract, competing activities with those of the principal. In fact, this obligation is not a consequence of the agency contract, because it has to be agreed by the parties in written document, and cannot exceed more than 2 years nor the zone or circle of clients (art. 630).

2. The obligation of promotion does not require the conclusion of contracts and, even if the principal has granted representation powers to the agent, contracts are always concluded in the name of the principal.

This element distinguishes the agency from related contracts, such as commission and brokerage contracts. In *commission contracts* there is no promotion obligation and the commission agent acts in his own name. In fact, the commercial commission is a mandate by which a commercial entrepreneur (the commission agent) undertakes to buy or sell goods in his own name, but for the account of another person, against payment (art. 593). In brokerage contracts (e.g., real estate brokers), there is no legal relation of collaboration, dependence or representation of the broker to any of the parties who he places in contact for the agreement of a transaction (art. 708).

Moreover, the agent has the obligation to inform third parties about his powers of representation and credit collection, namely by means of notices in his workplace and in every identification document of agency (art. 642). This is very important, because when the principal does nothing despite he is (or should be) aware that the agent is presenting himself as an agent with representation powers without having them, there may be ground for *apparent representation* meaning that contracts agreed by his agent may produce effects towards him although he did not ratify them (art. 644). The general rule is that contracts concluded by the agent without powers of representation have no efficacy toward the principal unless he ratifies them (art. 643), but silence can be valued as ratification in case the principal does not communicate his opposition to the transaction to the good faith third party within five days after he gains knowledge of its agreement and of its essential content (art. 643, 2). Moreover, the *apparent representation* rule is justified to protect the good faith of the third party in the legitimacy of the agent to which the principal has also contributed.

Powers of representation are granted in writing (art. 623, 1), and in case he agent is granted powers of representation he is presumed to be also granted powers to collect credits of contracts concluded by him (art. 624, 2).

3. Moreover, the agent acts *autonomously and in a stable manner*. It means that the agent is not an employee of the principal, because there is no subordination of the agent to the principal. In *labor contracts*, the employee is not free to decide how to carry on his activity, since he has to comply with the orders of the employer concerning namely timetables and working place, and the employer has disciplinary power over the employee. In agency contracts, the agent is free to choose the manner to perform his obligations. He has an obligation of result, not of means, and therefore he is only obliged to respect the instructions of the principal that are not against his professional autonomy (art. 628-a).

The notion of agency mentions the element of a possible designation of a certain zone or circle of clients. This is not an essential element of the agency contract. However, it is required in case of exclusive agent, i.e. an agent that is granted the exclusive right by which the principal obliges himself not to use within the same zone or circle of clients other agents for the exercise of competing activities with those of the exclusive agent (art. 625).

4. Another element is *remuneration*. In fact, the agent activity is not gratuitous because he acts against *remuneration*. Remuneration consists in a commission for contracts that he arranged as well as for contracts concluded with clients that he has procured (art. 637, 1). The right to commission includes contracts concluded not only before but also after the termination of the agency relation provided that, in the later case, the agent proves that he has negotiated them or their conclusion is due mainly to his preparatory activity, and they are concluded within a reasonable period after the termination of the agency relation (art. 637, 3).

The terms of the commission can be agreed between the agent and the principal (e.g., a percentage of the value of the contract), otherwise they are established according to usage or equity (art. 637), and the right to commission is acquired at least when the third party fulfils the contract or should have fulfilled it, provided that the principal has already fulfilled his obligation (art. 639, 2); however, if the contract is not performed by cause imputable to the principal the agent does not lose the right to claim the commission due for that contract (art. 640).

On the other hand, the element of remuneration justifies several rights that the agent has toward the principal as enumerated in art. 634, such as, namely, not only the right to the payment of those commissions, but also the right to be informed without delay of the acceptance or refusal of contracts he has negotiated, to receive periodically a list of

contracts concluded and commissions due, and to receive an extract of the accounting books of the principal in order to verify the amount of commissions due to him. Moreover, special commissions are due to the agent in case he collects credits and/or provides «del credere» guarantees, i.e. clauses by which the agent agrees to guarantee the performance of obligations related to contracts negotiated or concluded by him (art. 632, 1); to be valid «del credere» clauses have to be agreed in writing and must specify the guaranteed contract or persons (n. 2).

5. The *duration* of the contract is not an element of the definition of agency. If the parties do not establish a time limit to the contract, it is considered to be for an undetermined period of time (art. 647, 1). It may also happen that the parties have established a time limit, but they continue to execute the contract after its expiration. In this case it is deemed to be renewed for an undetermined period of time (art. 647, 2).

An agency contract for undetermined period of time can be terminated by denunciation. This cause of termination does not require justification, but a minimum advance notice is required according to the duration of the contract. For example, concerning contracts that lasted more than two years the minimum advance notice is three months (art. 648, 1-c). In case the minimum advance notice is not respected, a compensation for damages is due to the other party, who may demand in alternative payment of remuneration due for the lacking period (art. 649, 1).

Rescission is different from denunciation. This cause of termination requires justification (art. 651). Rescission can be justified either by serious breach of obligations by one of the parties (e.g., the violation of the obligation of confidentiality, or non payment of commissions) or the occurrence of circumstances rendering impossible the achievement of the contract aim (e.g., a natural disaster destroying the factory of the principal), so that it cannot be demanded the maintenance of the contract (art. 650). In any case, compensation for damages can be demanded, but in the later case it is an *equitable compensation* (art. 652).

6. An equitable compensation for *goodwill* is due to the agent by the principal in case the following requirements are met (art. 653, 1): a) the agent has either procured new clients for the other party or substantially increased the volume of business with existing clients; b) the other party will considerably benefit from the activity of the agent after termination of the contract; c) after termination of the contract the agent ceases to receive any remuneration for contracts negotiated or concluded with the clients mentioned in paragraph a). As for this last requirement it should be remarked that it does not concern

to the commissions to which the agent has right, according to article 637, 3. In fact, the right to commission includes contracts concluded also after the termination of the agency relation provided that, in the later case, the agent proves that he has negotiated them or their conclusion is due mainly to his preparatory activity, and they are concluded within a reasonable period after the termination of the agency relation (art. 637, 3). Accordingly, the above requirement should be read as referring to contracts not concluded within a reasonable period after the termination of the agency relation.

This equitable compensation is aimed to reward the agent for the entrepreneurial value that he has created or helped to create and which will only be enjoyed by the principal after the termination of the agency.<sup>32</sup> However, despite the above mentioned requirements are met, this reward will not be granted in certain circumstances, namely in case the contract is terminated for reasons imputable to the agent (art. 653, 3). This does not mean, however, that the equitable compensation should be denied in case the contract is terminated by rescission of the agent upon just cause, because in this case the contract is terminated for reasons imputable to the principal, not to the agent.

The compensation for goodwill is calculated according to equity (or fairness), i.e. all circumstances must be considered in order to achieve the justice of the concrete case. In special, it is important to take into account whether the agent has agreed to an obligation of non-competition, despite the fact that the agent is also entitled to a special compensation for the obligation of non-competition after the termination of the contract (art. 634-g). Regardless of this, the equitable compensation cannot exceed an amount equivalent to an annual average compensation (art. 654).

7. As for form requirements, there is no special requirement of form. However, both parties have the right to claim from the other a signed document indicating the content of the contract as well as any subsequent additions or amendments (art. 622, 1). Moreover, several clauses have to be stipulated in written document, such as to grant powers of representation (art. 623, 1), collection of credits (art. 624, 1), obligation of non-competition (art. 630, 1), and «del credere» agreements (art. 631, 1).

## **§ 32. Commercial Concession**

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<sup>32</sup> See A. Pinto Monteiro, *Contrato de Agência*, cit., pp. 132 ss; Id., *Direito Comercial – Contratos de Distribuição Comercial*, cit., pp. 157 ss (analyzing the legal nature of this compensation and discussing its application to other distributors, mainly concessionaires and franchisees). On this issue see also, e.g., Carolina Cunha, *A indemnização de clientela do agente comercial*, Coimbra, 2003.

1. The economic function of concession is embedded in the legal definition. The commercial concession is a «framework contract» by which the principal integrates independent entrepreneurs into his distribution network.<sup>33</sup> It is a «vertical agreement» by which, instead of setting up branches and subsidiaries, the enterprise establishes a network of independent concessionaires, therefore saving the otherwise required investment in offices, staff, and other expenses of direct establishment.

The concession contract is defined as the contract by which one of the parties, the concessionaire, undertakes to buy and resell, in his name and for his own account, goods produced or distributed by the other party, the principal, in a certain zone and in a stable manner, subjecting himself to a certain degree of control by the other party (art. 657, 1). In this contract the principle of freedom of form meets an exception because it has to be done in writing (art. 657, 2).

2. As for legal features of concession contracts, contrary to the agent, the concessionaire acts in his name and in his own account, undertaking to buy goods from the principal and to sell them in a certain zone. Parties may agree to an obligation of minimum sale (art. 663) and, moreover, in principle, the concession implies reciprocal exclusivity (art. 658), meaning that, on one hand, the concessionaire can not sell nor promote sales of goods that compete with the principal, who, on the other hand, cannot sell directly or indirectly goods that are the object of the contract. Exclusivity means also that in principle the concessionaire can only buy from the principal goods that are object of the contract (art. 658, 2). However, parties are free to agree otherwise.

On the other hand, the concessionaire acts in a *stable manner*. As a member of the distribution network of the principal, the concessionaire exercises a continuous activity. In order to promote the concession stability parties cannot agree a time limit to the contract lower than three years and in case they don't set it, the contract is presumed to have been agreed for an undetermined period of time (art. 659).<sup>34</sup>

Another important element of concession contracts is the submission of the concessionaire to a certain degree of *control* by the principal. This element of submission does not prevent the independence of the concessionaire. However, it justifies many of the obligations of the concessionaire provided in art. 662, such as: 1. to act according to the *commercial policy* of the principal, respecting his instructions, namely those related to

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<sup>33</sup> See, e.g., M. Helena Brito, *O contrato de concessão comercial*, Coimbra, 1990. Concession and franchising contracts are usually considered to be legally atypical contracts in Portuguese law. See, in special for franchising, António Menezes Cordeiro, *Do contrato de franquia ("franchising"): autonomia privada versus tipicidade negocial*, ROA 1988, p. 74-75. On atypical contracts see, e.g., Pedro Pais de Vasconcelos, *Contratos Atípicos*, Coimbra, 1995.

<sup>34</sup> This rule also applies to franchising contracts (art. 684).

sales methods and advertising; 2. to comply with the *resale prices* recommended by the principal; 3. to provide *post-sales assistance* to clients, under the terms set by the principal; 4. to allow the principal to inspect replacement parts and working methods used by his auxiliaries in the provision of post-sales assistance; 5. and to provide all information that may be requested from him, namely on the market situation and perspectives of evolution. Moreover, the concessionaire is obliged to keep the products unchanged, namely by not changing their external appearance or packaging (art. 664), and to respect confidentiality (art. 665, referring to art. 629).

Eventually, the submission to the control of the principal may lead the concessionaire to agree to an obligation of minimum sale<sup>35</sup>, undertaking to sell periodically a minimum quantity or purchase a certain quota of goods, or to reach a determined market share (art. 663, 1), as well as to accept an obligation of non-competition after the termination of the contract (art. 665).

The element of control does also inform the transfer of the contractual position. The concession contract may be the main value of exploitation of the enterprise of the concessionaire. As owner of his enterprise, the concessionaire is free to transfer or lease it to third parties. According to article 110(1), the transferee of the enterprise would succeed in the contract of commercial concession, which does not seem to have personal nature. However, the same article safeguards otherwise provided in special provisions. That is the case, because art. 672 gives to the principal the right to oppose the transfer by an *inter vivos* act of the position of concessionaire inherent in the transfer of the respective enterprise, if the acquirer doesn't correspond to the standards required to his new concessionaires nor offer sufficient guarantees as to the performance of his obligations. For example, the principal demands an independent guarantee that the concessionaire is not able to give, provided that such guarantee is not manifestly excessive in terms of abuse of right.

The principal does also have obligations towards the concessionaire (art. 667 ff.), namely: 1. to sell and deliver in time the goods that he produces or distributes, and to guarantee its production (arts. 668 to 670); 2. to allow the use of his distinctive marks to the promotion of the concession; 3. to provide all technical and commercial information necessary for running the concession; 4. to render technical assistance; 5. to compensate the concessionaire for the obligation of non-competition after termination of the contract. Moreover, the principal has an obligation of confidentiality concerning the secrets of the concessionaire (art. 671).

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<sup>35</sup> This obligation of minimum sale seems to be an obligation of guarantee, in the sense that the principal has the right to rescind the contract if the concessionaire, regardless of fault, does not fulfill the obligation.

3. The termination of the concession contract is regulated by the corresponding provisions of the agency contract. However, some specialties are provided.

To begin with, instead of lapsing by the expiry of the agreed time limit, the concession contract is automatically renewed (for an equal term or, after it was twice renewed, for an undetermined period of time - art. 674, 2 and 5) at the end of the stipulated term, unless any of the parties communicates in writing to the other the intention not to renew it with a certain advance notice, such as for example six months for contracts lasting from five to ten years (art. 674, 1-b).

Then, contracts of undetermined duration can be denounced by minimum advance notices provided that they lasted at least three years. In this case, the minimum advance notice is three months (arts. 676, 2, and 674, 1-a). Despite the wording of article 676, 1, even contracts with a term can be denounced due to the rule of automatic renewal of concession contracts.

Then, a special *objective* cause of rescission is provided, because the principal has the right to rescind the contract in case the concessionaire, regardless of fault, does not fulfill the minimum levels that he has accepted with the obligation of minimum sale (art. 677).<sup>36</sup> However, in case the concessionaire does not fulfill without fault the obligation of minimum sale it should be considered that the contract has terminated for reasons not imputable to him, and therefore, according to art. 678, the principal will be obliged to: repurchase the goods not sold at the end of the contract, for the price at which he sold them to the concessionaire, with the exception of those goods bought by the latter after the communication to him of a declaration terminating the contract (1); compensate the concessionaire for expenses incurred, before that communication, in promotional activities such as advertising, the effects of which extend beyond termination of the contract (2).

4. An equitable compensation for goodwill for concessionaires? It may be argued that the concessionaire is entitled to an equitable compensation for good will. The regulation of the termination of the concession contract does not exclude it, and despite it is not expressly mentioned, the principle of fairness embedded in this compensation may justify, according to the circumstances of the concrete case, the application of an equitable compensation for good will. However, it will be necessary to justify the analogy between

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<sup>36</sup> Another objective cause of rescission also applicable to concession contracts is provided in art. 650-b.

the activity of the agent and the activity of the concessionaire (e.g., in case the concessionaire without opposition of the principal acts, *de facto*, as an agent).<sup>37</sup>

### § 33. Franchising

1. Franchising has economic advantages and disadvantages. Franchising is exploited by local entrepreneurs, the franchisees, who are licensed by franchisers to explore a business system within a period of time and a market territory that is defined by the contract. Moreover, the franchisee is integrated in the entrepreneurial network of the franchiser, and the enterprise that the franchisee exercises is not substantially different from the enterprise of the franchiser (see *infra*).

There are *advantages* and *disadvantages* for both parties. The franchiser can enter into new markets setting up shops without the costs and risks of establishment that he otherwise would have to take (for ex., setting up a branch). Moreover, based upon his intellectual property rights and know-how secrets, he can exercise control over the activity of the franchisee, imposing contract clauses that give him almost full control over the franchisee. As for the franchisee, despite his situation of economic dependence, he has the chance to explore a usually successful business system providing him almost direct access to the market and goodwill. In order to enter into the franchising network the franchisee has to pay an initial fee and then periodic royalties for the use of the licensed business system including know-how, trademarks and other intellectual property rights. Similar to concession agreements, it is a contract of vertical integration, because the contracting parties are not in the same level of production or distribution.

There are two types of franchising. On one hand, *master* franchising, by which the franchiser grants a license to the franchisee in order to set up a network of shops on a certain territory. On the other hand, the *servant* franchising, in which the franchiser himself or the master franchisee grant licenses to end franchisees so that these explore the business system in shops open to the public. Basically, the master franchising looks like an agency contract, and the Commercial Code of Macau provides special regulation for servant franchising, concerning namely rights and obligations of the contracting parties.

2. The legal notion of franchising can be analyzed in several elements. According to the legal definition, franchising is the contract by which one of the parties, the franchiser, grants to the other, the franchisee, against a direct or indirect payment (initial fee +

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<sup>37</sup> See A. Pinto Monteiro, *Contrato de Agência*, cit., pp. 138 ss; Id., *Direito Comercial – Contratos de Distribuição Comercial*, cit., pp. 161 ss.



periodical royalties), in a certain zone and in a stable manner, the right to produce and or to sell certain goods or services under his entrepreneurial image, according to his know-how, with his technical assistance, and subject to his control (art. 679). This notion includes several elements:

1.º - the contracting parties are the franchiser and the franchisee;

2.º - the object of the contract is the granting of a license to exploit a business system, be it the production or sale of goods or the provision of services;

3.º - the exploitation of franchising is done in a certain zone and in a stable manner and concerning this dimension a natural (although not essential) element of franchising is exclusivity: as provided in art. 683, within the zone determined in the contract, the franchisee can neither manufacture nor sell goods nor render services in competition with those of the franchiser, nor can the latter, directly or indirectly, compete with the former, except if there is a written agreement to the contrary. Accordingly, unless otherwise stipulated in the contract, within the territory defined therein, the rule is of reciprocal exclusivity, meaning not only that the franchisee cannot exercise activities competing with the franchisee, but also that the franchiser has to refrain from competing with the franchisee in that very same territory, for example establishing branches or licensing new franchisees. Moreover, the franchisee cannot use the know-how for purposes other than running the franchise, nor disclose its content to third parties, without the franchiser's agreement in writing (art. 696).

4.º - the exploitation of the franchising is done under the entrepreneurial image of the franchiser and according to his know-how and technical assistance, within a relation of straight cooperation in which the franchiser controls the activity of his franchisees. However, despite he is economically in a situation of dependence, the franchisee preserves his legal independence. One of the aspects in which the autonomy of the franchisee is preserved and protected by law is the relation with suppliers. In fact, despite the control of the franchiser, he cannot, directly or indirectly, forbid a franchisee from freely choosing the equipment, the installations and the suppliers of goods or services to be used in the assembly or in the functioning of the franchise, unless it is strictly necessary to protect his industrial and intellectual property or to maintain the common identity and reputation of the franchise network (art. 689). However, his independence is very fragile, as for ex., unless otherwise agreed, the use of sub-franchisees is not permitted (art. 685, 1);

5.º - the franchisee has to pay a remuneration which consists of the initial fee (or admittance entry fee) and periodic royalties.

6.º - concerning requirements of form, similar to concession contracts, in franchising agreements there is an exception to the principle of freedom of form of contract, because a

writing document is required (art. 681). This document serves as enough title concerning the license to use intellectual property rights of the franchiser included in the franchising system (art. 682, 2).

3. The franchisee is usually in a weaker position. Therefore, in order to protect him, the Commercial Code establishes a detailed obligation to provide *pre-contractual information* and clarification (art. 680). This information is aimed to allow the franchisee to form a balanced and informed assessment of the advantages and disadvantages of the contract.

As examples of information that the franchiser must provide we can mention namely his identification and two last exercises annual accounts, the specifications as to the estimated sum of the initial investment needed for acquisition, installation and entry into functioning of the franchise, the composition of the franchise network, lists of franchisees, sub-franchisees and sub-franchisers of the network, as well as of those who have left the network in the last 12 months, and also, for example, any services that the franchiser obliges himself to render to the franchisee during the duration of the contract. In case this obligation is not complied with by the franchiser, the franchisee is entitled to demand annulment of the contract thereof.

4. As for the *obligations of the parties*, concerning the obligations of franchisers, the Code provides an extensive list of obligations, which express the general principles of good-faith and the pursuing of contract aim (art. 686).

Examples of the obligations of the franchiser are, namely, to allow the franchisee to use and ensure peaceful enjoyment of his industrial and intellectual property rights and other elements that identify his enterprise, as well as know-how that he must keep updated; to provide training to the franchisee and his auxiliaries; to ensure the advertising of the franchise network at regional and international levels; to supply or to ensure the supply of goods that, taking account of the circumstances, are necessary to run the franchise (see art. 686).

Moreover, the franchiser has the obligation to inform franchisees of any change in the running of the enterprise, namely the composition and presentation of the goods and conditions of sale (art. 688), and he must supervise the franchise network, namely controlling and verifying the performance, by the other franchisees, of obligations designed to ensure the common identity and the reputation of the franchise network such as the obligation not to contract supply outside the network (art. 691). Another obligation of the franchisee designed to protect the common identity and the reputation of the

network is the obligation not to make advertising without previous authorization of the franchiser (art. 699).

5. As for obligations of franchisees, the general principles apply, with the specificity that he has a special duty of care concerning the maintenance of the identity, image and good reputation of the franchise (art. 694). This identity is based upon know-how and IP rights. For this reason, franchisees have to inform the franchiser of any breach to the industrial and intellectual property rights that are the object of the franchise, which may come to their knowledge, and take action, or support the franchiser, in any judicial proceedings against the infringer (art. 700).

This obligation to promote the franchise is reinforced by the obligation to communicate to the franchiser any new experience gained in running the franchise that amounts to an improvement to its conditions of functioning and efficiency, as well as to grant both authorization to use such know-how and the right to allow its use by the other franchisees (art. 687). For this know-how compulsory license, the franchisee is entitled to receive from the franchiser an adequate compensation (art. 692).

In addition, franchisees must pay the agreed remuneration (entrance fee and periodic royalties), use the franchiser's IP objects, following his instructions concerning equipment and uniform presentation of premises and means of transport, and pursuing the objective specifications of quality; alike the concessionaire, the franchisee must comply with the recommended resale prices of the franchiser, provide post sales assistance to clients allowing the principal to inspect replacement parts and working methods used by his auxiliaries in the provision of post-sales assistance, as well as to provide all information that may be requested from him, namely on the market situation and perspectives of evolution (art. 695). For purposes of post-sales assistance, the franchisee is obliged to attend, or to instruct his assistants to attend, periods of training organized by the franchiser, with the frequency mentioned in the contract (art. 698).

Moreover, the franchisee can assume an obligation of minimum sale (art. 701) as well as of non-competition, and he is subject to the obligation of confidentiality (art. 702) in terms similar to other distributors (agency and concession).

6. The *termination* of franchising contracts is regulated by the provisions of the concession agreements and, therefore, also by those of the agency contract (arts. 704 and 673), except for special provisions concerning the transfer upon death or extinction of franchisee (art. 705), the use of know-how and distinctive marks (art. 706), and the termination of contract for reasons not imputable to franchisee (art. 707).

In the later situation, the franchiser is obliged: either to repurchase goods not sold by the end of the contract (the so-called goods in stock), for the price at which he sold them to the franchisee (with the exception of those goods bought by the latter after having received a declaration terminating the contract); or to allow the franchisee to continue to use his industrial or intellectual property rights until the exhaustion of those goods in stock. It seems that it is up to the debtor – in the case, the franchiser – to chose the performance that best suits his interests, i.e. the franchiser can opt either to repurchase the goods or to allow the use of his IP rights and know-how until the exhaustion of the stock. In case he chooses the first performance he is also obliged to compensate the franchisee for expenses incurred in promotional activities with effects continuing beyond termination of the contract, namely advertising. This is an exception to the rule according to which after termination of a contract the franchisee cannot continue to use the industrial and intellectual property rights or the know-how authorized in the framework of the franchise contract (art. 706).

7. Finally, we reload the question of the analogy between franchising and enterprise lease. Franchising units are exploited by local entrepreneurs, the franchisees, who are licensed by franchisers to explore a business system within a period of time and a market territory that is defined by the contract. Moreover, the franchisee is integrated in the entrepreneurial network of the franchiser, and the enterprise that the franchisee exercises is not substantially different from the enterprise of the franchiser. Not to mention that the public image of the franchisee is the image of the franchiser.<sup>38</sup>

This entrepreneurial similarity raises a number of questions. To begin with, it might be argued that franchising contracts impose a situation of subordination to the franchisee. In fact, the franchisee can't even change the location of the premises without the consent of the franchiser. Therefore these contracts could be qualified as labour or employment contracts. In this approach, the piercing of the veil doctrine could be called into play, in order not to consider the independent legal personality of the franchisee. The issue is however doubtful.

Nonetheless, the entrepreneurial similarity in franchising agreements has justified my argument that, in Portuguese law, franchising agreements could be assimilated to the contract of enterprise lease for purposes of legal regulation.<sup>39</sup> In fact, not only do franchising contracts have an important element of licensing of intellectual property rights (including know-how), but also the consideration of franchising as a business system makes it very close to the concept of enterprise in objective sense.

In Macau, the Commercial Code provides a comprehensive regulation for franchising contracts. However, it seems to distinguish the enterprise of the franchiser from the enterprise of the franchisee. In fact, it provides the right of the franchiser to oppose the transfer *inter vivos* of the position of the franchisee in the sale or temporary transfer of the respective enterprise in case the transferee does not correspond to the standards required of his new concessionaires nor offer sufficient guarantees as to the performance of his obligations (art. 703). This is another aspect of the control of the franchiser that embodies the economic dependence of the franchisee. However, it expressly considers the franchisee as having an enterprise of its own. Nonetheless, confronting the notion and features of the enterprise as provided in the Commercial Code with the notion and features of franchise as provided in the same Code, it is quite difficult to establish the difference.

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<sup>38</sup> António Pinto Monteiro, *Contratos de agência, de concessão e de franquia («franchising»)*, Coimbra 1989 (*Separata do número especial do Boletim da Faculdade de Direito de Coimbra — «Estudos em Homenagem ao Prof. Doutor Eduardo Correia» — 1984*), p. 21. On franchising see also, e.g., L.M Pestana de Vasconcelos, *O contrato de franquia (franchising)*, Coimbra, Almedina, 2000; Maria de Fátima Ribeiro, *O contrato de franquia (franchising) – Noção, natureza jurídica e aspectos fundamentais de regime*, Coimbra, Almedina, 2001

<sup>39</sup> See Alexandre Dias Pereira, *Da franquia de empresa («franchising»)*, Boletim da Faculdade de Direito, Universidade de Coimbra, 1997, pp. 251 ss, with more references. For a different conclusion see J.M. Coutinho de Abreu, *Da empresarialidade (As empresas no direito)*, Coimbra, 1996, pp. 62 ss.

In fact, the Commercial Code defines the commercial enterprise as “any organization of productive factors for the exercise of an economic activity aimed at production for systematic and lucrative exchange” (art. 2, 1). Analyzing this notion, the enterprise is, to begin with, an *organization of means*. The value of organization is of greatest importance, because for the purpose of negotiation a commercial enterprise can only be considered to exist as such if the factors of production are coordinated in such a way that is likely to mean for the public the existence of a new commercial enterprise, regardless of whether it is working or not (art. 102). Accordingly, it is conceivable a commercial enterprise to exist as such despite the productive factors have not yet been assembled or putted into operation, and it seems that a commercial company may come out of know-how and distinctive signs, if the good-will or economic chances it has can be valued as a commercial enterprise.<sup>40</sup>

Nonetheless, normally commercial enterprises have *productive factors or means* such as corporeal things (for example, buildings, machines, tools, furniture, raw materials, merchandises, etc.), incorporeal things (for example, patented inventions, utility models, trademarks, names, etc.), and other goods such as labour provision. But, if these elements are not organized (or assembled) by capable know-how and identified by distinctive signs, the enterprise is not feasible and therefore does not exist.<sup>41</sup> On the other hand, for a commercial company to be it is required the exercise of an *economic activity* aimed at production for systematic and lucrative exchange. The Commercial Code provides an exemplificative list of activities that illustrate the concept of economic activities that are exercised by commercial enterprises: the industrial activity for the production of goods or services, the activity of intermediation in the circulation of goods, the activity of transportation, the banking and insurance activity, as well as all their auxiliary activities.

Objectively speaking it is very difficult if not impossible to separate the enterprise of the franchisee from the franchise itself. The organization of productive factors for the exercise of an economic activity aimed at production for systematic and lucrative exchange is provided by the franchise itself. The franchisee is licensed to explore this business organization or system within the conditions defined in the contract. Doesn't article 102 of the Code provide that, for the purpose of negotiation, a commercial

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<sup>40</sup> See António Ferrer Correia, *Sobre a projectada reforma da legislação comercial portuguesa*, Revista da Ordem dos Advogados, 1981, I, p. 22.

<sup>41</sup> In several cases an administrative license may also be required for an activity to be exercised (e.g., banking, insurance and gambling activities), but, at the same time, these licences are only granted provided that the applicant company meets several requirements. It means that the enterprises cannot be exercised without the administrative license, but this license will not be granted if the enterprise is not yet provided with several elements of production. For example, the Casino Gaming Act provides that only public companies that meet certain requirements, namely to have a corporate capital of at least 200,000,000 MOP that must be fully accomplished, are eligible applicants for licenses (see Law 16/2001, arts. 10 and 17, 1 and 2).

enterprise is considered to exist if factors of production are coordinated in such terms, which are likely to signify for the public a new commercial enterprise of that type, regardless of the start of operations? Where is the new commercial enterprise for the public when a franchise business is set up?

### **§ 34. Financial transactions**

Financial contracts are an important part of the regulation provided by the Commercial Code. We will analyze leasing and factoring contracts, as well as independent guarantees. These are very important agreements in business life.<sup>42</sup> They are financial contracts because of the economic function they perform as financial instruments.

To begin with, enterprises often conclude leasing contracts in order to have financial conditions to buy equipment goods such as machines or vehicles. Either the enterprise doesn't have the money that it takes to buy a machine or it prefers not to put all the money in the machine, so that it still has financial resources to invest in other elements of the enterprise or to cover the production costs of its operation. So, the leasing operation is a financial instrument for the company, providing it financial means to acquire the machine. At the same time, the leasing operation means a guarantee for the bank, because it keeps the property of the machine until the end of the contract. It can also happen that the company did already buy the machine, but nonetheless is having financial problems. Therefore, it sells the machine to the bank and the bank will then permit its use against payment by the company that has the right to buy it back at the end of the leasing period. This modality of leasing is called sale and lease back

As for factoring, companies need money in time to pay their debts. In the exercise of their enterprises, companies acquire credits over debtors. However, either because the time of payment of those credits does not match the time of payment of their debts or simply because the collection of those credits is not certain, companies assign their credits to a financial enterprise that will manage and collect them, anticipating payments of their credits and eventually supporting the risk of non-payment by debtors.

Finally, concerning the independent guarantee, those who grant credit usually demand guarantees of payment. It is usual for banks to lend money for the acquisition of a real estate property (e.g., a house) upon the provision of a mortgage by the taker of the loan.

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<sup>42</sup> On financial contracts see, e.g., Diogo Leite de Campos, *A locação financeira*, Lex, Lisboa, 1994; A. Menezes Cordeiro, *Manual de Direito Bancário*, 2.<sup>a</sup> ed., Coimbra, Almedina, 2001; J. Calvão da Silva, *Direito Bancário*, Coimbra, 2002; Rui Pinto Duarte, *Escritos sobre Leasing e Factoring*, Principia, 2001; Mónica Jardim, *A garantia autónoma*, Coimbra, Almedina, 2002; Pedro Pais de Vasconcelos, *Contratos Atípicos*, Coleção Teses, Coimbra, Livraria Almedina, 1995; António Pinto Monteiro / Carolina Cunha, *Sobre o Contrato de Cessão Financeira ou de "Factoring"*, Volume Comemorativo do 75.<sup>o</sup> Tomo do Boletim da Faculdade de Direito, Universidade de Coimbra, Coimbra, 2003, pp. 509-554; Pedro Romano Martinez, *Contratos Comerciais – Apontamentos*, Coimbra, Almedina, 2001.

This mortgage is a real guarantee that secures the payment of the loan: if the taker does not pay it, the bank will then execute the mortgaged good having a credit privilege that consists in the right of priority to have his credit paid by the amount for which the mortgaged good has been sold (Civil Code, art. 682 ff.).

### **§ 35. Leasing**

The regulation of leasing contracts is based upon the Portuguese Leasing Act, approved by Decree-Law 149/95, of June 24, later amended by Decree-Law 285/2001, of November 3.

The Commercial Code defines leasing as the contract by which one of the parties (the *leaser*) undertakes to provide to the other party (the lessee) the temporary enjoyment of a good acquired either from the lessee or from a third party according to the latter's instructions, or built upon his indications (art. 889), the lessee having to pay remuneration and the right to buy the good when the contract expires.

There are two *contracting parties*: the leaser and the lessee. As for the *object*, it can be composed of any goods that can be rented (art. 890, 1), such as, for example, machines, buildings, vehicles. Moreover, for reasons of legal security, according to the nature of the leased goods, leasing contracts must be concluded by the respective *form* (e.g., public deed for buildings) and registered; in case they are not subject to registration, a label or visible sign must be placed on them indicating the property right of the leaser (art. 891). Concerning *time limits*, leasing of movable goods cannot be concluded for periods shorter than one year and longer than the presumed period of economic use of the good, provided it is not longer than 20 years (art. 894).

As for remuneration, the lessee has to pay it for the period of leasing. It consists of rents which must allow, firstly, the recovery within the leasing period of more than half of the capital corresponding to the value of the leased good, and secondly to cover of all charges and the profit margin of the leaser; the residual value of the good corresponds to the price the lessee has to pay to acquire the good (art. 892, 1 and 2). The lessee has the right to buy that good after the leasing period for that price, which is usually determined in the contract or determinable by means of application of the criteria provided in it (art. art. 889, *in fine*). In case the lessee does not opt to buy the good, the leaser, in the quality of owner of the good, can give it the destination he wishes (art. 895).

Concerning the *rights and obligations* of the parties, they are enumerated in articles 897 and 898, although some simply repeat the regulation of the lease contract provided in the Civil Code which applies in subsidiary terms to leasing. First, the leaser has the obligation to buy the good, deliver it to the lessee and allow him to enjoy it according to its purpose



of destination. The lessee has the right to use the good and to defend his right of use, taking actions of defence of possession even against the leaser. However, the lessee has to pay the rent, and to use the good for the agreed purpose, ensuring its conservation and carrying out urgent or necessary repairs as well as immediately informing the leaser about defects. In special, the lessee has to insure the good against risk of deterioration or damages. Moreover, in principle, the lessee cannot allow third parties to use the good, either assigning his position, or subletting or borrowing the good.

During the leasing period, the leaser can always defend the integrity of the good, and he has the right to examine it, the lessee having the obligation to allow it in so far as it does not prejudice his normal activity. By the time the contract period terminates, the lessee has the right to acquire the leased good, and the leaser has the obligation to sell it to him, at its residual price. In case the lessee does not buy the good or the contract is terminated because of him, the leaser can take ownership without compensation of parts or other accessory elements incorporated in the good by the lessee. Moreover, the leaser can request a provisional remedy of judicial delivery and cancellation of registration (art. 909).

### **§ 36. Factoring**

the Commercial Code of Macau defines factoring as the contract by which one of the parties, the factor, undertakes against payment an obligation to manage and collect present and/or future credits that arise from the exercise of the enterprise of the other party, and additionally to anticipate payments or to undertake the risk, total or partial, of non payment by the debtors (art. 869).

Factoring contracts are based upon *assignments of credit*. Therefore, the default rules of factoring contracts are the provisions of the Civil Code on the assignment of credits (arts. 571 to 582), in so far as they do not contradict the special regulation of factoring contracts provided in the Commercial Code (art. 870). The special regulation consists of: 1. unless otherwise agreed, the supplier has the obligation to notify the debtors of the assignment of credits, and to mention in all documents certifying his credits that liquidation is due to the factor (art. 877); 2. an agreement of non-assignment of credits between the supplier and his debtor can never be argued against the factor (art. 879); 3. the accessory nature of the assignment has limited scope in factoring contracts, because factoring is not merely an assignment of credits for it also involves a complex activity of credit management exercised in a stable manner within a framework contract; 4. factoring contracts always have to be agreed in writing (art. 871, 1), 5. present and future credits can be assigned in block (concerning in the later contracts to be agreed in a period of 24 months and operating at the moment they emerge), and their validity and enforceability is only

dependent upon the indication in the contract of the necessary and sufficient elements to their automatic determination (art. 872); 6. the supplier, i.e. the assigner, guarantees in principle the solvency of the debtor (art. 875).

### **§ 37. Independent guarantees**

The Commercial Code provides an extensive regulation of the independent guarantee, which is based upon the UN Convention on Independent Guarantees and Stand-by Letters of Credit 1995 prepared by the United Nations Commission on International Trade Law (UNCITRAL).

The independent guarantee is defined as a contract by which one of the parties undertakes to pay to the other a determined or determinable amount of money, upon demand, eventually with documents related to the obligation, for the case of occurrence of a certain risk or event (art. 942). This financial operation involves three parties: the applicant asking for the issuing of the guarantee; the guarantor or issuer of the guarantee (usually a bank); and the beneficiary entitled to demand payment from the guarantor. The applicant and the guarantor conclude a contract by which the guarantor promises to pay a certain amount to the beneficiary upon demand, according to the guarantee conditions and the applicable law. The independent guarantee is therefore a contract in favour of a third party involving a unilateral transaction (a promise) from the guarantor (Civil Code, arts. 437 ff. and 451).

The independent guarantee is, like the performance bond, a guarantee and a personal guarantee. However, unlike the performance bond, the independent guarantee has not accessory nature. The accessory nature of the performance bond means that the obligor can invoke against the creditor any exceptions arising from the contract between the debtor and the creditor (Civil Code, arts. 628 and 633). For example, if the source contract of the obligation is void, then the bond is also void. Moreover, the provider of bonds concerning civil obligations has the benefit of previous execution of the debtor's assets, meaning that the obligor can refuse to pay the debt if the debtor still has executable assets (Civil Code, art. 634 CC). However, concerning bonds of commercial obligations, the rule is joint liability meaning that the bond provider may be demanded to pay the debt regardless of the sufficiency of assets of the debtor of the main debt (art. 568).

According to the Commercial Code, a guarantee is considered independent in case the obligation of the guarantor towards the beneficiary is not dependent upon the existence or validity of the underlying transaction, or upon any other contract, and it is not subject to any clause not apparent from the guarantee, or to any future and uncertain act or event, except presentation of documents or another analogous act or even comprised in the

normal course of the activity of the guarantor (art. 947). Autonomy is therefore a basic principle underlying independent guarantees. However, this autonomy is not complete.

It is commonly said that these operations are ruled by 'payment first, discussion later'. In fact, if the demand for payment meets the requirements the guarantor must pay as soon as possible, in case there is no agreed time limit for that purpose, and payment can be done by compensation unless the credit has not been assigned to him namely by the applicant (art. 959). However, the guarantor must not pay the guarantee in case demand of payment has not been done in writing enclosing the necessary documents, which he must examine with care and due diligence within 7 working days in order to take the decision (art. 957 and 958).

Moreover, the guarantor has to *refuse payment* in case it is manifest that any of the documents is not genuine or has been falsified, or that no payment is due according to the demand itself or to the presented documents, or the demand totally lacks ground considering the type and purpose of the independent guarantee (art. 960). In appraising these circumstances he must act with good faith and due diligence, otherwise he will be held liable. Moreover, these causes of denial of payment show that the autonomy of independent guarantee is not complete. This idea is reinforced by the justifications for denial of payment concerning demands that totally lack ground, such as, for example, when it is indisputable that the event or risk that the independent guarantee is designed to compensate did not take place. This shows that the autonomy of the independent guarantee is not complete, despite its level of autonomy can to a certain extent be decided by the parties.

However, it does not mean that the level of autonomy is not considerable. In fact, despite the right of the applicant (or the counter-guarantor) to request provisional court measures in the situations (and only in these) in which it is manifest that the guarantor must not pay the demand, such provisional orders can only be issued if the applicant presents clear and precise evidence that the demand presented (or about to be presented) by the beneficiary has some of those manifest defects and the non-issuance of such order is likely to cause irreparable damage to the applicant (*periculum in mora*); moreover, the applicant must post a bond (art. 961).

## **Part IV - Negotiable instruments, in special bills of exchange**

### **§ 38. Overview**

Book IV of the Commercial Code provides the regulation of negotiable instruments.<sup>43</sup> As stated in the preamble, this regulation contains “a general theory of negotiable instruments” and, moreover, “the Code incorporates the uniform laws on bills of exchange, promissory notes and cheques. This is a merely formal option, in order to avoid the dispersion of instruments essential to commercial activity.”

The source of this regulation is, on one hand, the Geneva Convention of 7 June 1930, providing for a Uniform Law for Bills of Exchange and Promissory Notes, and the Geneva Convention of 19 March 1931, providing for a Uniform Law for Cheques, both published in a supplement to Official Bulletin no. 6, of 8 February 1960. As stated in art. 4 (1)(2) of Decree-Law 40/99/M, of August 3, these conventions on bills of exchange, promissory notes and cheques have been incorporated in the Commercial Code under articles 1134 to 1211 and articles 1212 to 1268, respectively.

It means basically that the previous regulation continues to apply as such, and this is made clear by art. 7(2) on amendments to Commercial Code, providing that any amendment to the provisions on bills of exchange, promissory notes or cheques will only have effects in Macao strictly within the limits allowed by the respective international agreements. Art. 1(3) of the Civil Code provides that international conventions that are applicable in Macau prevail over ordinary legislation (on international conventions that are applicable in Macau see the Basic Law, in special arts. 136 and 138). On this concern note that the Supreme Court (Proc. 2/2004, 2/6/04) has decided that both art. 5 of Decree-Law n. 40/99/M, and art. 569(2) of the Commercial Code are contrary to art. 48(2) of the law on bills of exchange (which is considered to be in force since 1960 despite its incorporation in the Code), and therefore should not be applied by the courts.

### **§ 39. Notion, types and features of negotiable instruments**

According to the definition of Vivante, a negotiable instrument is a “necessary instrument to exercise a literal and autonomous right embedded therein”. The document is necessary not only to prove the existence and content of the right but also to constitute it. That’s the so-called principle of incorporation: the right is incorporated or embedded in the document. Then, the document performs a function of legitimacy, since the right can only be exercised by who has its regular possession (legitimate or good-faith possession –

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<sup>43</sup> See A. Ferrer Correia, *Lições de Direito Comercial – Letra de Câmbio*, Vol. III (c/ colaboração de Paulo Melero Sendim e José Manuel Sampaio Cabral) Universidade de Coimbra, Coimbra, 1966; see also Paulo Melero Sendim, *Letra de Câmbio*, vols I e II, Coimbra, Almedina, 1980; Fernando Olavo, *Direito Comercial – Títulos de crédito em geral*, Coimbra Editora, Coimbra, 1983; Pereira de Almeida, *Direito Comercial*, Vol. 3, *Títulos de créditos*, AAFDL, Lisboa, 1988; J.A. França Pitão, *Letras e Livranças – Lei Uniforme sobre Letras e Livranças (Anotada)*, 2ª ed., Coimbra, Almedina, 2003; N. Madeira Rodrigues, *Das letras: aval e protesto*, Coimbra, Almedina, 2002.

art. 1071). Moreover, negotiable instruments are featured by literality, meaning that the wording of the instrument provides the content, the limits and the modalities of the right (*quod non est in cambio non est in mundo*). Another feature is autonomy, meaning that the holdership of the possessor is established *ex novo*, regardless of previous holderships and their defects (see art. 1072 concerning defenses opposable against the holder).

The interests that justify the law of negotiable instruments, making it different from credit assignments, are the protection of good-faith of third parties, and the promotion of the flow of these instruments.

The principle is freedom of issue (art. 1064) and there are several types of negotiable instruments. First, concerning their content, there are: a) instruments of participation that grant a status, such as shares (and bonds) of public companies; b) instruments representing merchandises, such as transportation or carriage notes (e.g., bill of lading); c) credit instruments in strict terms that grant a right to a pecuniary provision, such as bill of exchange, promissory notes and cheques. Second, concerning their normal way of circulation, there are: a) nominative instruments, which transmission must be noted in a book of registries, otherwise it does not produce effects; b) order or on demand, circulating by endorsement; c) to bearer, that are transmitted merely by deliver (art. 1065; see also arts. 1093 ff., 1101 ff., and 1126 ff.).

#### **§ 40. Origins, economic functions and characteristics of bills of exchange**

Bills of exchange have originated during the Middle Age in Europe within the exchange contract of merchants. The so-called *cambium per litteras* was mainly a means of security of payments, making the use of money unnecessary. This instrument of safe payment is quite important concerning international business transactions. Concerning economic functions, bills of exchange perform functions of guarantee, means of payment and instrument of credit. One only payment is enough to extinguish a series of pecuniary debits. It does also have the advantage of discount which takes place by endorsement of the bill to a bank that will pay it discounting an interest that is due for the period since payment until maturity of the instrument.

As provided in art. 1134, a bill of exchange contains: a) the term 'bill of exchange' inserted in the text of the instrument and expressed in the language employed in drawing up the instrument; b) an unconditional order to pay an exact sum of money; c) the name of the person who is to pay (drawee); d) an indication of the time of payment; e) an indication of the place where payment is to be made; f) the name of the person to whom or to whose order payment is to be made; g) an indication of the date on which and the place where the bill is issued; h) the signature of the person who issues the bill (drawer). Except

for the requirements provided in d), e) and g) *in fine*, the bill must contain all these elements, otherwise it is not valid (art. 1135, 1).

In a bill of exchange, the drawer gives an order of payment to the drawee to the benefit of the payee. The payee can later transfer the holdership of the bill by endorsement. The drawer must guarantee at least the payment of the bill (art. 1142), in case the drawee does not pay or cannot pay. But the obligation of guarantee applies not only to the drawer but also to the endorsing payee and further endorsers, as well as to the provider of 'aval' (a personal guarantor similar to the bond ('fiança') provider – see arts. 1163 ff., in special art. 1165). There is a difference, however: while the drawer has an obligation of guarantee towards any holder of the bill, each endorser only guarantees towards further endorsees.

The exchange guarantee takes place by means of demanding its payment (presenting the bill for payment – art. 1171 ff; in case payment is not done the holder of the bill must protest for non-acceptance or non-payment (art. 1177), unless there is a clause dispensing protest (art. 1179)), and there is joint liability for it (art. 1180), because each one or all together can be called to pay. However, the drawee is only bound to pay upon acceptance of the bill, thereby becoming acceptor (see arts. 1154 ff.).

Bills of exchange have the following characteristics: incorporation, literality, abstraction, and autonomy.

*a) Incorporation* means that the obligation is incorporated in the instrument. In other words, who owns the document owns the right, meaning that it is enough to be the legitimate holder upon a continuous series of endorsements to have the right to claim and receive payment. This is so important that the good faith holder of the bill prevails over a previous holder that unfairly lost its possession (art. 1149).

*Literality* means that the existence and content of the obligation is defined by the document (*quod non est in cambio non est in mundo*). This is another dimension of incorporation of the credit in the bill. But it goes further to justify the protection of the good faith holder in terms that several defects of will cannot be opposed to him, thus making circulation easier.

*b) Abstraction* means that the causal or underlying business is separated from the bill of exchange. In fact, the defects of the causal or underlying transaction (e.g., *exceptio inadimpleti contractus*) cannot be opposed to mediate and good-faith holders of the bill. However, in case they are in bad faith (*exceptio doli*) those defenses can be opposed to them.

*c) Autonomy* means that exceptions of the causal transaction cannot be opposed to mediate holders in good faith (appraised at the moment of acquisition of the bill – *mala fides superveniens non nocet*), and that the legitimate holder of the bill has an autonomous

right, and therefore a previous holder that unfairly lost its possession cannot oppose to the legitimate holder the illegitimacy of the one that has transmitted the bill to him (art. 1150). In this context, gross negligence means bad faith (*lata culpa est nimia negligentia id est non intelligere quod omnes intelligunt*), for example in case the holder gets the bill from someone well known to be a thief or a indigent person.

## **PART V – Macau Intellectual Property Law (Synopsis)**

**§ 41. Sources:** As member of the World Trade Organization, Macau has enacted new legislation on intellectual property rights (IPR), in order to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights.

On one hand, Decree-Law 97/99/M, of December 13, has approved the new Code of Industrial Property (CIP) concerning patents (including the protection of new plant species), industrial designs and models, trademarks (including services marks), geographical indications (including appellations of origin), and the configuration topography of integrated circuits.

On the other hand, Decree-Law 43/99/M, of August 16, has approved the new Copyright Law. In view of the WTO/TRIPS obligations, Macau copyright law has been harmonized with the Paris Act of 1971 of the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome in 1961.<sup>44</sup>

### **§ 42. Patents**

Patent law protects inventions. An invention is a novel idea which permits in practice the solution of a specific problem in the field of technology. In order to be protected by law ("patentable"), the idea must fulfil several requirements (CIP, arts. 61 to 68). In fact, it must be: 1. *new* in the sense that it has not already been published or publicly used; 2. *non-obvious* ("involve an inventive step") meaning that it would not have occurred to any specialist in the particular industrial field, had such a specialist been asked to find a solution to the particular problem; 3. *capable of industrial application*, i.e. it can be industrially manufactured or used. There are however limits to the object of patent (e.g., discoveries, scientific theories and mathematical methods, as well as human cloning processes cannot be patented - CIP, arts. 61, 1-a, 3-b). Patents have to be applied for at the

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<sup>44</sup> On the issue, notably, José de Oliveira Ascensão, A situação da propriedade intelectual em Macau, RFDUL, XLII, 2/2001, 691-734.

government office for patents (DES, CIP, art. 77 ff.), which will issue a patent document, describing the invention and creating a legal situation in which the patent holder will be entitled with an exclusive right of economic exploitation (making, use, sale, import) of the patent (CIP, art. 104) for a period of 20 years from the filing date of the application for the grant of a patent (CIP, art. 103, 1).

### **§ 43. Trade Marks**

A mark is a sign, or a combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings (commercial or not). In short, it must be a distinctive sign. Concerning its composition, the sign may consist of one or more distinctive words, letters, numbers, drawings or pictures, emblems, colours or combinations of colours, or may be three-dimensional, such as the form of containers or packages (provided they are not solely dictated by their function - CIP art. 199, 1-a) for the product; the sign may also consist of combinations of any of the foregoing (CIP, arts. 197 to 199). However, certain elements, such as signs or indications that have become customary in current language or in bona fide and established commercial practices cannot be granted an exclusive use, unless the signs have acquired distinctive character in commercial practice (CIP art. 199, 1-b, 2)

Generally it is necessary for effective protection that a mark be registered in the government office for marks (DES) according to the registration procedure (CIP, arts. 204 ff; however, unregistered trademarks also enjoy some protection - CIP, art. 202, see also for well-known and prestigious marks art. 214, 1-b/c, CIP). The registration of the mark will be made in respect of specified goods or services. However, registration may be refused if, e.g., the sign is deceptive or misleading, meaning that it is likely to mislead the public, namely with respect to the nature, qualities, usefulness or geographical origin of the product or service for which the trademark is to be used (CIP, art. 214, 2-a). In case it is registered, then no person or enterprise other than the owner may use it for goods or services identical with or similar to those for which the mark is registered (*principle of specialty*); moreover, any unauthorized use of a sign similar to the protected mark is also prohibited, if such use may lead to confusion in the minds of the public (art. 219, 1). The exclusive right does also include the use of the marks in documents, printed matter, computer pages, advertising and documents relative to the entrepreneurial activity of the titleholder (CIP, art. 219, 2). However, it does not include the use of the registered trademark, whenever that be necessary to indicate the origin of a product or service, namely in respect of accessories or spare parts, provided that it is used according to the



standards and honest practice applicable in industrial and commercial matters (CIP, art. 220-c). Registration lasts for 7 years, and it can be renewed (art. 218).

#### **§ 44. Industrial designs and models**

Industrial designs are defined as creations whose appearance represents a product in whole or in part by virtue of such characteristics as lines, contours, colours, forms, textures and/or the materials used in the product itself and/or its ornamentation (CPI, art. 150). Basically, an industrial design is the ornamental aspect of a useful article. This ornamental aspect may be constituted by elements which are three-dimensional (the shape of the article) or two-dimensional (lines, designs, colours) provided that they are not dictated solely or essentially by technical or functional considerations.

To be eligible for industrial property protection, industrial designs must be original or novel (although it is not entirely novel, it can be protected in case it involves novel combinations of known elements or a different layout of already used elements that endow the respective subject matter with a unique character - art. 152, 2), and must be registered in the government office for industrial designs (see CPI, arts. 152 to 158) according to a certain application procedure (art. 160 ff.). In case protection of an industrial design is granted, third parties without consent of the right may not make, sell or import articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes (arts. 177 and 178). Moreover, some kinds of industrial designs can (also) be protected as works of art (works of art being objects of copyright protection) – cf. CIP art. 179, and Copyright Law, art. 2, 1(i) (original works of applied art, industrial designs or models and design works that constitute artistic creations).

#### **§ 45. Copyright and related rights**

According to international treaties, Macau Copyright Law protects "literary and artistic works," that is, original creations in the fields of literature and arts, regardless of the form in which such works are expressed, be it words, symbols, music, pictures, three-dimensional objects, or combinations thereof as in the case of an opera or a motion picture (CL, art. 1).

The acquisition of copyright protection is independent of any formalities, such as registration or deposit (CL, art. 10), that is, copyright protection starts as soon as the work is created (CL, art. 1, 3). *Originality* is the basis of protection. A work is considered original if it results of the author's own creative effort and not merely the appropriation of another person's creation. However, even if original certain works are not protected, such as

requests submitted to public authorities, political speeches and official texts (CL, arts. 5 and 6). Moreover, the protection only applies to the literary or artistic form of expression of the work (and provided that it is original), not to the ideas, processes, systems, operational methods, concepts, principles or discoveries, as such, that may be embedded in the work (CL, art. 1, 2). Examples of types of works that are protected include (see Copyright Law, arts. 2 and 3): literary works (e.g., novels and poems), including computer programs and «oral works» (i.e., works not reduced to writing), musical works (e.g., songs and operas), choreographic works; artistic works (e.g., paintings and sculptures), maps and technical drawings, photographic works (e.g., portraits); audiovisual works, i.e. "motion pictures" or "cinematographic works", as well as the so-called derivative works (translations, adaptations) and collections (compilations) of works and mere data (data bases), and "works of applied art" (e.g., artistic jewels).

Copyright protection generally means that certain uses of the work are lawful only if they are done with the authorization of the owner of the copyright: the so-called exclusive rights of economic exploitation. Macau copyright law provides a large bundle of rights (CL, arts. 7, 55 and 56) covering the most typical uses (which are independent one from another) of works such as: 1. the right *to copy or otherwise reproduce* any kind of work; 2. the right to *distribute* copies to the public; 3. the right *to rent* copies of certain categories of works such as computer programs and audiovisual works; 4. the right to make sound recordings of the performances of literary and musical works; 5. the right to *perform in public*, particularly musical, dramatic or audiovisual works; 6. the right to communicate to the public by cable or otherwise the performances of such works and, particularly, *to broadcast*, by radio, television or other wireless means, any kind of work; 7. the right *to translate* literary works; 8. the right *to adapt* any kind of work and particularly the right *to make audiovisual works* thereof. Copyright Law provides detailed regulation for special uses such as publication stage performance, production of audiovisual works, fixation and publication of phonograms and videos, broadcasting, and communication to the public, and translations (CL, arts. 67 ff.)

In some specific cases the authors are granted not an exclusive right but a right to remuneration (see, for example, arts. 125, 2, 130, concerning publication and broadcasting of previously fixed works) or equitable compensation (see CL, arts. 62, 2-b, 137, 191, 2). However, certain uses (for example, private use and certain fair uses, such as quotations, teaching illustration, or press reviews including the use of articles on political or economic matters in other newspapers) are "copyright free", that is, they require neither the authorization of, nor remuneration for, the owner of the copyright (CL, art. 60).

In addition to economic rights, authors (whether or not they own the economic rights) enjoy "moral rights" on the basis of which authors have the right to claim their authorship and require that their names be indicated on the copies of the work and in connection with other uses thereof; moreover, they have the right to oppose the mutilation or deformation of their works as well as the right of withdrawal (CL, arts. 7-3, and 41 to 48). Although the owner of copyright may generally transfer his right or may license certain uses of his work, moral rights are, however, inalienable and cannot in principle be waived by the author.

As for the beneficiary of protection, copyright generally vests in the author of the work (CL, art. 9 - or authors, in case of works of joint authorship, art. 14). However, certain exceptions are provided. For example, the employer may be considered the owner of copyright if the author was, when the work was created, an employee and was employed for the very purpose of creating the work (CL, art. 12).

Concerning duration, copyright protection is limited in time. The general rule is a term of protection that starts at the time of the creation of the work and ends 50 years after the death of the author, thereby falling into the public domain (see CL, arts. 21 to 25).

Artistic performers, phonogram producers, broadcasting organizations and entertainment organizers are granted related or neighbouring rights (arts. 170 ff.).

#### **§ 46. Unfair competition**

The protection of intellectual property in Macao is reinforced by the prohibition of unfair competition. The Commercial Code of Macau (approved by Decree-Law 40/99/M, of August 3) provides the prohibition of *unfair acts of competition* in a *general clause* according to which it applies to any act of competition that is objectively against the norms and honest usage of economic activity (art. 158).<sup>45</sup>

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<sup>45</sup> See *supra* at § 10.