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Construction of model contract law for Guangdong-Macao intensive cooperation zone in Hengqin

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CITATION

Iong MT. (2024). Construction of model contract law for Guangdong-Macao intensive cooperation zone in Hengqin. *Journal of Infrastructure, Policy and Development*. 8(4): 3525. <https://doi.org/10.24294/jipd.v8i4.3525>

ARTICLE INFO

Received: 5 December 2023

Accepted: 22 December 2023

Available online: 27 February 2024

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Abstract: The Guangdong-Macao Intensive Cooperation Zone in Hengqin (Intensive Cooperation Zone) has emerged as a pivotal economic hub, attracting Macao residents and enterprises. However, disparities in contract-related rules between the zone and Macao have led to legal challenges. This article delves into a comparative study of contract laws between the People's Republic of China (PRC) and Macao. Analyzing key facets such as pacta sunt servanda, freedom of contract, principle of equity, contract form, principles of interpretation, and termination of contract, the study identifies nuanced differences. Recognizing the imperative of aligning contract laws for the Intensive Cooperation Zone's development, the article advocates for a unified legal environment. To achieve this, the author proposes a model contract law that prioritises the United Nations Convention on Contracts for the International Sale of Goods (CISG) as the basis. Notably, Macao's contract-related rules should govern aspects not covered by the CISG given the policy trend in the Intensive Cooperation Zone. The proposed model law serves as a foundation for legislative reform, aiming to address the existing disparities and promote the Intensive Cooperation Zone's economic growth.

Keywords: model law; contract law; comparative study; legal alignment; Hengqin

1. Introduction

Guangdong-Macao Intensive Cooperation Zone in Hengqin (Intensive Cooperation Zone), a special economic zone close to Macao and situated in Zhuhai city of Guangdong Province of the People's Republic of China (PRC), has been developed in recent years. Since 2009, there have been policies developing the Intensive Cooperation Zone, which are intended to help Macao develop diverse industries rather than gambling and facilitate Macao residents to live and work in the zone, as well as enterprises to invest in it. With the continuous optimisation of policies, Macao has been developing other industries through the Intensive Cooperation Zone and the number of Macao residents moving to this zone continues to increase. For example, according to the recent development plan (Governo da Região Administrativa Especial de Macau, 2023), Macao has promoted the development of the following key industrial sectors through the Intensive Cooperation Zone: 1) Integrated tourism and leisure industry; 2) traditional Chinese medicine big health industry; 3) modern financial industry; 4) cutting-edge technology industry and reconversion and valorisation of traditional industries. To integrate with the international standards, some authors suggest that, in addition to the above four industrial sectors, the Intensive Cooperation Zone should also pay attention to major areas such as international commercial dispute resolution, digital international trade, and international regulatory standards and normative systems (Lyu and Tian, 2022).

Nonetheless, various problems continue to emerge, including those arising from the differences in contract laws between the Intensive Cooperation Zone and Macao. The problems appear even though both belong to the civil law system. The former implements a Chinese-style legal system, which is mainly influenced by German law, while the latter, as a special administrative region, continues the civil law system from the period of the Portuguese administration, that is, the Roman-Germanic civil law system. For instance, many Macao residents who purchased real estate in the Intensive Cooperation Zone were not protected due to false or exaggerated publicity by real estate developers, even if they safeguarded their rights through legal channels.

This article will conduct an in-depth analysis of the similarities and differences in contract laws between the PRC and Macao. Based on the continued trend of Macao residents moving to the Intensive Cooperation Zone to live and work, the differences highlight that the contract law in this place shall not be the Chinese one but needs to be adjusted to this trend. For this purpose, this article suggests the construction of a contract model law for the Chinese legislator to refer to and adjust the current Chinese contract law applicable in the Intensive Cooperation Zone.

2. Comparative study on contract laws

At the level of contract law, Intensive Cooperation Zone applies the contract law included in the Civil Code of the PRC, while Macao's contract law is contained in its Civil Code. Against this background, what deserves our in-depth analysis and discussion are the similarities and differences in contract laws between the two places. Such comparisons can pave the way for the alignment of their contract laws. However, due to the word limit, this article only comparatively analyzes the following aspects, which do not represent all comparable aspects.

2.1. Pacta sunt servanda

Pacta sunt servanda is a basic principle in international law and contract law and originated from the social contract theory. It means that all parties to a contract should perform the contract strictly following the agreement and cannot unilaterally change or terminate it without authorization (Han, 2011).

In the Civil Code of the PRC, such a principle is not directly stipulated in a specific article, but it runs through the entire contract law and is the foundation and core principle of Chinese contract law, such as in Articles 509 and 577. On the other hand, Macao's common doctrines (Varela, 2009) and case law (e.g., Court of Second Instance, 2019) believe that the principle is reflected in the first paragraph of Article 400 of its Civil Code. However, the principle in both jurisdictions is subject to *clausula rebus sic stantibus*, reflected in Article 533 of the Civil Code of the PRC and Article 431 of the Macao Civil Code. It refers to the situation where, once a contract is established, fundamental changes occur due to unforeseen circumstances beyond the control of the parties, which disrupt the common basis of the transactions contemplated by the contract, resulting in the parties being unable to perform or continue to perform the contract becoming unfair (Prata, 2011). This means that the application of *pacta sunt servanda* is not absolute, and the contract is allowed to be changed or terminated under the circumstances referred to by *clausula rebus sic*

stantibus. This exception is similar to the ideas resulting in the English Contract Law case *Ruxley Electronics and Construction Ltd v Forsyth* (Law Teacher, 2013), in which Ruxley failed to perform his specific obligations to build a pool under the contract, but the judgement upheld an award of £2500 for loss of amenity instead of awarding £21,540 to cover the cost of having a pool demolished and rebuilt.

Therefore, *pacta sunt servanda* is the same in the contract laws of the two places. The difference lies in whether it is reflected in a certain article.

2.2. Freedom of contract

The civil codes of the PRC and Macao have many similarities in the principle of freedom of contract, and both embody the basic concept of contractual autonomy, which is a universal provision of contract law under market economy conditions. This principle applies to the formation, agreement and cancellation of contracts. Taking the formation as a reference, the parties have the right to choose whether to sign a contract, choose what kind of contract to sign, decide the content of the contract or decide the dispute resolution mechanism according to their wishes (The Open University of Hong Kong, 2009).

However, in both contract laws, the content of the contract agreed by the parties can be different. According to the Civil Code of the PRC, such as Article 496, the content of the contract established by both parties under certain circumstances must abide by the principle of equity, but this situation does not exist in Macao. Therefore, the scope referred to in the Civil Code of the PRC is narrower than the scope referred to in the Macao Civil Code.

2.3. Principle of equity

Judgment based on the principle of equity implies resolving a conflict most equitably, taking into account only the characteristics of the situation and without resorting to applicable legal norms (Prata, 2011). The civil codes of the PRC and Macao stipulate that courts, arbitration institutions and one of the civil parties have the right to take the initiative to resolve disputes by the principle of equity, such as Articles 496 and 533 of the Civil Code of the PRC and Articles 3 and 801 of the Macao Civil Code.

However, after summarizing the legal provisions of both civil codes, it can be concluded that there are obvious differences in the scope of application between them. The principle of equity regulated in the Civil Code of the PRC only applies to contractual liabilities (e.g., Articles 6, 496, 533, etc.), while the same principle in Macao Civil Code applies to both contractual and non-contractual liabilities (e.g., Articles 3/b, 801, 873/n1, 1052/n1, 1084/n2, 1141/n2, etc. for contractual liabilities; Articles 331/n2, 482/n1, 487, 489/n3, 560/n6, etc. for non-contractual liabilities).

2.4. Contract form

In terms of contract form, the civil codes of the PRC and Macao (e.g., Article 135 of the former; Article 211 of the latter) adopt the principle of freedom of form. The parties may agree to adopt any form of contract as long as it does not fall within the specific form required by law.

However, there are obvious differences in the specific forms of legal provisions between the PRC and Macao. The differences are mainly reflected in the special contracts under their contract laws, especially the formal requirements for these contracts under the notarial laws of the two places. Macao's notarial law is more rigorous than China's in terms of contract form. This can be demonstrated, for example, in real estate sales contracts and real estate lease contracts.

2.5. Principles of interpretation

In theory, there are generally two different positions on the interpretation of legal acts: one is a subjective position, which believes that the interpretation of legal acts aims to ascertain the true meaning of the parties; the other is an objective position, which believes that the interpreter should adopt the meaning or content that a normal person would understand (Prata, 2011).

By analyzing the first and second paragraphs of Article 142 of the Civil Code of the PRC, we can draw the following conclusions: when it comes to interpretations involving the counterparty's expression of intention, an objective stance should be adopted; The interpretation of the relative person's expression of intention should adopt a subjective stance. Since in principle a contract involves the expression of intention by a counterparty (e.g., one of the parties to the contract), the interpretation in contract law adopts an objective interpretation. This is the reason why the first paragraph of Article 466 only cites the first paragraph of Article 142. In Macao, Article 228 of the Macao Civil Code also has a similar situation: the first paragraph adopts an objective stance; the second paragraph adopts a subjective stance. However, unlike the Civil Code of the PRC, paragraph 2 shall take precedence when conditions are met. Similar situations also exist in paragraphs 1 and 2 of Article 230 of the Macao Civil Code. Therefore, Macao's interpretation of contract law adopts a subjective interpretation. However, the meaning or content resulting from the subjective interpretation should be understood as a shared or common intent upon which the parties have agreed. If shared or common intent of the parties cannot be established, or if it appears that there is no common intent, the court will determine how a statement or the conduct of a party could reasonably have been understood in good faith by the other party.

In terms of interpretation methods, both adopt literal interpretation. However, there are differences between them in other interpretation methods. Combining the first paragraph of Article 466 of the Civil Code of the PRC with the first paragraph of its Article 142, if the meaning cannot be determined by the literal interpretation, the disputed clause must be interpreted based on the nature of the contract, the purpose of the contract, customs and the principle of good faith (Regulatory Center of Law Press China, 2022). In Macau, the interpreter will determine whether the contract terms are consistent with their literal meaning through the teleological, systematic and historical elements of the contract terms: if so, the interpretation carried out is literal; if not, the interpretation carried out is a restrictive interpretation or expansionary interpretation, depending on whether the meaning expressed by the contract terms is more or less than the true intention of the parties (Prata, 2011).

In case of doubts about the interpretation, Article 229 of the Macao Civil Code

stipulates a legal presumption for resolution, namely “If there is any doubt about the meaning of the expression of intention, the meaning that imposes a lighter burden on the person disposing of the gratuitous legal act shall prevail, and in the case of paid legal acts, the meaning that can achieve a more balanced payment shall prevail”. On the contrary, there is no similar resumption in the Civil Code of the PRC, which means that the interpreter should not draw doubtful conclusions about the disputed clause and must determine its meaning under the provisions of Article 142, paragraph 1.

2.6. Termination of contract

Articles 562 and 563 of the Civil Code of the PRC and Article 462/n1 of the Macao Civil Code stipulate two methods of termination, namely termination by agreement and statutory termination, and that *clausula rebus sic stantibus* is regarded as one of the statutory termination situations.

The difference is that the Civil Code of the PRC mainly regulates the statutory termination of a contract in Article 563, although, at the end of this article, it is stated that the parties may terminate the contract in “other circumstances provided for by law”. Paragraph 1 of Article 426 of the Macao Civil Code states that “the termination of a contract ... is allowed following the law”, and the situations of statutory termination are scattered in many of its articles. In addition, the four situations referred to in Article 563, Paragraph 1, of the Civil Code of the PRC are regarded as situations in the “compliance and non-compliance” rules in the Macao Civil Code, rather than situations of statutory termination.

2.7. Breach of contract

A breach of contract occurs when one of the parties does not comply with the obligations resulting from a contract, regardless of whether it is caused by the party, another party or a third party. The Civil Code of the PRC and the Macao Civil Code regulate civil liability in case of a breach of a contract, but with different solutions.

The Civil Code of the PRC regulates liability for breach of contract from Articles 577 to 594. Article 577 determines the basic rules for liability for breach of contract with the following content: “Where a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall continue to perform its obligations, take remedial measures, pay damages, or be otherwise held liable for breach of contract”. However, it does not indicate the situations in which “a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract” and explain in detail the forms of liability. The doctrine clarifies that the situations include the impossibility of performance, delay in performance and incomplete performance and the liability consists of the following forms: 1) continuation of performance; 2) repairing, reconstitution and replacement; 3) returning of goods, reduction of price or remuneration, etc.; 4) statutory compensation losses and agreed compensation losses such as liquidated damages and deposits (Regulatory Center of Law Press China, 2022). On the other hand, the same legal norm is not clear whether contractual liability refers to fault liability or liability without fault, which causes divergence in doctrine (Han, 2011). Although there are doubts about the two points mentioned above, the Civil Code of the PRC is clear that

the liability can be excluded in case of force majeure (Article 590) or reduced when both parties breach the contract, or one party's breach of contract is culpably caused by the other party (Article 592).

On the contrary, Macao's Contract Law rules regarding breach of contract are more detailed and rigorous than the ones in the PRC and the doubts existing in the PRC do not exist in Macao. First of all, the rules regarding breach of contract are in detail divided into the following three sections: 1) impossibility of performance and delay not attributable to the debtor (Articles 779 to 786); 2) lack of performance and delay attributable to the debtor (Articles 787 to 801); 3) delay of the creditor. As the first section relates to the impossibility of performance and delay not attributable to the debtor, the fault of the debtor does not exist and, for that reason, the contractual liability is extinguished. The contractual liability exists only in the second and third sections, which require the existence of a fault. It means that the contractual liability in Macao refers to fault liability. On the other hand, the impossibility of performance not attributable to the debtor can be divided into objective impossibility and subjective impossibility. The former refers to situations in which the performance becomes objectively impossible for reasons not attributable to the debtor (Article 779), including force majeure, and the latter refers to impossibility relating to the person of the debtor who cannot be replaced by a third party (Article 780). This implies a major ambit of exclusion of contractual liability in Macao, compared with the one regulated in the Civil Code of the PRC.

It should be emphasized that the Macao Civil Code has a mechanism applicable to contractual liability that the Civil Code of the PRC does not have, namely the so-called "compulsory financial penalty" regulated in Article 333. This mechanism is intended to compel the liable party to fulfil the performance to which he/she is bound (Costa, 2009), applying to the situation in which the violated party can require the court to sentence the other party to pay a monetary penalty for each day, week or month of culpable delay until the other party complies with the court decision condemning him/her to fulfil the performance to which the violated party is contractually entitled. However, the court cannot set the penalty at its discretion, but according to reasonableness criteria (Prata, 2011).

3. Benefits of alignment of contract laws

Based on the above comparative study, there are many differences in contract regulations between the civil codes of the PRC and Macao. The existing differences, while not properly handled, may have various impacts to a certain extent, affecting Macao residents' willingness to work, live or invest in the Intensive Cooperation Zone as they may think that they cannot get the same level of justice as in Macau.

Therefore, the alignment of contract laws between the two places is necessary, bringing many benefits to those who live, work or invest in the Intensive Cooperation Zone. First of all, in terms of increased commercial transaction activities, a unified legal environment can greatly reduce the risk perception of enterprises in cross-border transactions, thus encouraging more cross-border commercial transactions and investment activities. This consistency of the legal environment can also attract more international investors and further expand the Intensive Cooperation Zone's economic

influence. Second, in terms of reducing legal disputes, the alignment of contract law rules in the two places can help unify the understanding and execution of contracts, thereby reducing possible legal disputes. Third, in terms of operating cost reduction, a unified legal environment can reduce the burden on enterprises to understand and adapt to different legal environments. For example, enterprises can avoid spending a lot of time and money on familiarizing themselves with and adapting to different contract laws in the two places, and they do not need to hire legal consultants who are specifically familiar with the laws of the two places, thus saving time and money and reducing operating costs. Fourth, in terms of promoting regional integration, one of the development goals of the Guangdong-Hong Kong-Macao Greater Bay Area is to achieve deep regional integration. The effective alignment of contract law rules of the two places can help achieve this goal. Finally, in terms of promoting confidence and trust, effective legal alignment also plays a positive role in the stable development of the entire community. A unified legal environment can enhance the confidence of individuals and enterprises in the future development of the community, thereby enhancing their trust in community development and encouraging them to make long-term investments and development in the Intensive Cooperation Zone.

To sum up, properly aligning the contract law rules of the PRC and Macao is of great significance to the development of the Intensive Cooperation Zone. This requires the joint efforts of many parties to promote the alignment of contract laws in the two places through legislative reform, judicial practice and legal services.

4. Suggestions for alignment of contract laws

Faced with the differences in contract laws between the civil codes of the PRC and Macao, to make the alignment of rules possible, it is necessary to construct a model contract law that is uniformly applicable to the Intensive Cooperation Zone for reference and adoption by the legislators.

Inspired by the Organization for the Harmonization of Business Law in Africa (OHADA) project on the general law of contracts, this article suggests that the most suitable model law for the Intensive Cooperation Zone should meet the following three requirements: 1) PRC and Macao have joined the United Nations Convention on Contracts for the International Sale of Goods (CISG); 2) the CISG as the basis of contract law in Intensive Cooperation Zone, except the aspects that are contrary to the both contract laws of the PRC and Macao; 3) For aspects that are not regulated in the CISG, Macao's contract law shall be applied with priority.

The CISG was approved by the PRC as early as December 11, 1986, and came into effect on January 1, 1988. Although Macao is part of the PRC, it does not mean that it has become a part of the CISG. According to Paragraph 1 of Article 138 of the Macao Basic Law, one of the requirements for Macao to join the CISG is the need to join this international convention. Since Macao has not yet joined the CISG, there seems to be no need for this. However, this article believes that two reasons highlight the need for Macao to join the CISG. First of all, Macao, like other countries and regions, involves cross-border transactions, in which there inevitably are buyers and sellers from different countries or regions and possible disputes. In this regard, the CISG can be a good bridge, providing a unified system for resolving disputes related

to the international sale of goods and introducing certainty to commercial transactions (Castellani, 2013). In addition, from an economic perspective, Macao's accession to the CISG can help reduce transaction costs, thereby lowering the price of imported and exported goods. In this way, users and consumers in Macao can obtain goods at lower prices, and the exported goods may be more competitive in the global market due to their lower prices.

After Mainland China and Macao join the CISG as a prerequisite, the Intensive Cooperation Zone can use the norms of the CISG as the basis of contract law, especially in terms of sales contracts, except the aspects that are contrary to the contract law rules of the PRC and Macao, such as the doctrine of the "clausula rebus sic stantibus", which is not accepted in the CISG. Since many countries and regions have successively joined the CISG, if the countries or regions involved when a dispute arises are parties to the CISG, the legal norms applicable to resolving the dispute are the same in the Intensive Cooperation Zone. This helps increase certainty and predictability in international sales contracts. In addition, the CISG does not favour the buyer or the seller because it carefully balances the interests of the two parties (United Nations, 2010), which allows the interests of the weaker party to the contract to be treated more fairly. This point can be demonstrated by the rules on conformity of the goods and the possible remedies for a breach of contract (Schwenzer, 2016). The most important point is that the CISG is the product of many years of preparatory work and represents a milestone in modern contract law and, as such, has been a source of inspiration for many regional and national legislations (Castellani, 2013). If Intensive Cooperation Zone takes CISG as the basis of its model contract law, it can use its many years of doctrine and case law as the basis for judgment in terms of legal application.

Certainly, the scope regulated by the CISG does not cover all aspects of contract law. For example, it does not apply to the following aspects (United Nations, 2010; Fontaine and Ly, 2009): 1) sales and service sales to consumers; 2) sales of certain specific types of goods; 3) the validity of the contract; 4) the impact of the contract on ownership rights in the goods sold; 5) pure domestic sales contract; 6) pre-contractual liability.

Regarding the aspects that the CISG does not regulate, this article suggests that the applicable law should not be determined through conflict of laws, but the law of Macao. This suggestion does not mean that Macao's contract-related rules are superior to that of the PRC, or that the former is better than the latter. It is mainly based on the policy trends set by the Chinese Government for the Intensive Cooperation Zone in favour of Macao residents and enterprises, especially the policies that have been implemented in recent years. Many policies have been introduced to facilitate Macao residents to live and work and enterprises to invest in the Intensive Cooperation Zone. For instance, Macao New Neighborhood properties can be sold only to Macao residents; Intensive Cooperation Zone recruits civil servants from Macao residents; Macao residents working and living in Intensive Cooperation Zone can enjoy a series of tax incentives and convenience measures; Macao residents who work or start a business in this place can enjoy subsidies, etc. It is precisely based on the promotion of these policies that Macao's contract-related rules, not the Chinese ones, should be directly applied in the Intensive Cooperation Zone. Nonetheless, the policies

facilitating Macao residents to work in the Intensive Cooperation Zone should be supported by applying Macao's Labour Relations Law (Law No 7/2008) instead of the Chinese one, given that the former has higher employee protection, especially in terms of equality of employees (Zhou, 2007) and occupational safety rights protection (Pei Zhou, 2011).

In this regard, to make the alignment of contract laws possible, this article recommends that the originally applicable Mainland China contractual rules in the Intensive Cooperation Zone be adjusted accordingly based on the above-mentioned model contractual law. It means that the above-mentioned model contractual law serves as the legislative basis and foundation, and the contract-related rules resulting from such legislation are particularly applicable to the Intensive Cooperation Zone as a special law, to be more conducive to its development.

With the benefits of alignment of contract laws, it is possible to adjust and legislate in the Intensive Cooperation Zone according to the proposed model contract law, but this article recognizes some difficulties of such a project. The first refers to the one regarding conciliation between the norms in CISG and the ones in Macao's Contract Law. This requires heavy and prudent work before the legislation. The second relates to the fact that, even though the legislation can be achieved, the judges in the Intensive Cooperation Zone do not have enough knowledge of Macao's Contract Law to handle cases. To resolve this problem, this article suggests that the government in the Intensive Cooperation Zone recruits judges from Macao's legal experts and creates a specialized court to handle cases related to contractual litigation.

5. Conclusion

In conclusion, this article provides a comprehensive analysis of the disparities in contract law rules between the PRC and Macao, with a focus on the Intensive Cooperation Zone. The emergence of this cooperation zone as a significant economic hub has led to an influx of Macao residents and enterprises, but the existing differences in contract-related rules have given rise to legal challenges.

The comparative study explores key aspects such as *pacta sunt servanda*, freedom of contract, principle of equity, contract form, principles of interpretation, and termination of contract. While identifying nuanced differences, the article emphasizes the need for a unified legal environment to facilitate the development of the Intensive Cooperation Zone. To address these disparities, the author proposes the construction of a model contract law, with a foundation based on the CISG.

The benefits of aligning contract laws between the PRC and Macao are highlighted, including increased commercial transactions, reduced legal disputes, lower operating costs for enterprises, and promotion of regional integration. The article underscores the significance of legislative reform, judicial practice, and legal services in achieving the alignment of contract laws.

The suggested approach involves the construction of a model contract law for the Intensive Cooperation Zone, incorporating the CISG as the basis. Notably, Macao's contract-related rules would govern aspects not covered by the CISG, reflecting the policy trends favouring Macao residents and enterprises in the Intensive Cooperation Zone. The article concludes by emphasizing the necessity of joint efforts from various

parties to promote the alignment of contract laws through legislative reform, thereby contributing to the stable and prosperous development of the Intensive Cooperation Zone.

Funding: This article is a part of the research project “Alignment of Civil and Commercial Rules in the Hengqin Guangdong-Macau Deep Cooperation Zone from the Perspective of Regional Rule of Law”, Guangdong Province Philosophy and Social Sciences research project, 2023.

Conflict of interest: The author declares no conflict of interest.

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