

MACAU FOCUS 2014

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Effortlessly attractive

Gonçalo Cabral, legal adviser to the Macau SAR Government, spoke to *China Law & Practice* about the enduring success of Macau's gaming industry and its reliance on the Chinese market



What is the main focus of your work?

I'm a legal adviser to the Secretary of Economy and Finance, who is one of five members of the Macau government – excluding the Chief Executive – and is in charge of a large portfolio of services and industries like gaming, trade, IP registration, labour, tax services, banking, insurance and so on. I may be asked to issue legal opinions or to draft legislation proposals concerning any matter under our umbrella. I also often represent the government in court within judicial reviews.

What are the biggest recent changes to Macau's laws in the efforts to attract investment?

We have not had to make big amendments in a direct effort to attract investment because since the new gaming law was enacted in 2001, when the government decided to put an end to the monopoly of the gaming industry [Law 16/2001], investment has been pouring into Macau without our having to try very hard.

How does Macau construct its laws? Is there a model jurisdiction it follows?

We belong to the family of jurisdictions under continental law; our legal system is based on Portuguese law, which has been mainly influenced by French, German and Italian law. These laws have historically been the biggest influences to our system, not to mention Roman law, which is the basis of all continental legal systems. But of course in forming regulation nowadays, we very often look to what is going on around us, namely Hong Kong, Singapore and Japan.

How is the IP regime in Macau developing?

Macau follows the main treaties in IP law: the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement. The Copyright Ordinance was also amended in 2012 to put it in harmony with the WIPO Performances and Phonograms Treaty and with the WIPO Copyright Treaty. The registration of patents and trademarks is under the umbrella of my boss and enforcement is in the hands of the Customs department. One other interesting consequence of the development of the gaming industry was the remarkable increase in registration of patents,

especially in gaming machines and devices (games as such cannot be patented). There were very few registrations of patents before the end of the gaming monopoly.

We are not part of any international treaties that allow for international registration. You cannot file for registration of any Macau IP rights abroad – you must file your application here.

What are the biggest sectors/industries for Macau-China investment?

The key industry is gaming and everything revolves around gaming, like the hotel and retail (especially retail of luxury items) industries. There are others, for example we still have a textiles industry, but the other industries pale in comparison. The weight and value of Macau's gaming industry is now seven times the value of Las Vegas.

The industry and economy of Macau are totally dependent on the mainland people and consumers. They make up the major proportion of people that visit Macau every day, and therefore we are totally

While China does well, without any economic or public health crises, and grants exit visas in great numbers, the economy in Macau will continue to flourish

dependent on the economy of China and all things China, including the peoples' purchasing power, their ability to travel to Macau and the number of exit visas granted by the mainland government.

What are the challenges to investing in Macau?

There aren't so many challenges but one is a shortage of labour. There is no freedom to hire as many non-resident workers as some casinos and businesses would like. Foreign non-resident labour hiring requires government authorisation, which is issued at the government's discretion in light of factors such as the situation of the local labour market, the situation of the economy, the type of company that is applying and the number

of residents it already employs. Whether the hiring of non-resident workers is possible or not is up to the Human Resources Bureau, also under the Secretary for Economy and Finance, and the trend is to not authorise as many as the local businesses request. So it can be a little bit difficult or tricky to some businesses in managing available labour. On the other hand, our territory is very limited and prices have gone up in the past 10 years. The prices of real estate, the rents of housing and commercial premises and everything else is much more expensive now, which also creates difficulties for SMEs that at times cannot pay the commercial rents and salaries charged in Macau.

We have unfair competition law, but not antitrust law. We have some general principles about competition in the Commercial Code, but nothing full-fledged – it is just private law. There is, consequently, no public authority to monitor monopolistic practices. The issue has been raised a few times in the past but I am not aware of any intention to introduce such kind of legislation, which in my opinion would be very important.

What is your outlook for investment in Macau?

Every economy goes through cycles and we have been in this positive cycle for over 10 years. Macau is totally dependent on China, and I see Macau investment continually rising unless there is a problem in the mainland. While China does well, without any economic or public health crises, and grants exit visas in great numbers, the economy in Macau will continue to flourish. Prices, salaries and rent will continue to increase. There are dozens of hotels in Macau to be opened in the next few years. So things will keep growing until something happens in China. That will be felt here in Macau.

The legal system in Macau has been favourable to all overseas investors who have come here. Certainly, we could do a few legislative reforms, for instance we should reform the tax system because it's old fashioned and unwieldy, but there have been no real complaints against it. Such a reform could be worked on without even raising tax rates but it's nothing urgent.

Overall, taxation is low, the degree of economic freedom is high, the gaming industry has been doing tremendously well and so we have received investment from all over the world without having to try hard. That's the reality here.

Understanding local practices

Accessing the lucrative market of Macau is on every foreign investor's radar. Though challenges regarding corporate structure and registration, real estate, employment, litigation and licensing appear intimidating, a good understanding of local practice ensures a smooth and solid transaction

The Chinese gaming enclave of Macau has experienced another boom last year, far beyond analysts' wildest dreams. Gaming regulators announced that the casinos had taken in more than US\$45 billion (Rmb282 billion) in 2013 – a nearly 20% jump over the previous year. In this economic environment alongside a simple and low tax system, it is no wonder that the interest of foreign investors in Macau is equally booming, with many choosing to enter the market by acquiring existing businesses.

Mergers and acquisitions are operations that, if successful, may propel the business to new heights. In many cases, they represent the most efficient way to expand or to consolidate a business in the Macau market. However, along with such opportunities come risks associated with these transactions that a potential investor should be aware of.

Such risks are not simply related to financial issues assessed through the seller's audited financial statements and balance sheets. The investor's attention should place equal focus on legal and regulatory matters when deciding to acquire a business. For example, the existence of pending court proceedings, unlawful agreements and expiring governmental licences may lead to major liabilities and may even impair the future operation of the business.

Beyond this, it is important to have a good understanding of the local practices and customs. There are often significant cultural differences and incompatibilities between the overseas investors and the local business people that could make it more challenging to negotiate a successful deal. In addition, as a large number of investors originate from common law systems, the understanding of Macau's legal system can sometimes be challenging, given that Macau's legal system, having Portuguese law as its main reference, belongs to the civil law tradition originated in continental Europe.

It is therefore essential to have a sufficiently deep and broad understanding of these issues before delving into an acquisition – not only to make an informed decision but also to have a proper valuation. To do so requires conducting thorough due diligence on the target business, which involves retaining lawyers in Macau and is normally complemented with financial audits.

Corporate structure

Understanding the corporate structure of the target business is essential. Primarily, it provides the investor with important information for choosing the right acquisition method. Knowing the legal nature of the target company helps the investor to select the right approach, as the procedures and formalities may vary depending on the type of company.

There are several ways to perform a merger and acquisition in

Macau. Such arrangements may include the transfer of all the assets from one company to another (amalgamation), the winding-up of the companies involved in the operation followed by a transfer of all their assets to a newly incorporated company (consolidation), share acquisition or transfer of all or part of the business from one entity to another, involving the transfer of all assets, obligations, duties and rights related with the transferred business (transfer of undertaking).

Accessing information on companies in Macau is not a particularly arduous task, as most corporate entities are subject to registration with the Macau Companies Registry – whose main purpose is to make available to the public the status of entrepreneurs (whether natural or legal persons) and businesses, thereby guaranteeing the certainty and security of commercial transactions. Furthermore, there is a legal presumption that registration records are true and accurate, being effective against third parties.

When conducting company searches in Macau, it is possible to obtain several details – former and current – such as the identity

It is therefore essential to have a sufficiently deep and broad understanding of these issues before delving into an acquisition – not only to make an informed decision but also to have a proper valuation

of shareholders and respective shares, directors, business purpose, articles of association, encumbrances and certain pending court proceedings that may impact the company's value. This gives an important overview of the target business and helps to avoid certain pitfalls, such as acquiring shares that are subject to limitations that affect their ability to be disposed of.

However, it is important to note that the registration of businesses (which are not legal persons) and individual entrepreneurs ceased to be mandatory. In this case, it is essential to protect the position of the investor by means of representations and warranties from the seller in the contractual arrangements. This also applies to certain facts that are not subject to registration (even in the case of legal persons) and that may affect the success of the transaction. For example, although not frequent, there may be shareholders' agreements (not publicly available) establishing special conditions or restrictions to the transfer of shares to third parties that potentially may render the transaction void and ineffective if not observed.

In addition to the publicly available records in the Companies Registry, it is always important to review all corporate

documentation of the target business, such as minutes of shareholders' meetings and of board of directors' resolutions. This also gives an interesting perspective on the path that the business has been following since its incorporation and on its values and market positioning.

Real estate

Real estate due diligence in Macau, in general, is simplified by the fact that most rights over properties are subject to registration with the Macau Property Registry. This registration system (a Torrens title registration system), similarly to the commercial one, is intended to make available to the public the status of properties and any interests registered against the same so as to guarantee the security of transactions.

Notwithstanding, there are certain particularities in Macau that must be considered. The large majority of land in Macau is held under leasehold granted by the Government for a certain period of years. With such leasehold, initially provisional, the developer becomes bound to certain obligations – essentially, developing the land with the construction of buildings or infrastructure within a determined period and under the terms provided by the leasehold grant. Only upon completion of the development does the land grant become definitive. It is therefore essential to perform the necessary searches with the Property Registry to ascertain if the land has been developed at the right time, otherwise it may be reverted to the Macau Government. This would considerably affect the value of the target business and could compromise the whole success of the operation.

Furthermore, as the leasehold is granted for an initial term of no more than 25 years and is successively renewable for terms of 10 years, it is also important to verify whether the grant has expired or to ascertain if its renewal was requested in time.

Through property searches it is also possible to determine which interests are registered over properties, such as ownership title, promissory sale and purchase agreements, right of usage, mortgages and encumbrances that may hinder the disposal of properties. Certain pending court proceedings on properties are also subject to registration.

For undeveloped land or properties under construction the due diligence is more difficult. The property registration record does not give a clear perspective on the effective status of construction works, which requires further investigation on the construction project with the Public Works Department. Moreover, it may be important to confirm if inspection of the works has been completed, so as to verify whether the land has been properly developed or if there is a potential infringement of construction and zoning rules.

Employment

Employment is one of the most decisive factors for the success of a merger or acquisition in Macau. According to the Macau Census and Statistics Department, the unemployment rate in Macau is only 1.7% (as of from December 2013 to February 2014), meaning the number of residents seeking employment is very low.

The virtual full employment situation, in conjunction with a notorious shortage of qualified human resources, makes the success and feasibility of businesses in Macau dependent on their capacity to hire non-resident employees. In this regard, the main challenge

is that the Macau Government has implemented strict policies on non-resident labour. An employer intending to hire non-local staff must apply to the Human Resources Office (HRO) for a work permit, which only authorises a limited number of non-residents and requires a ratio between local and non-local employees (which for SMEs is currently at least twice as many locals). In addition, the permits are temporary (maximum two years) and their validity and renewal are subject to the compliance of certain obligations.

Consequently, if the target company has non-resident staff, it is essential to conduct a thorough and detailed review of the HRO authorisations and the employment documents, in order to determine if the work permits are valid and if the relevant legal provisions are being observed in order to avoid potential sanctions or even criminal liabilities, given the stringent laws on non-resident labour and illegal work. Infringement of these laws would also compromise the target's ability to hire and employ non-resident workers in the future, as well as imply the cancellation of the existing work permits.

It is also crucial to review all employment conditions and contracts for compliance with the local labour laws to avoid sanctions imposed by the Labour Department and potential litigation with employees. The Macau employment system is mostly based on a set of mandatory rules that cannot be derogated by the employment agreements. Such rules mainly concern overtime work, night work and shift work; weekly rest days; annual leave, sick leave and other statutory leaves; as well as employment termination.

Julia Brockman

DSL Lawyers

After practicing in Portugal until 1995, Julia moved to Macau and started as a legal consultant with the Macau Maritime Department in 1996 and in 1999 became legal counsel and company secretary to the main telecommunications provider in Macau, Companhia de Telecomunicações de Macau SARL (CTM). She joined DSL Lawyers in 2007 as a partner, having since then developed her experience in the corporate area obtained while working for CTM.

Julia graduated in Law from the University of Lisbon, in Portugal, focusing on Private Law areas. In 1989, she was admitted to the Portugal Bar and later also became a member of the Macau Bar Association.

Julia advises mainly institutional clients in commercial and corporate matters, including mergers, acquisitions and cross-border transactions, as well as commercial litigation and arbitration, handling a wide range of disputes such as corporate and employment disputes.

She has recently handled a number of mergers and acquisitions projects involving major transactions and corporate finance, namely the acquisition of a majority interest in the main telecommunications provider in Macau by a Hong Kong-listed company, and was also involved in the arrangement of securities required for financing such acquisition.



André Marques

DSL Lawyers

André joined DSL Lawyers as a trainee lawyer in 2012, under the patronage of Carlos Duque Simões. His legal practice encompasses corporate and commercial areas.

Before arriving in Macau, André had a two-year traineeship in Portugal with the law firms of Dr^a Inês Martins and Caiado Guerreiro & Associados. André completed a post-graduation in Civil and Criminal Law in 2011 and was awarded his Law degree in 2010. Both degrees were completed at the Catholic University of Lisbon, in Portugal, where he was also awarded with merit scholarships.

André is a native Portuguese speaker and is fluent in English. He has been heavily involved in mergers and acquisitions and cross-border transactions.



This is particularly important if the selected acquisition method is a “transfer of undertaking”, whereby all employees, including all rights and obligations arising from their employment agreements, will be transferred to the purchaser. If the employment agreements do not comply with the relevant laws (as is often the case), the purchaser may be sanctioned by the Macau authorities or may become liable to pay compensations to the employees.

Litigation

The pending court proceedings to which the target business is a party should be identified through court searches (the courts will issue the relevant certificates upon simple written request) and covered by representations and warranties of the seller, in order to protect the position of the purchaser.

However, some cases (e.g. if the employee claims filed with the Labour Department) can only be accessed by the direct parties and not by the potential investor. This should also be considered when defining the necessary representations from the seller.

Regulations and licensing

Certain activities and businesses in Macau are subject to licensing and supervision of certain governmental departments, such as

financial or banking, gaming, advertising, hospitality industry, security and pharmaceuticals. All other areas are unregulated and do not require specific licences.

As part of the due diligence exercise, a review of the relevant licences and compliance with regulatory requirements is also

In spite of some difficulties and hurdles an investor may encounter when acquiring a business, with good guidance and advice and a thorough due diligence process, any adversity can easily be overcome

important, as existing licenses may not be renewed or cancelled in case of infringements, which ultimately compromise the effective operation of the business.

Don't be intimidated

Macau maintains its attractions as a place to do business and will continue to do so. In spite of some difficulties and hurdles an investor may encounter when acquiring a business, with good guidance and advice and a thorough due diligence process, any adversity can easily be overcome and lead to a smooth and successful completion of the transaction.

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THE RIGHT PEOPLE. HERE IN MACAU

How to employ in Macau

The labour authority of Macau has put in place strong guidelines and requirements for the employment process in order to meet the rocketing economy's demand for workforce

Macau SAR is a small city with the highest population density in the world and is renowned for its casinos. It is the world's largest gambling hub by revenue, which represented about 40% of Macau's GDP in 2013, and a growing number of individuals and companies contribute to sustain its soaring economy.

Macau is one of the fastest growing economies with a top-ranking GDP. Because of its soaring development, Macau has nearly matched the concept of "full employment" as was recently noted by local economists (with over 376,000 people employed and current unemployment rate steadily hovering around 1.7%).

More and more foreign investors are attracted to business and investment opportunities in Macau, through various small, medium and large enterprises of foreign ownership or local collaboration projects. However, the local resident population is not large enough to catch up with the rocketing economy. A large number of foreign labourers have entered Macau to look for work opportunities – the number of non-resident employees was well over 140,000 in the last quarter of 2013.

The legal framework

The government's policy regarding human resources, specifically on the import of foreign labour, is channelling the demand to local resident workers who are prioritised over non-resident workers if both are found to be in equal circumstances. This policy aims to keep a sound equilibrium between the conditions offered to resident workers and those offered to NRW.

Two main laws in force, namely Law 7/2008, the Labour Relations Law with resident workers, and Law 21/2009, put in operation by Administrative Regulations no 8/2010 and 13/2010 in its most recent version provided by Law 4/2013, the Non-Resident Workers Law, regulate the rights and obligations of each party. The Labour Relations Law's main rights, obligations and guarantees are generally applicable to an employment relationship of a non-resident worker.

The main principles of the Labour Relations Law include:

Contract and formalities

A labour contract may have a fixed, variable or indefinite term. There is no mandatory form, and hiring may be concluded verbally or in writing, except if minors (14 to 18 years old) are being employed.

Probation period

There shall be a probationary period in the contract, during which parties may assess their interest in continuing the relationship of employment (unless both parties express to waive the period). The duration of the probationary period may be freely set out by

the parties; if not expressly agreed to, it shall be deemed to have a duration of 90 days for most employees; 180 days for employees whose work is of a highly technical nature or involves special qualifications, as well as for employees who hold leadership and management positions, while it is 30 days for employees under term contracts.

Working hours and overtime compensation

Normal working hours shall not exceed 8 hours a day and 48 hours per week. The employer may decide, according to the characteristics of its business and by agreement with the employee, whether the daily working hours shall exceed these hours (other statutory limitations apply). If night or shift work is not within the scope of the employment contract, night work is compensated with an accrual of 20% to standard salary and shift work with an accrual of 10%, enabling greater flexibility. Moreover, highlighting the high degree of autonomy given to parties, the Labour Relations Law allows the performance of work during holidays, under certain conditions. Lastly, overtime compensation accrues and entitlements to enjoy additional rest days may apply.

The government's policy regarding human resources, specifically on the import of foreign labour, is channelling the demand to local resident workers who are prioritised over non-resident workers if both are found to be in equal circumstances

Rest days, public holidays and paid leave

Mandatory weekly rest is 24 hours, which can be freely changed with both parties' agreement.

Mandatory holidays in Macau are: January 1; Lunar New Year (the first, second and third day of the first month of the Lunar Year); Qing Ming Festival; May 1; the day after the Mid-autumn Festival; October 1; Chong Yang Festival; and December 20.

Annual mandatory leave for employees who have worked for over one year is six working days; if the duration of the labour relation is less than one year but more than three months, the employee is entitled to half a day's leave for every one month of actual service in the second year of service. Remunerated mandatory sick leave is six days a year and remunerated maternity leave is 56 days.

Basic remuneration and bonuses

According to the Labour Relations Law, basic remuneration means all regular monetary payments, irrespective of name or form of calculation, is payable to the employee for work performed in

accordance with an agreement between the employer and the employee (or by legal regulation). Also, bonuses are included under the definition of variable remuneration and include all non-regular remunerations paid by the employer to the employee in accordance with an agreement between the employer and the employee, such as allowances, complementary bonuses, commissions, and tips.

Termination

The labour contract may be terminated by:

- Revocation – termination by mutual consent without any compensation being due;
- Rescission – unilateral termination by employer or employee (excluding situations of early termination in the probationary period) with or without just cause;
- Expiry – when the employee becomes incapable of working, especially on grounds of chronic illness or disability, or dies, the employment contract expires; or
- Denunciation – The employment contract is freely terminated by either party during the probationary period.

The employer shall make all termination payments due, as applicable, within nine working days after the termination of the employee.

Labour disputes

In case of a labour dispute arising from an employment relation subject to the Labour Relations Law, either party may bring the case to the consideration of the Labour Court installed with the First Instance Court (FIC). The Labour Department is the authority who supervises the compliance of key aspects of the labour relationship and is therefore legally entitled to sanction certain contraventions with penalties.

Applying for non-resident workers

The Non-Resident Workers Law set out some special, mandatory provisions that differ from the solutions provided in the Labour Relations Law – execution, performance and cessation of a labour contract.

Lou Sio Fong

Partner

Lou Sio Fong Lawyer and Associates

Ms. Lou Sio Fong is a lawyer practicing in Macau Special Administrative Region. She received her bachelor degree from the Law Faculty of University of Macau in 2003. After years of practical experience in some large-scaled law firms, she has operated her own law firm and is now a partner in Lou Sio Fong Lawyer and Associates since 2010.

She has worked on issues in diverse areas of practice, especially on employment law and labour disputes, business law, company law, contracts and property law.

As she is a Macau native and is one of those rare Chinese lawyers in Macau, she understands well on culture background, political system, judicial system, investment environment and future development of Macau. Based on her knowledge and multi-lingual ability, she is capable to provide professional legal services to clients from all over the world and communicate with them without language barrier.



Relevant authority and application

The relevant authority in Macau to accept applications to hire a non-resident worker is the Human Resources Office (HRO). The prospective employer shall present his application to the HRO to hire a non-resident worker under the terms set out in the Non-Resident Workers Law.

Who can be hired

With respect to employees, foreign persons who are not entitled to residency in Macau may be granted the authorisation to work in Macau under a non-resident title, which lawfully (under the Non-Resident Workers Law) allows the intended employee to work in Macau as one of three categories: specialised and qualified worker; non-specialized worker; or domestic worker.

Who can hire

As a general rule regarding employers, the following categories of local individuals and collective entities are entitled to submit an application to the HRO with the purpose of hiring one or more non-resident worker employee(s): Macau residents; legal persons

The Labour Department is the authority who supervises the compliance of key aspects of the labour relationship and is therefore legally entitled to sanction certain contraventions with penalties

(including commercial company) headquartered or established in Macau; non-residents who have a commercial or industrial enterprise in Macau; and civil servants/public employees, Macau officials of the PRC government, consular representatives in Macau, specialised workers authorised to work in Macau.

Foreigners are indirectly allowed to hire staff by utilising a business vehicle such as a limited liability company (LLC).

Services provided by foreign companies

Illegal work

Administrative Regulation 17/2004, the *Regulation on the Prohibition of Illegal Work*, bars unlawful accepting or rendering of work and sets corresponding penalties. For the purpose of the Regulation, illegal work is considered as such if being provided by:

- A non-resident who does not have the necessary authorisation to exercise an activity for another party, even if not paid;
- A non-resident who, despite having the necessary authorisation to work for another party, is working, with or without pay, for an entity other than the one that applied for his employment;
- A non-resident who, despite having the necessary authorisation to work for another party, is working in breach of other conditions of employment imposed by the respective act of authorisation; or
- A non-resident who exercises a self-supporting activity disregarding mandatory prior authorisation.

Assistance agreements

Being tightly supervised and limited, one of the exceptions to the types of illegal work listed above is an agreement concluded between enterprises, on one side, one that has a registered office located outside Macau; and from the Macau side, individuals or who have a registered office in Macau. The scope of the agreement of both parties shall be: the foreign company performing certain specific or occasional works or services, including guidance, technical, quality control or supervision services.

The Macau company shall, in this case, control and keep an updated record regarding each displaced foreign employee, ensuring he does not provide service for more than 45 working days (continuously or separately) within any six-month period, nor being remunerated, for any reason, by the Macau company. This period begins on the day the non-resident first legally enters Macau.

Applying for Macau residency

Under the terms of Administrative Regulation no 3/2005, foreign persons who intend to apply for residence in Macau as prospective investors or current investors; managerial personnel; and specialised

technical personnel may submit an application for temporary residency to the Trade and Investment Promotion Institute.

Applicants of the latter two categories must submit a copy of the employment contract/promissory-contract, proving the intended labour bind with a Macau-based company, along with several other

The Trade and Investment Promotion Institute is authorised to a high degree of discretion when assessing the need to fill the intended employment position with a foreign prospective employee

relevant documents. The Trade and Investment Promotion Institute is authorised to a high degree of discretion when assessing the need to fill the intended employment position with a foreign prospective employee.

Following approval of the application for temporary residency, applicants shall then apply to the Foreigners Sub-Division of the Immigration Department for a Residence Receipt, with which applicants can in turn apply for a Macau Non-Permanent Resident Identity Card to the Identification Bureau.



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New property laws offer investors security

Macau's booming property market has prompted the government to issue a series of laws to provide further security to both buyers and sellers. The most important changes are to the laws on stamp duty and promissory and pre-sale agreements

Macau, the Las Vegas of Asia, like most gems, is small and valuable. The attractiveness of this region also appears in the property market, where prices have been on the rise for the last few years (the annual increase in 2013 was of 43% per m²). In order to control speculation and the inflationary trends seen in the property market, the Macau government and the Legislative Assembly (Legco) enacted a number of laws in 2012 and 2013, bringing substantial regulation into the market.

The two biggest recent changes in legislation affecting the property market are the law on promissory agreements regarding buildings under construction, or the Pre-Sale Law (PSL), and the amendments to the Stamp Duty Law (SDL).

Promissory agreements

Promissory agreements are a main staple of Macau law and practice due to its closeness to Portuguese law. These contracts are “promises to enter into a transaction”. Depending on the nature of the promised transaction and the contents of the promissory agreement itself, they may be subject to specific performance (i.e. a court decision, in which the claimant can obtain the promised transaction) and, for property, may be subject to registration, which renders its rights and obligations enforceable against third parties (*erga omnes*).

The purpose is to enhance the transparency of the transactions and to guarantee the legitimate rights and interests of the parties, namely the buyers, being the unprotected party

Further, these contracts normally entail a down payment or advance payment, which is the main criterion to trigger the penalties payable in case of default. If a party who made a down payment does not complete the promised transaction, in the absence of any justification or *force majeure* event, the other party has the right to retain the down payment as a penalty or compensation for default; if the contract breach is instead due to the other party, the party who paid has the right to demand twice of what he has paid (that is, the refund of the down payment, plus an amount equal to the down payment, as statutory penalty).

Pre-Sale Law

The previous lack of regulation on buildings under construction led to a number of problems, in particular the deficient identification of the property, the lack of guarantees to the buyer, and, above all, economic issues such as the sudden influx to the market of numerous projects (in times of great speculation).



The PSL (Law 7/2013), which entered into force on June 1 2013, establishes a new legal framework on the Promissory Purchase and Sale Agreement of buildings under construction (PP&S Agreement) and its subsequent assignments as well as the Promissory Security Interest Agreement (PSI Agreement) over such buildings (promises to create a mortgage once the unit is completed and transferred to the buyer).

The purpose is to enhance the transparency of the transactions and to guarantee the legitimate rights and interests of the parties, namely the buyers, being the unprotected party. The scope of the law comprises: any future property at project stage, in construction, or at a stage where construction has already been concluded, but for which no valid licence of use has been issued; and future units (e.g. apartments), without definitive registration at the Property Registry.

This law is a response to the numerous transactions occurred in Macau on property under construction, aiming to give certainty to these transactions and to the property market in general. This market is where most transactions take place and which reflects major speculation at certain times, given the possible leverage in terms of invested capital.

Prior authorisation

The PSL created a set of new procedures, both material and formal, to be adopted for the sale of units in buildings under or planned for construction.

Firstly, a prior authorisation from the Public Works Department is now required for the developer to be able to enter into this kind of agreement. From the requirements for issuance (construction licence, completion of foundation works and

registration of a provisional strata title) we can conclude that the construction works have to be partially completed. A total of 34 prior authorisations have been issued so far.

Secondly, all PP&S Agreements must be confirmed by a lawyer and the signatures of the parties certified by a notary. The referred confirmation by a lawyer of the PP&S Agreement basically consists of a declaration that its contents are in compliance with the law, which has introduced mandatory content for

This law is a response to the numerous transactions occurred in Macau on property under construction, aiming to give certainty to these transactions and to the property market in general

such agreements for the first time. The sanction for not complying with any of the requirements above is that the contracts are void. This can be invoked by any interested party at any time.

Mandatory registration

Within 30 days of the agreements' signature, a registration request has to be filed; otherwise, the applicant is subject to pay three times the registration fees. Once registration is in favour of the promissory-purchaser or the assignee is effective, any other transactions or agreements over the same unit are deemed legally void. And once registration of the security interest in favour of the creditor is effective, any other transactions or agreements over the same unit are also deemed legally void, unless the creditor grants a written waiver. In case of foreclosure of a building under construction, the registered parties on a PP&S Agreement or its assignment enjoy priority and are ranked immediately above common creditors. The registered creditor with a security enjoys the same privilege, with his credit being ranked above the credit of the promissory-purchaser or assignee.

In short, this law created three major requirements that were not applicable to these contracts before: confirmation by a lawyer, signature certification by a notary and registration. Two further substantial requirements were also introduced: prior authorisation from the government and mandatory contents for the contract.

Consequences

From a legal point of view, the PSL anticipated a number of procedures that normally would only take place at the stage of execution of the transfer deed.

It is not possible to evaluate this law's full impact at this stage, although in the short term it has resulted in a substantial reduction of the number of units on sale in the market. Most developers need time to adjust and seek compliance with the PSL as well as to obtain prior authorisation from the Public Works Department. Nonetheless the PSL has brought a legal and also an economic revolution to the pre-sale of units in Macau.

All developers should be therefore aware of the new legal requirements in order to ensure compliance.

Stamp Duty Law

Law 15/2012, which became effective on October 30 2012, widened the taxable transactions under the special stamp duty introduced during the previous year (under Law 6/2011). The special stamp duty was initially limited to residential property and aimed at curbing the chain-transfers of pre-sale properties (flipping) in a short period of time. Since its effect, the transfer of properties for commercial, office or parking purposes (whether under construction or still in project phase) occurring within two years since the last regular stamp duty payment for its acquisition has been subject to the special stamp duty. If the transaction occurs within one year, the tax rate for the sale is 20%. If the transaction occurs in the second year after the last liquidation, the tax rate is 10%. In both cases the special stamp duty is payable by the seller.

The Stamp Duty Law (Law 17/88/M) amendment also created an additional tax on the acquisition of property for residential purposes – to be levied on companies, entrepreneurs or non-residents. The rate of this additional tax

Carlos D. Simões

DSL Lawyers

Co-founder and managing partner of DSL Lawyers since 2007, Carlos also leads the property practice. He moved to Macau in 1993 and later became a partner at C&C Lawyers. Carlos graduated in Law from the Catholic University in Lisbon in 1991 and in the same year was admitted to the Portuguese Bar. He has been a member of the Macau Bar since 1993 and qualified as a Private Notary in 1994.

At DSL, Carlos' practice spans several areas – structuring of property investments, including tax optimisation, securities creation, financial raising and disposal strategies. He was the main legal advisor to one of the first mixed purpose (residential-commercial-hotel) developments in Macau launched in 2006. He was also an advisor to two AIM listed funds for both their portfolio acquisition and exit from Macau – including the tender sale of two of the most emblematic office buildings in Macau.

Carlos has been retained by several Hong Kong conglomerates with extensive retail networks in Macau, advising them on network expansion, lease negotiation and agreement termination. He is also experienced in dealing with licensing issues, both for use and re-development purposes.

Carlos was recently a speaker on the topic of Pre-Sale Law at the Sixth International Conference organised by the Macau University.

He has been consistently ranked with the directories Chambers & Partners and IFLR.



Pedro Manero Lemos

DSL Lawyers

Pedro recently joined DSL Lawyers. In Portugal, he worked as a trainee lawyer at the law firms João Marcelo & Associados and João Pedroso & Associados for two years, and previously as a legal consultant with Sal & Caldeira Advogados in Mozambique. He has a deep knowledge of the Property and Civil Law practice areas.

He graduated in Law from the University of Coimbra, where he also obtained a Master in Law. He received two post-graduations, one in Intellectual Property in 2012 by the University of Lisbon and another in Banking, Stock Market and Insurance Law by the University of Coimbra in the preceding year.

Pedro is a native Portuguese speaker and is fluent in English, Spanish and intermediate in French. He is a registered lawyer at the Portuguese Bar Association.



is 10% and must be paid within 30 days of the execution of the acquisition agreement.

Other laws and regulations

A number of other laws, part of the broad reform of the property market in Macau, came into effect in the last few years.

One of the most significant was the Property Brokerage Law (Law 16/2012), which came into force on July 1 2013. For the first time in Macau, property brokerage activity (for assisting in the

their headquarters in Macau or a representative with permanent residency in Macau and comply with the legal requirements for permanent activity in Macau. Brokers have several obligations, such as to promote their clients' full awareness, to verify properties' characteristics and to assure the properties are free of charges or encumbrances.

Other laws and regulations which recently came into force include the *Land Law* (Law 20/2013), *Urban Planning Law* (Law 12/2013) and *Heritage Preservation Law* (Law 11/2013).

Recent directives from the Banking Supervision Entity also limited the access to property acquisition by individuals through bank loans. Regulation no 022/B/2012-DSB/AMCM updated the limits of bank mortgage loans, which now varies from 40% to 90% of the property value (depending on the value and whether the buyer is a resident of Macau).

This law created three major requirements that were not applicable to these contracts before: confirmation by a lawyer, signature certification by a notary and registration

(purchase, lease or assignment of property) was regulated. The law aimed to introduce mandatory training to all qualified professionals in the area; regulate a set of duties and procedures to be followed by all brokers when operating their business; and provide a better protection to the end-users when using the professional services of brokers.

The law establishes a new certification of professionals in this area, amongst property brokers and agents. The former can be companies or entrepreneurs, which must hold a valid licence to operate. Companies, among other requirements, must have

Securing sustainability

The various laws recently enacted contribute to a higher certainty for the buyers and developers while conferring more credibility and reliability on the property market. Operators in this industry are now required to cope with more regulations and to address the new legal challenges posed by this booming market. All in all, although not perfect, these measures have led to a cooling effect on the market, fostering sustainability for its impressive growth.



THE RIGHT PEOPLE. HERE IN MACAU

DSL Lawyers provides an extensive range of legal services to local and international corporations with interests throughout Macau. Our team of experienced professionals has international qualifications, language capabilities and long time knowledge of the region and industries.

Our lawyers are committed to their Clients' needs and problems, making available the time and resources required for the completion of any deal or for the right decision to be made in a timely manner.

We know our Clients and we know their needs. Our lawyers have acquired a long time experience at DSL and previously with other firms, with deep legal insight of the main Macau industries and its international players. Such experience makes the difference and is recognized by our Clients.

The involvement of partners at different levels of practice, as main contact points to Clients, and the supervision and monitoring of other lawyers' and staff work allows high quality service and reliability of results. The structure of the practice in teams led by partners also promotes a healthy growth, supported by solid procedures.

We are fluent in Portuguese, English, Mandarin, Cantonese and German languages.

PRACTICE AREAS

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- Employment
- Tax
- Construction & Infrastructure
- Telecommunications & Media