Book Review

Macau Commercial and Economic Law
by Jianhong Fan and Alexandre Dias Pereira

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This monograph is the only text ever published in English on the commercial and economic law of the Macao Special Administrative Region of China. It is meant to serve as a comprehensive guide for law students, academics and practitioners alike.

Throughout the text, the authors draw heavily on Godinho's *Macau Business Law and Legal System*[1] and Pereira's *Business Law: A Code Study*.[2]

There are a host of problems with this publication. In the introduction to the legal system of Macao, there is no mention at all of the sources or hierarchy of law. The authors assert that statutes are very important in Macau as a civil law jurisdiction where "the case-law plays a secondary role" whilst

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1. JORGE GODINHO, MACAU BUSINESS LAW AND LEGAL SYSTEM (2003) (bringing certain chosen areas of the legal system of Macau relating to business activities).

2. ALEXANDRE DIAS PEREIRA, BUSINESS LAW: A CODE STUDY - THE COMMERCIAL CODE OF MACAU (2004) (analysing concerns such as the obligations of commercial entrepreneurs, company law issues, commercial contracts and negotiable instruments in special bills of exchange).

"the works of academics and law professors are influential."[3] By "statutes," the authors refer to the five Codes (including the Civil and Commercial Codes). Interestingly, though, both authors appear unaware that many of these Codes were enacted, before the handover of the territory to China in 1999, not by the Legislative Assembly but by the then Portuguese Governor in the shape of decrees which are relegated to the status of (and revocable by) mere administrative regulations of the Chief Executive in post-1999 Macao![4]

The authors also claim (again, without elaboration) that Macao "can choose whether to adopt national laws of the People's Republic of China"[5] notwithstanding the doctrine of "one-country-two-systems" and Articles 5 and 18 of the Basic Law. Indeed, it is a moot question whether (and if so, how far) the provisions of the Chinese Constitution (other than Article 31) and, for the present purposes, national laws (other than those listed out in Annex III), may rationally apply to Macao.

The claim that Macao law (and for that matter, Portuguese law) is derived from German law[6] is gratuitous. It is not difficult at all to identify substantial similarities (if not also identical provisions) in the Italian as opposed to the German Civil Code insofar as the rules governing property and obligations are concerned.

In the chapter on principles of contract law, the authors write: "The parties shall observe the principle of equity in defining each other's rights and obligations …, the principle of good faith in exercising their rights and obligations ... [and] shall, in making and fulfilling the contract, abide by laws and administrative regulations and respect social ethics, and may not disrupt the social economic order nor impair social and public interest."[7] There is neither a discussion of, nor citation of the legal basis (if any) for, these elements or requisites. Indeed, "equity" (which has yet to be elaborated) is given very limited recognition and effect under Article 3 of the Civil Code. The references to social ethics, social economic order and social and public interest *vis-a-vis* the general requirement of good faith (*bona fides*) are vague and perplexing. Nor is there any discussion of the question of fault, the *quantum* and remoteness of damage, or vexed and controversial concepts in

3. JIANHONG FAN & ALEXANDRE DIAS PEREIRA, MACAU COMMERCIAL AND ECONOMIC LAW 26-27 (2007).

4. Administrative regulations are not regarded as "laws": *see, e.g.*, Case Nos. TSI, Apr. 27, 2006 (223/2005); TSI, July 20, 2006 (280/2005) (intermediate tribunal) contra TUI, July 18, 2007 (28/2006) (final appeal tribunal).

5. *See* FAN & PEREIRA, *supra* note 3, at 27.

6. *See* FAN & PEREIRA, *supra* note 3, at 26.

7. *See* FAN & PEREIRA, *supra* note 3, at 78.

the law of obligations such as unilateral juristic act, unjust enrichment, *negotiorum gestio*, *obligatio naturalis*, *simulatio* (relating to the enforcement of the "hidden" transaction) and *restitutio in integrum* (notwithstanding an overt violation of principles of law, good faith or public policy (*ordre public*) under Articles 273 ff. of the Civl Code).

Propositions of substantive law are usually dealt with by summarising the statutory provisions or making pure assertions. For example, the authors maintain that a penalty clause differs from an exemption clause or an obligation-defining clause but the reader is not offered any help or guidance in order to distinguish one from another.[8] Notwithstanding a wealth of case-law in Macao and Portugal (where ECJ jurisprudence prevails), there is hardly any citation still less analysis of court decisions.[9]

Turning to the chapter on economic operators, the reference to "public companies" is unfortunate because *sociedade anonima* is not the same as a "public (limited) company" so well known in the common law and EU law. Indeed, neither the Civil Code nor the Commercial Code uses the term "public company." The reference to partnerships *vis-a-vis* companies[10] is misleading insofar as they are nonetheless classified as "companies" in Macao law. The claim that "public companies can *also* be created through public subscription"[11] is perplexing. So is the inclusion of a chapter on the Stock Exchange of Hong Kong given that, quite unknown to the authors, Macao is not one of the jurisdictions recognised by the Stock Exchange for listing purposes in Hong Kong. The question of what amounts to an offer of shares to the public is not addressed. Nor is there any mention of the Decree-law on the Registration of Off-shore Companies.[12]

Despite their relevance to commercial law and practice, a good number of topics (for example, accounts and reporting requirements for companies, bankruptcy, commercial papers, hire-purchase and credit sale, transport law and insurance) are dismissed in a few lines whereas pre-contract liability, delictual liability, administrative contracts and promissory/preliminary contracts are not mentioned at all. In the discussion of pledges, transport and insurance contracts (*inter alia*), the respective rights and duties of the parties

8. *Id. See, e.g.,* Ping-Fat Sze, *Hong Kong Contract Law*, *in* THE INTERNATIONAL ENCYCLOPAEDIA OF LAWS 166 (Sophie Stijns & Roger Blanpain eds., 2001).

9. *See, e.g.,* STJ Acordao de Nov. 20, 2003 (Proc. 03A3514); STJ Acordao de Oct. 2, 2004 (Proc. 04A4299); STJ Acordao de Apr. 17, 2004 (Proc. 08A630) (penalty clauses); and STJ Acordao de May 2, 2002 (Proc. 02B1133); STJ Acordao de Apr. 18, 2006 (general clauses) (Proc. 06A818).

10. *See* FAN & PEREIRA, *supra* note 3, at 38.

11. *See* FAN & PEREIRA, *supra* note 3, at 39, emphasis added.

12. Decree No. 58/99/M. This decree allows off-shore "trust" business to be conducted in Macao although this legal concept is totally alien to Macao law.

are not listed out (still less elaborated).

The chapter on negotiable instruments is most puzzling. To begin with, the authors state categorically that "an instrument is a document of title to money" and divide negotiable instruments into (1) those representing a claim to order (for example, bills of exchange, cheques or promissory notes) or to bearer (for example, cheques, bonds or debentures); (2) those transfering moveable goods (for example, a bill of lading or warehouse receipt); and (3) those representing the membership and the patrimonial rights of shareholders (for example, share certificates).[13] With respect, the authors are evidently ignorant of the concept of a "document of title" as distinct from a "document of credit" under Title I of Book 4 of the Commercial Code, or a document pursuant to Article 1080 of the Commercial Code or Article 929 of the Civil Code.[14] A bill of lading (unlike a consignment note or other "transport document" such as a waybill) is a document of title (as prescribed by both the Hague and Hague-Visby Rules) whereas a warehouse receipt does not entitle its holder to claim the goods unless a "pledge certificate" is also produced pursuant to Article 790 of the Commercial Code.

At this juncture, it is useful to note that, because of its shallow harbour, Macao depends heavily on the carriage of goods by sea through neighbouring Hong Kong. Both Portugal and China respectively acceded to the Hague Rules and the Brussels Convention 1957 as the international conventions applicable to Macao before and after the handover although the Portuguese administration of this enclave enacted the Marine Decree-law[15] immediately before the handover following, rather, the Hague-Visby Rules and the London Convention 1976 (and this mistake has yet to be corrected). As far as the present discussion is concerned, the authors are clearly unaware of the different provisions in the Marine Decree-law *vis-a-vis* Title XI of Book III of the Commercial Code and furthermore, the fact that the bill of lading issued by ocean-liners in Hong Kong (for outward cargoes) or abroad (for inward cargoes) does not and cannot cover the sea carriage by another operator (using barges or river-vessels) between Macao and Hong Kong to which the Hague/Hague-Visby Rules do not apply particularly as there is seldom a transport document issued for this segment.[16]

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13. *See* FAN & PEREIRA, *supra* note 3, at 59-60.

14. Ping-Fat Sze, *Applicability of Part II of the Macao Marine Law*, 11(6) J. INT'L MARITIME L. 424, 426 (2005).

15. Decree No. 109/99/M.

16. The prevalent practice to name Macao in the bill of lading as the port of loading or discharge is not only improper but also fraudulent. One explanation offered by the business community lies in the need to comply with the terms of letters of credit (and insurance policies) which always insist on the cargo being carried at one go.

The authors also assert that cheques are "bills of exchange drawn on a banker payable on demand" in common law but amount to "negotiable instruments little more than a written order to pay the stated sum from the drawer's account" in the continental system.[17] In a preceding paragraph, however, both authors state categorically that "civil law countries recognize that negotiable instruments only include bills of exchange and promissory notes [but not cheques]"![18] The reader is completely at a loss with the further averments in the conclusion of this chapter that cheques and bills of exchange share the same "rules of technique" and "promissory notes [neither defined nor discussed at all in this monograph] remains [*sic*] the basis [*sic*] instrument for forfeiting [*sic*] operations"!![19]

The practice to post-date cheques is not accepted in Macao so that these cheques are payable upon presentation. The authors state that a cheque must be presented for payment within eight days from the date of issue[20] but fail to clarify if the drawer will be relieved from the duty to pay altogether if the cheque is presented after the said period. There is also no mention of the controversial practice (and court decisions) in Macao to regard it an offence under Article 214 of the Criminal Code where the cheque is dishonoured upon presentation within the said period but only a civil claim in the case of dishonour upon presentation after the said period.[21] Nor is there any discussion of the effect or consequence of a forged, fictitious, or an irregular endorsement.

There are also inconsistencies (if not also absurdities) in the principles stated. In the chapter on economic operators, it is suggested that "in private companies, the administration can be exercised by one or more persons, regardless of whether they are shareholders or not [whereas] in public companies, the adminsiraton is entrusted to a board of directors."[22] In the chapter on negotiable instruments, the authors made clear that Macao follows the Geneva Convention as opposed to the English Bills of Exchange Act 1882, maintaining that they are two diametrically different systems. Surprisingly, in the definition of a "bill of exchange" or "acceptance," the authors nonetheless see fit to quote and rely on the English definition or concept (just because they could not find a relevant provision in the Geneva Convention!) without ascertaining in the first place whether the English

17. *See* FAN & PEREIRA, *supra* note 3, at 66.
18. *See* FAN & PEREIRA, *supra* note 3, at 61.
19. *See* FAN & PEREIRA, *supra* note 3, at 67.
20. *See* FAN & PEREIRA, *supra* note 3, at 66.
21. *See, e.g.*, Case Nos. TSI, Feb. 9, 2001 (150/2000); TSI, Jan. 11, 2001 (203/2000) (intermediate tribunal).
22. *See* FAN & PEREIRA, *supra* note 3, at 48.

provisions necessarily form part of the law under scrutiny! The adoption of the English principles in Goode's *Commercial Law*[23] in the discussion of liens and pledge of "non-possessory" interest in Macao law[24] serves as another example of this seriously-flawed methodology.

Coming to Part II of this monograph, sadly, the discussion of economic law is equally superficial and incomplete. There is not a single reference in the chapter on state supervision *etc* to the anti-moneylaundering legislation[25] introduced (involuntarily) following the notorious *Banco Delta Asia* saga in which the Government of Macao was accused by the US Department of State of having persistently turned a blind eye to such activities (indeed Macao has been on the OECD list of moneylaundering centres of the world). Nor is there any discussion of the legislative schemes for domestic and international arbitration (where the provisions are internally inconsistent).[26]

The authors refer to the gaming (casino) industry as the main economic activity in Macao. However, only a page is devoted to the law relating to this industry and the reader is not provided with any substantive rules or terms usually found in such concessions. There is reference to the forfeiture of a "cash deposit" on expiry of the gaming concession but, surprisingly, the payment of such deposit is never mentioned in the preceding paragraphs.[27]

The chapter on consumer protection is deficient absent, in particular, any reference to the scheme for consumer arbitration. The authors do not even mention an "act of commerce" under Article 3 or "private use or consumption" under Article 91 of the Commercial Code (despite its relevance to the determination of a business as opposed to a consumer or private transaction). Nor are they aware of the definition of "consumer" in the EC Directive on Unfair Terms in Consumer Contracts (which also applies to a "publicly-owned" supplier). The definition of "consumer" in Article 2 of the Law on Consumer Protection[28] is expressly limited in application to this law only. Quite contrary to the authors' assertion, there is neither a definition of, nor a reference to, "consumer" in the Law on Standard Contract Clauses[29] (which, quite unknown to the authors, does not provide personal remedies, for example, in damages) and indeed, this law

23. ROY GOODE, COMMERCIAL LAW (1995).
24. *See* FAN & PEREIRA, *supra* note 3, at 95.
25. Law No. 2/2006; Administrative Regulations No. 7/2006.
26. Ping-Fat Sze, *Some Reflections on the Minor Civil Claims in the Macau SAR*, 28(3) BUSINESS L.R. 62, 62 (2007); *see also* Ping-Fat Sze, *Voluntary Arbitration and Fair Trial*, 171(36) JUST. OF THE PEACE 638, 638 (2007).
27. *See* FAN & PEREIRA, *supra* note 3, at 109.
28. Law No. 12/88/M.
29. Law No. 17/92/M.

applies generally –that is to say, its application is not confined to consumers as alleged. Evidently, they have also misconstrued Article 172 of the Commercial Code (relating to unfair competition) as providing consumer redress[30] notwithstanding that the damage is caused to other businessmen in the trade as opposed to consumers.

One Portuguese jurist maintains that the law of Macao ("as part of the most prevalent family of the world –the Roman-German variety") is readily accessible and comprehensible, having been set out in a "very systematic, rigorous, logical and compact manner".[31] Unfortunately, the present book review does not lend support to such claim. From the experiences of this reviewer (having also read continental law in both Edinburgh and Leuven two decades ago and served as a law professor in Macao for a number of years), it is reasonably clear that many of the legal texts or commentaries so far produced on various aspects of Macao law (in Chinese, English or Portuguese) are purely propositional rather than analytical.[32] The busy foreign law practitioners, or academics interested in comparative law, may not benefit from the brevity (if not also superficiality) of such publications.

It is also contended among local jurists that the "long" contract (including every detail of the parties' rights and undertakings) as a common law device finds no place in Macao where a contract usually contains one or two pages only (leaving everything to good faith and the default provisions of the Code), however complicated the transaction. This is again a misconception insofar as many of the commercial contracts used in the construction, financing, aviation and shipping industries (*inter alia*) are actually drafted in the common law style and, to the knowledge of this reviewer, businessmen from Hong Kong, Australia, the United States and even mainland China or Taiwan as a civil law jurisdiction (providing most of the capital and know-how for the economy of this former Portuguese enclave) always insist on a choice of foreign law (for example, Hong Kong law) or arbitration outside Macao (for example, in Hong Kong).

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30. *See* FAN & PEREIRA, *supra* note 3, at 137.

31. Jorge, A. F. Godinho, *Time to end the myth of the obscure legal system*, 43 MACAU BUS. 27, 27 (2007). The text *see* http://www.macaubusiness.com/index.php?id=997 (last visited Aug. 28, 2008)

32. *See, e.g.*, BOLETIM DA FACULTDADE DE DIREITO and the Macao law series published by the Macao Foundation or the Legal and Judicial Training Centre. Further and more extensive researches are indispensable (preferably with the help of jurists well-versed in both the common law and the continental system abroad) for post-handover Macao to rationalise its own law: *see generally*, Ping-Fat Sze, *Is a Public Offer Contractual? Common Law vs Civil Law*, 26(11) BUS. L. R. 261, 261 (2006).