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The Private International Law Rules of the New Special Administrative Region of Macau of the People's Republic of China

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I. INTRODUCTION

On December 20, 1999 the transfer of administration over the territory of Macau took place between Portugal and the People's Republic of China, this latter state resuming the exercise of sovereignty over all its mainland. It was a final act of a process¹ that had been announced a little more than twelve and one-half years before, when, on March 26, 1987, the two countries signed the Sino-Portuguese Joint Declaration on the Question of Macau.²

According to this treaty,³ the Special Administrative Region of Macau was to enjoy a high degree of autonomy, being vested with executive, legislative, and independent judicial power. It has also been granted that the laws in force in the territory at the time of its conclusion are to remain basically unchanged.

With the purpose of adjusting the previous legal system to the needs of the transitional process, the Civil Code in force in Macau⁴ was reformed with the aim mainly of adapting its text to the political and legal context of the territory. This exercise, which implied the replacement of the Portuguese background by one peculiar to Macau and the adjustment of the previous provisions that would be out of touch with reality was concluded a little more than four months before the transfer of administration, and the Civil Code of 1999, approved by Decree-Law n.º 39/99/M, of August 3, came into force on November 1, 1999.⁵

These developments involved the repeal of the previous private international law rules, contained in Articles 14 to 65 of the Portuguese Civil Code of 1966, and the entering into force of a new set of provisions, now included in Chapter III (Rights of non-residents and conflicts of laws) of Title I (Interpretation and

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1. Similar to the one that led to the same result concerning Hong Kong nearly two and a half years before, on July 1, 1997.

2. Following a similar instrument of Dec. 19, 1984, between the United Kingdom and the People's Republic of China on Hong Kong.

3. On the nature of this legal instrument and for the commentary of its main provisions see Moura Ramos, *La Déclaration Commune Sino-Portugaise dans la perspective du Droit International*, in *Mélanges en hommage à Michel Waelbroeck*, 97-109 (1999).

4. It was the Portuguese Civil Code of 1966, extended to the territory of Macau by an order n.º 22869, of Sept. 4, 1967.

5. Following Article 1 of Decree-Law n.º 48/99/M, of Sept. 27, 1999 amending Article 1 of Decree-Law n.º 39/99/M, of Aug. 3, 1999, which contained the schedule of Oct. 1st.

application of laws) of Book I (General Part), Articles 13 to 62 of the 1999 Macau Civil Code.⁶

The purpose of this essay is to comment on the main options of this new private international law codification. Taking into account that it represents an evolution and an adaptation of the Portuguese 1966 conflict of laws codification,⁷ we will mainly point out the similarities and differences between these two legal systems. When justified, we will, besides, compare the new solutions with the ones enacted by those private international law codifications in which preparation the distinguished scholar to whom this issue of the *Louisiana Law Review* is dedicated played a decisive role—the 1991 Louisiana Acts No. 923, effective January 1, 1992, and Puerto Rican (Projct of March 1, 1991) codes.

Since the 1999 Civil Code follows very closely the Portuguese and continental tradition on this matter, we will deal separately with the general provisions (Articles 13 to 23) (I) and the specific conflict of laws rules (Articles 24 to 62) (II).

II. THE GENERAL PROVISIONS

A. *Law of Aliens*

The first provision of the chapter does not address a conflict of laws issue, but concerns, on the model of the Portuguese Code, the law of aliens. It is provided that private law rights of non-residents in Macau are to be put on the same footing as Macau inhabitants, in the absence of a legal provision to the opposite effect (Article 13).

The essential feature of the rule is that, although dealing with aliens, it does not address itself to foreigners (people having not the same nationality of the one of the citizens of one state) but to non-residents. This is a consequence of the fact that the Macau legal system, even if an autonomous one, is in a certain way part of a complex legal order with a territorial basis. The entity where that system is in force (Macau) does not constitute a state in the realm of public international law, but only a territorial unit of the People's Republic of China (which is itself a state within the meaning of the Law

6. The introductory note that precedes Decree-Law n.º 39/99/M, of Aug. 3, 1999, underlines the contribution of Professor Isabel Magalhães Collaço in the drafting of these provisions.

7. That was subjected to a reform some years later (1977). For the main characteristics of the original codification see Ferrer Correia, *O Novo Direito Internacional Privado Português (Alguns Princípios Gerais)*, Boletim da Faculdade de Direito da Universidade de Coimbra, 48 (1972), and I Inocencio Garcia Velasco, *Concepcion del Derecho Internacional Privado en el nuevo codigo civil portugues* (1971).

Some modifications had been made to this system by Decree-Law n.º 496/77, of Nov. 25, 1977. On the purposes and framework of such a change see Moura Ramos, *Portugal—Droit de la famille—Dispositions intéressant le droit international privé*, 67 *Rev. crit. dr. internat. privé*, 598 (1978); Ferrer Correia, *A reforma do Código Civil e o direito internacional privado*, 283 *Boletim do Ministério da Justiça*, 19 (Feb. 1979); Almeno de Sá, *A revisão do Código Civil e a Constituição*, 3 *Revista de Direito e Economia*, 425, 443-45 (1977); Baptista Machado, *Lições de Direito Internacional Privado*, 404, 422-26 (2d ed., Coimbra, 1982).

of Nations). In these circumstances, the link that can delimit the circle of persons to which the legal rights provided by the autonomous Macau legal system are in principle granted is residence,⁸ not nationality (which does not exist as such in relation to Macau). Such a conclusion implies that what is therefore necessary to define is the legal status of non-residents, and not that of non-nationals.⁹

Although the matter is dealt with in a very particular way, the legal answer provided for the rule is, on the contrary, a very well-known one: the principle of equality (between residents and non-residents, now), subject only to the legal exceptions that can be put forward by the legislator. We would underline here only that the new provision diverges from the Portuguese one when it does not mention the reciprocity principle¹⁰ as a ground for denying rights to aliens.

B. General Conflict of Laws Problems

The provisions concerning the general problems of the conflict of laws system follow essentially the pattern of the Portuguese Civil Code of 1966. It is primarily what happens with characterisation and *fraus legis*, where Articles 14 and 19 of the new Code limit themselves to the reproduction of Articles 15¹¹ and 21 of Portuguese Civil Code.

The same happens also with public policy (*ordre public*), interpretation and assessment of the contents of foreign laws and with acts taking place on board of ships and aircraft, at sea or in flight. The solutions of the

8. As it flows from the Joint Declaration and as confirmed by the attention paid in one of its annexes to the definition of permanent residents in Macau.

9. As far as the private law rights of the legal system of Macau are concerned it is consequently immaterial to this effect whether one is or not a citizen of the People's Republic of China. It matters only if one is or not a resident in the Special Administrative Region of Macau. For the importance of this last concept see also our study *supra* note 3.

10. Whose constitutionality is vigorously debated under the Portuguese system. See Lima Pinheiro, *Direito Internacional Privado—Parte Especial (Direito de Conflitos)*, 133-34, (1999).

On this question, in general see Paul Lagarde, *La réciprocité en droit international privé*, in 154 *Collected Courses of the Hague Academy of International Law* 103-214 (1977); in respect to Italian law, Robert Clerici, *Criteri di parità e principio di eguaglianza nel disegno di legge*, in *La riforma del diritto internazionale privato e processuale. Raccolta in ricordo di Edoardo Vitta*, 309,330-35 (Giorgio Gaja ed. 1994).

11. Concerning the position adopted in this Article see Moura Ramos, *Le droit international privé portugais à la fin du vingtième siècle: avancement ou recul?* in *Private International Law at the End of the 20th Century: Progress or Regress?* 349, 369-372 (Symeon C. Symeonides ed. 2000).

The position of the Puerto Rico Draft Code on this issue (Article 5) is slightly different. Although it states that "the legal categories and terms of foreign law that are applicable to an issue under the provisions of this code shall be interpreted and applied in accordance with that law," it also starts from the idea (which is foreign to Portuguese thinking) that "the characterization of a legal or factual issue for purposes of selecting the applicable provision of this Code is to be done in accordance with the legal categories, concepts and terms of [forum] law." By leaning towards the Robertson doctrine, this text follows, on the contrary to Macau and Portuguese Codes, a *lex fori* theory.

Portuguese Civil Code contained respectively in Articles 22,¹² 23 and 24 are maintained. The new rules just replace the expression "foreign law" in Articles 20 (public policy) and 22 (interpretation and assessment of foreign applicable law) by "law outside Macau,"¹³ and the reference to the law of Macau (the *lex fori*) as the last solution as a result of the application of a public policy exception that takes the place of Portuguese law. With respect to acts taking place on board at sea and in flight, where the territorial law is the law of registration, Article 23(2) of the new Code provides that military ships and aircraft are considered as a part of the territory of the State or of the territorial unit to which they belong rather than only to the State, as happens in Article 24 of the Portuguese Code.¹⁴

With respect to *renvoi*, the main criteria of the Portuguese codification are also maintained. Reference by a conflict of laws rule to any law outside Macau¹⁵ is normally seen as a reference simply to the domestic law¹⁶ of such a system (Article 15(1), as is the case in Portuguese Code).¹⁷ The Macau Code also kept the goal of achieving international uniformity that had led the Portuguese system to accept *renvoi* to a law of another system, when such a law is considered applicable¹⁸ or back to the substantive law of the forum, when the conflict of laws system of the law chosen by the forum rules refer to the domestic rules of such a law.¹⁹ However, the new codification does not follow the Portuguese system in the subtleties that this law has adopted in matters of personal status, with the intent of giving equal footing insofar as the law of nationality and the law of habitual residence are concerned.²⁰ Such an issue does not arise in the context of the Macau Code in view of the exclusion of the law of nationality in personal matters and the exclusive reference in this respect to the law of habitual residence.²¹ Finally, the path adopted by Portuguese system concerning the influence of *favor negotii* principle in *renvoi* matters and the exclusion of this mechanism when parties' free choice is the relevant connecting factor is also followed.²²

12. On the praxis of the Portuguese courts on this Article, see Moura Ramos, *L'ordre public international en droit portugais*, 74 Boletim da Faculdade de Direito da Universidade de Coimbra, 45-63 (1998). See also the very similar formulation of Article 7 of Puerto Rico Draft Code.

13. The purpose is to cover also Chinese law or the laws of other Chinese regions that cannot properly be considered foreign laws.

14. The reason is the same as mentioned in the previous note.

15. Article 16 of the Portuguese Code spoke generally in this respect of "a foreign law." *But see supra* note 13.

16. Paragraph 2 of Article 15 of the Macau Code states that domestic law means, for the purposes of this chapter, substantive law, irrespective of the conflict of law rules of the system. That has also been the unchallenged interpretation in Portuguese literature and practice.

17. See Article 16. The Louisiana codification (Article 3517) and the Puerto Rico Draft Code (Article 6) follow the same general rule, and they also admit of some limits to its application.

18. Article 17(1) of Portuguese Code and Article 16(1) of the Macau Code.

19. Article 18(1) of Portuguese Code and Article 16(2) of the Macau Code.

20. See Article 17(2)(3) and Article 18(2), of the Portuguese Code and Ramos, *supra* note 11, at 365-68.

21. See Article 30 of Macau Code and *infra*, Section II.A.

22. See Articles 19, 36(2) *in fine* and 65(1) of Portuguese Code and Articles 17, 35(2) and 62(1) of Macau Code, and Ramos, *supra* note 11.

With respect to non-unified legal systems,²³ the approach has some similarities too, even if some differences can be underlined. The main one is the omission (in Macau Code, Article 18) of one of the situations with which Article 20 of Portuguese Code deals: choice of nationality as a connecting factor.²⁴ The rule in general adopted (for interterritorial and interlocal conflicts) in the Macau Code is the one that was also retained in the Portuguese Code for interpersonal conflicts and which refers to the criteria used by the applicable law to the same purpose, adding nevertheless that when such criteria are missing, the law most strongly connected with the situation is to apply.²⁵ Such an option, totally ignored by the Portuguese Code in its first version, has been received later in this system but only with a limited effect.²⁶ In accordance with a general trend²⁷ the Macau Code makes greater use of this clause.²⁸

From a formal point of view the major difference between the two systems in the framework of the general part of private international law is the provision contained in Article 21 of Macau Code concerning mandatory rules (in the sense of *lois de police*, rules that because of their nature and purpose must be applied whatever the law applicable to a certain relationship). Like certain other legal systems²⁹ the Code provides that rules of Macau law that in view of their specific object and scope must mandatorily be applied prevail over the provisions of the outside law designated under the forum conflict rules. But such an approach, even if not present in the Portuguese codification, has long been adopted by Portuguese scholars³⁰ and has been recently inserted in some specific legislative acts.³¹

23. On these questions see mainly Alegria Borrás, *Les ordres plurilégislatifs dans le droit international privé actuel*, 249 *Hague Academy Collected Courses*, t. 147-368 (1994).

24. In the sense that this connecting factor is absent from the Macau Code, see *supra* note 21.

25. See Article 18(2).

26. See Articles 52 and 60(2) of Portuguese Code as they stood after the 1978 reform and Moura Ramos, *Les clauses d'exception en matière de conflit de lois et de conflits de juridictions—Portugal, in Exception Clauses in Conflict of Laws and Conflicts of Jurisdictions—or The Principle of Proximity* 273, 284, n. 34 (D. Kokkini-Iatridou ed. 1994).

27. In the field of the private international law of the European Communities, for example, see Moura Ramos, *Un Diritto internazionale privato della Comunità europea: origine, sviluppo, alcuni principi fondamentali in 2* *Divenire sociale e adeguamento del diritto*. Studi in onore di Francesco Capotorti, 273, 289-304 (1999).

28. See Articles 30(5), 41, 50(2), 56(2), and 58(2).

29. See, for example, the Swiss private international law codification of Dec. 18, 1987 (Article 18), Article 17 of Italian law of May 31, 1995, reforming private international law, and to a certain extent and with a more universalist approach and containing also another ingredients, but limiting itself to delictual and quasi-delictual obligations, Article 3547 of Louisiana Civil Code.

For a general overview on this subject, see most recently Andrea Bonomi, *Le norme imperative nel diritto internazionale privato. Considerazioni sulla Convenzione europea sulla leggi applicabile alle obbligazioni contrattuali del 19 giugno 1980 nonché sulle leggi italiana e svizzera di diritto internazionale privato*, Zurich, 1998, Schulthess Polygraphischer Verlag.

30. For a presentation of the situation in this respect, see Ramos, *supra* note 11, at 354-56, 362-64.

31. See Article 3 of Decree-Law n.° 486/99, from Nov. 13, 1999 (Movable Securities Act).

III. THE SPECIFIC CHOICE OF LAW RULES

Under the scheme of the Macau Code, the specific choice of law rules appear in seven subsections that deal respectively with personal law (Articles 24-33), law regulating legal acts (Articles 34-39), obligations (Articles 40-44), real rights (Articles 45-47), family relationships (Articles 48-57), cohabitation (Article 58), and succession on death (Articles 59-62). However, as the provisions of Macau Code concerning applicable law on legal acts and succession on death follow exactly the ones contained in the Portuguese codification,³² we will confine ourselves to the other matters.³³

A. *The Personal Law*

The great majority of the provisions of this subsection does not depart from those included in the Portuguese Code. That is absolutely the case if we consider those relative to the scope of the personal law (Article 24),³⁴ the inception and extinction of legal personality (Article 25),³⁵ and guardianship and similar measures of protection for persons without legal capacity (Article 29).³⁶

Furthermore, other provisions contain only minor changes that are determined by the new situation, like replacing the expression Portugal by Macau³⁷ and the reference to "foreigner" or "stateless" by "non-resident."³⁸

The same applies to the replacement of the word "State" by "place," when considering the determination of the personal law of legal persons (Article 31(1)),³⁹ the continuity of the legal personality of legal persons in case of transfer of their

32. Articles 35-40 and 62-65 respectively.

33. For a commentary on the provisions concerning those areas, see Baptista Machado, *supra* note 7, at 351, 433-52; and see Lima Pinheiro, *supra* note 10, at 139-61, 279-88.

34. That includes, as in Article 25 of Portuguese Code, civil status, capacity, family relationships, and succession on death.

35. Like Article 26 of Portuguese Code, reference in these matters is also made to personal law, and the same solution is adopted where two or more persons die at the same time.

36. The applicable law is the personal law, as in Article 30 of Portuguese Code.

37. This is the case of Articles 26 and 27 of Macau Code, that correspond to 27 and 28 of Portuguese Code.

Dealing with rights of personality, Article 26(1) states that personal law is applicable concerning their existence, means of protection and restrictions imposed as to its exercise. It also states that in Macau a non-resident cannot use the remedies unknown in the local law. On the other hand, Article 27(1) lays down that an act concluded in Macau by a person whose applicable personal law considers it without legal capacity cannot be annulled on incapacity grounds, when the law of Macau, where it is the applicable law, should consider such a person as having legal capacity. According to Article 27(2), such an exception does not apply when the other contractant was aware of the absence of legal capacity, or when the act was unilateral, belonged to family or succession law or related to disposal of immovables outside the territory of Macau. Finally, Article 27(3) provides that when the act is concluded outside of Macau, a law of the place of conclusion containing rules identical to the previous ones (those of Article 27 (1)(2)) should be observed.

38. See Article 26(2) cited, *supra* note 37; and, for the underlying rationale, *supra* section II.A.

39. That is, the law of the place (and not of the State like in Article 33(1) of Portuguese Code) where are located the main and effective headquarters of its administration.

headquarters to a place subject to a different legal order (Article 31(1)),⁴⁰ and the determination of the personal law of legal persons created by an international convention (Article 32).⁴¹

Moreover, some provisions improve on the drafting or even the presentation of the solutions of the Portuguese Code. This is the case of Article 28 which deals expressly with majority and emancipation, providing that change of a personal law is not to affect such status when acquired by the preceding personal law.⁴² The same is true of Article 33, which states that the rule laid down in Article 27 concerning derogations from the consequences of lack of capacity is also applicable to legal persons, where the analogy is justified.⁴³

Although these changes are small, the picture is totally different if we consider determination of the personal law, where a more radical change takes place.

Article 31(1) of the Portuguese Code refers to national law in this respect, adding in Article 32 a subsidiary conflicts rule, according to which the personal law of a stateless person is that of the place of his habitual residence or that of his legal domicile in case of minors or people without legal capacity.⁴⁴ Furthermore, the Portuguese Code contains another provision, Article 31(2), that refers only to situations created abroad and according to which legal relationships entered into in the country of habitual residence of the people concerned, in accordance with that country's law whenever it is considered the applicable law, are recognized in Portugal.⁴⁵

This dual structure of the provision has been maintained but in a certain way also reversed, although the Macau Code contains a more complete and more complex system of solutions.

As I have already suggested,⁴⁶ the choice of nationality as the relevant connecting factor concerning personal status would not make sense in Macau, an entity that does not itself confer a nationality. In these circumstances Macau law itself would never be directly⁴⁷ applied in personal matters, and the same would

40. Like in Article 33(3) of Portuguese Code, such a solution is followed when the law of both headquarters agree on it.

41. Reference is made to the law designated in the convention or in the statutes, and, if there is no such designation, to the law of the place of the main headquarters (Article 34 of Portuguese Code mentions the law of the State of the main headquarters).

42. Following the same solution, Article 29 of Portuguese Code refers only to majority, even if the same scope must be recognized to the provision.

43. The conclusion, even if it was not formulated, is undisputed in Portuguese legal writings. See Baptista Machado, *supra* note 7, at 350-51 and Lima Pinheiro, *supra* note 10, at 97-98.

44. Article 32(2) contains a substantive rule, by reference to the solution provided in Article 82(2), for the case where a stateless person has no habitual residence: in this case, one is considered to be domiciled in the place where he happens to reside, or, if this can not be ascertained, in the place where he stays.

45. On the construction of this Article see Moura Ramos, *Dos direitos adquiridos em direito internacional privado*, 50 Boletim da Faculdade de Direito da Universidade de Coimbra, 175-217 (1974), and Ramos, *supra* note 11, at 375-76.

46. When dealing with solutions to *renvoi* problems, see *supra* section I.I.B.

47. It could, however, be applied by way of a concretization of the relevant connecting factor inside a non-unified legal system. See *supra* section II.B.

happen to the laws of the other systems of law coexisting inside the Chinese state. This inadequacy of the Mancinian heritage in the context of a non-unified legal system⁴⁸ has already been noted by the legislature in Macau, which previously approved⁴⁹ a modification to the Portuguese Civil Code in force in Macau by inserting a new provision in Article 31. According to it, even if the personal law was one of nationality, the law in force in Macau would be the law (in personal matters) applicable to people habitually resident in the territory. It was clearly a unilateral choice of law rule⁵⁰ (as it referred only to territorial scope of application of the *lex fori* (Macau law)) which thus limited the application of the nationality rule in the field of personal matters. This last mentioned law remained applicable only in this framework, concerning people who were not habitual residents in Macau.

Instead of restricting the application of the previous bilateral choice of law rule, the new provision (Article 30(1) of Macau Code) replaced the connecting factor (habitual residence having taken the place of nationality), therefore restoring the integrity of the universalist approach. It was just a change of the connecting factor, and the rule remains a hard and fast one, favoring certainty in the determination of personal law.⁵¹ Habitual residence was defined as the place where an individual has the actual and stable center of his personal life (Article 30(2)), and it is also underlined that such a situation is not dependent on any administrative formality, although persons entitled to a resident's identity card of Macau are presumed habitual residents in Macau territory (Article 30(3)).

The law also deals with cases where there are several or no habitual residences. In the first case, if one of them is in Macau, personal law is that of the territory of Macau (Article 30(4)).⁵² In the second, it is provided that personal law is the law

48. Which is now the case of Macau inside the People's Republic of China.

49. By Decree-Law n.º 32/91/M, of May 6, 1991. The solution was justified by the need to clarify the personal *status* of the Macau residents of Chinese culture and ethnic origin. Underlining the aim of finding stable solutions in accordance with the realities of the territory and the transitional period, the same decree-law stated that all references in the Civil Code to Portugal were now understood as relating to Macau and expressly repealed Decree n.º 36.987, of July 24, 1948. This act had determined that people born in Macau, who according to Portuguese law (Decree of 3 Nov. 1905) would be considered Portuguese nationals, were subject to Portuguese private law, while Chinese born in Macau but not having Portuguese nationality as well as Chinese nationals were subject to Chinese private law in family and succession matters. Meanwhile, these fundamental provisions did not prevent marriages contracted between Chinese people according to their religion's formalities from producing full private-law effects. Two other provisions of a transitional nature must be mentioned. The first reserved the situations created before the enactment of this act in accordance with Chinese custom codified by the Decree of June 17, 1909, and the second stated that goods which, when these customs were in force, had been set aside for family "sacrifices" (*sacrificios*, in the original), may be alienated if all beneficiaries that are alive expressly so agree.

50. On the degree of acceptance of this approach in Portuguese Code, see Ramos, *supra* note 11, at 359-60.

51. A different approach was taken by Puerto Rico Draft Code, that made the status of natural persons subject to "the law of the State which, with regard to the issue in question, has the most significant connection to the parties and the dispute" (Article 10). Stability of personal relationships is in this case looked after by a flexible conflicts rule.

52. The law does not deal with the situation of several habitual residences when none is in Macau but the solution must be to take into consideration the one with which the personal law of the individual

of the place with which the personal life of the individual is most closely connected [Article 30(5)].

In the field of situations created abroad, the Macau Code goes along with the Portuguese model and also recognizes in Macau the legal relationships entered into in the country of the nationality of the persons concerned, in accordance with that law, where it is considered applicable (Article 30(6)). The move from habitual residence to nationality is justified by the central role played by the former. But the alternative relevance of nationality shows that the law of personal status must exhibit a stable link with a legal system which may only be evidenced by a connection of a permanent nature: nationality or habitual residence. However, the similarity with the Portuguese system is limited by the nature of the (non-unified) legal system to which the Macau legal order belongs. Article 30(7) states, therefore, that the rule does not apply when a person has the nationality of a State where there are different legal orders and he is habitually resident in such a country, provided that the law of the place of habitual residence is considered applicable to the situation. The provision is justified by the primacy that habitual residence is deemed to have over nationality. In such a situation, that primacy must be extended also to internal conflicts and not only to international ones: the result is the irrelevance of nationality in the realm of a non-unified legal order,⁵³ even in situations created abroad.

B. Obligations

The system followed in this respect is very close to that of the Portuguese Code, and the solutions are also the same, concerning quasi-delictual liability and, to a certain extent, delictual and contractual liability.

The cases of absolute similarity are those of *gestio negotii* and unjust enrichment which, according to Articles 42 and 43, are subject to the law of the place where the essential activity of the manager occurred, and to the law according to which the transfer of patrimonial value to the enriched took place, respectively.⁵⁴

The changes concerning delictual liability are of a purely semantic nature. The main rule states, in Article 44(1), that delictual liability (on wrongful acts, on risk and on legal acts) is subject to the law of the place of the essential activity that caused the damage, and, in case of omission, to the law of the place where the person liable should have acted.⁵⁵ Furthermore, it is also stated⁵⁶ that if the law where the injury took place considers the agent liable but such will not be the case according to the law of the place of action, the former law applies, provided that the agent should have foreseen the occurrence of a damage, in a place subject to that law, as a consequence of his act or omission.⁵⁷ It is also

concerned is more strongly connected.

53. In the light of the rule in Article 18, *see supra* section II.B.

54. *See* Articles 43 and 44 of Portuguese Code.

55. *See* Article 45(1) of Portuguese Code.

56. In Article 44(2).

57. In these provisions we can just note the replacement of the expressions "law of the State" by

provided that when the tortfeasor and the victim normally have the same habitual residence but happen to be abroad, the applicable law is to be that of habitual residence, notwithstanding the provisions of the legal order designated according to the preceding provisions that should be indistinctly applied to everyone.⁵⁸

In respect of obligations arising from legal acts and their substance, Article 40(1) relies on the will of the parties with regard to the law that the parties have chosen (express choice) or had in mind (implicit choice). The freedom of choice is however a limited one,⁵⁹ since the parties may only refer to a law whose application fulfills a serious interest of the contractors or has a connection with one of the relevant elements of the legal act under private international law.⁶⁰ To the extent that the applicable law has not been chosen, the Macau Code⁶¹ breaks with the archaism of the Portuguese Code⁶² and states that the judicial act should be governed by the law of the place with which it is most closely connected.⁶³

C. Real Rights

In this subsection, we can say that the solutions of the Portuguese Code are followed, the only differences being of a drafting nature.

Concerning real rights, the main rule states that *lex rei sitae* is the applicable law in matters of possession, property and other real rights (Article 45(1)), both in immovables and in corporeal movables.⁶⁴ And the special rules on *res in transitu* and on means of transport subject to registration which provide that the constitution

"law of the place" and "in that country" by "in a place subjected to that law." On the importance of foreseeability considerations in this field, see also Article 46(b) of Puerto Rico Draft Code.

58. Article 44(3). The same happens with Article 45(3) of Portuguese Code where a reference to common nationality appears along with common habitual residence.

59. Contrary to what is now the general trend that favors unlimited freedom. See Article 3 of 1980 Rome Convention on the law applicable to contractual obligations that replaced for the most part Article 41 of Portuguese Code.

60. Article 40 of Macau Code. See also Article 41 of Portuguese Code.

61. Article 41.

62. Article 42 of this Code (now in a great measure replaced by Article 4 of Rome Convention) refers, concerning unilateral acts, to the law of the habitual residence of the author of the statement, and in respect of contracts, to the law of parties' common habitual residence. In absence of such a common residence, the applicable law would be, concerning gratuitous contracts, the law of the habitual residence of the party that gives the benefit, and in the other contracts the law of the place of contracting.

63. According to Article 4 of Rome Convention, but without the presumptions contained in that Article and agreeing with the original proposition of Portuguese Code on this matter. See in this respect Moura Ramos, *Da lei aplicável ao contrato de trabalho internacional*, 374 n.17, 386 n.31 (Coimbra 1991). The same solution is also in force in the People's Republic of China (see Article 143 of the General Principles of the Civil Code of the People's Republic of China, approved by the National People's Assembly on Apr. 12, 1986, and Article 5 of Law on International Economic Contracts of 1985 and *id.* at 385, n.31).

64. See Article 46(1) of Portuguese Code.

and transfer of rights over these things are subject, respectively, to the law of destination (Article 45(2)) and to the law of the place where they are registered (Article 45(3)), merely reproduce the Portuguese 1966 solutions.⁶⁵

The same is equally true of the special rule concerning capacity to constitute real rights over immovables and to alienate them, which determines the law of the situation of the things as the applicable law, whenever such a law is considered applicable, the personal law recovering, however, its competence when this condition is not fulfilled (Article 46).⁶⁶ This application of the *Naherberechtigung* principle, by expressly taking into consideration the foreign conflicts law, seems justified by the strength of the *lex situs* in the field of immovables.

Finally, Article 47 provides that, notwithstanding the provisions of specific legislation, copyright and related rights as well as industrial property are subject to the law of the place where protection is claimed. Even though the solution seems different from that employed in the Portuguese Code,⁶⁷ the determination of the applicable law in intellectual property issues is in keeping with the interpretation that Portuguese academic writings have given to those provisions.⁶⁸

D. Family Relationships

Taking the same path as the Portuguese Code, the provisions of this subsection deal with marriage, matrimonial property regimes, and children.

In respect of marriage, there is no difference concerning the applicable law on capacity to marry or to enter marriage contracts: reference is made in both provisions⁶⁹ to the personal law of each betrothed, which will also govern matters of validity or lack of consent of the parties. Concerning formal validity, the general rule⁷⁰ regarding the law of the place where the marriage is contracted is also the same, but is subject in the Macau Code to fewer derogations than in Portuguese law. In fact, that legal order departs from the general rule only in the case of consular marriages, admitting that two foreigners⁷¹ may marry before the respective consular agents according to the formal requirements of the law of nationality of each party.⁷² In fact, there is no provision concerning the possibility of celebrating consular

65. See Article 46(2)(3). The reference to "law of the place" instead of "law of the State" is the only change, as already stated.

66. See Article 47 of the Portuguese Code.

67. That refers in Article 48(1) to the law of the place of the first printing of the work and to the personal law of the author, when this has not been published, in matters of copyright, notwithstanding what may be stated in specific legislation; and in Article 48(2), to the law of the State of its creation, in the field of industrial property.

68. See the persuasive arguments of Baptista Machado, *supra* note 7, at 381-92, and Lima Pinheiro, *supra* note 10, at 254-61.

69. Article 48 of Macau Code and Article 49 of Portuguese Code.

70. Article 49(1) of Macau Code and Article 50 of Portuguese Code.

71. Reference to foreigners (and not to people domiciled abroad) is justified by the aim of the provision—authorization of consular marriages—that entails the concept of nationality.

72. Article 49(2) of Macau Code and Article 51(1) of Portuguese Code. But the reference made in this last provision to the reciprocity principle is missing, as in Article 13. See *supra* section I.A.

marriages abroad, according to Macau law,⁷³ and the special rule on the recognition of some religious marriages contracted abroad (those where one or both parties were of Portuguese nationality) notwithstanding the formal provisions of the *lex loci celebrationis*, contained in Portuguese law⁷⁴ has not been retained.

Concerning the relationship between spouses and the effects of marriage, Article 50(1) of Macau Code considers the law of the common habitual residence the applicable law and states that when the spouses do not have the same habitual residence, reference must be made to the law of the place with which the couple's life is most strongly connected (Article 50(2)).⁷⁵ The same law is also applicable to divorce, according to Article 53.⁷⁶

In the field of matrimonial property, Article 51(1) considers the law of habitual residence of the spouses at the time of the celebration of the marriage as the applicable law,⁷⁷ and Article 51(2) refers to the law of the first matrimonial residence if the spouses did not have the same residence.⁷⁸ However, in a limited application of parties' freedom of choice (*Kollisionsrechtliche Verweisung*), Article 51(3) permits the choice of one of the matrimonial regimes established in the Macau

73. The Basic Law of the Special Administrative Region of People's Republic of China (adopted on the Mar. 13, 1993, by the People's National Assembly of People's Republic of China) does not foresee the possibility of the establishment of consulates of the Special Administrative Region (Article 141 referring only to economic or commercial missions in foreign countries) even if it allows (Article 142) the establishment of foreign consulates in Macau.

74. See Article 51(3) of Portuguese Code. Arguing the unconstitutionality of this provision, see Marques dos Santos, *Constituição e direito internacional privado. O estranho caso do artigo 51, n.º 3, do Código Civil, in, Perspectivas Constitucionais. Nos 20 anos da Constituição de 1976*, v. III, 367-90 (Jorge Miranda ed., Coimbra 1998). See also Lima Pinheiro, *supra* note 10, at 151 n. 241.

75. The Portuguese Code (Article 52) applies first the law of the common nationality of spouses, and refers only afterwards, whenever such a common nationality does not exist, to the two connections mentioned in Article 50 of Macau Code. On the reasons for such a difference, see *supra* section III.A.

76. The same solution is provided by Article 55(1) of Portuguese Code. Article 55(2) of this Code states that if the applicable law changes during the marriage, divorce and separation can only be decreed on the grounds that were relevant at the material time. This disposition has not been retained by the Macau Code, but the solution that it contains can also be used in the framework of this system, when divorce is seen as a sanction for the conduct of the spouses. To the effect that in Portuguese law the rule must be limited to these cases, see Baptista Machado, *supra* note 7, at 415-18 and Miguel Teixeira de Sousa, *O regime jurídico do divórcio* 16 (Coimbra 1991).

77. The Portuguese Code applies first the law of the nationality of spouses at the time of celebration of marriage, and refers only to the law of habitual residence when the spouses do not have the same nationality [Article 53(1)(2)].

78. According to Portuguese legal writings, the scope of application of this provision only covers situations arising from a marriage contract or a legal matrimonial regime. See Baptista Machado, *supra* note 7, at 406-13. On the contrary, the patrimonial effects of marriage that are independent from a marriage contract or a particular matrimonial regime (implicitly chosen), and that are called in French doctrine the *statut matrimonial primaire*, are governed by the law applicable to the effects of marriage—as determined by Article 50.

In a consistent application of this idea, Article 52(1), states that, admissibility, substance, effects of matrimonial contracts, and of changes made by spouses to the matrimonial regime (of a legal or of a conventional nature) are governed by the law provided for in Article 50. See also Article 54(1) of Portuguese Code. Article 52(2) of the same Article precludes a new matrimonial settlement from having retrospective effects in detriment of third persons. See also Article 54(2) of Portuguese Code.

Code, even when the applicable law is not the law of Macau, provided that one of the parties is a habitual resident in Macau.⁷⁹

The applicable law with regard to filiation is, according to Article 54, the personal law of the parent at the time of the establishment of the relationship,⁸⁰ even if Article 57 also provides for consent of the child when its personal law so requires.⁸¹ Furthermore, the relationship between parents and children are made subject by Article 55(1) to the law of the common habitual residence of the parents and, when there is no such common residence, to the personal law of the child.⁸² Article 55(2) states that when filiation is established with regard to only one of the parents, the personal law of that parent applies, and when one of them is deceased, the applicable law is the personal law of the survivor.⁸³

The same can be observed with respect to adoption. According to Article 56(1), adoption proceedings shall be governed by the personal law of the adoptive parent,⁸⁴ but when adoption is made by a married couple or the adoptee is a child of the spouse of the adoptive parent,⁸⁵ the applicable law is the law of common habitual residence of spouses, and if there is no common habitual residence, the law of the place with which the life of the couple is most strongly connected.⁸⁶ In any case, consent of the child will be respected, according to Article 57,⁸⁷ if the personal law of the child so requires. Concerning the relationship between the adoptive parents and child and between the child and its family of origin, the applicable law will be the law of the adoptive parent or, in the case of adoption by a married or cohabiting couple, the law governing the relationship between parents and children (Article 56(4)).⁸⁸

79. The solution is parallel to the one in Article 53(3) of the Portuguese Code.

80. Article 56(1) of the Portuguese Code contains the same solution, but it governs also in Article 56(2)(3) disavowal of paternity. These provisions refer to the law of common nationality of spouses, the law of their common habitual residence when they have different nationalities and the personal law of the child when there is no common habitual residence. The relevant time for the assessment of these connecting factors is that of the birth of the child, or the dissolution of marriage if it is prior to the birth.

Article 18 of Puerto Rico Draft Code refers in this matter to Puerto Rican law, with a unilateral conflicts rule, which makes provision only for cases brought in Puerto Rico.

81. See the more complex rule of Article 61 of Portuguese Code.

82. The only difference in the Portuguese Code is that, entirely consistently, Article 57(1) refers first to the law of common nationality of parents. It subsequently adopts the same solution as Macau Code.

83. To the same effect, see Article 57(2) of Portuguese Code.

84. As in Article 60(1) of Portuguese Code.

85. According to Article 56(3), the same rule will be applied where adoption is by two cohabittees or when the adoptive child is the child of the cohabitee of the adoptive parent. There is no parallel provision in Portuguese Code.

86. The same is provided in Article 60(2) of Portuguese Code, with the only difference that it refers first to the law of the common nationality of spouses. The solutions of Article 56(2) of Macau Code are only considered when the spouses have no common nationality.

87. See the more complex provisions of Articles 60(4) and 61 of Portuguese Code.

88. The same solution is provided, except concerning adoption in cases of cohabitation, by Article 60(3) of Portuguese Code.

E. Cohabitation

Since the Macau Code deals expressly with cohabitation⁸⁹ and its legal effects,⁹⁰ it also provides in Article 58 a conflicts rule on its conditions and effects.⁹¹ According to this provision, the applicable law is the law of the common habitual residence of the cohabitantes (Article 58 (1)), and if there is no such common residence, the law of the place with which the situation is most strongly connected (Article 58 (2)). Making cohabitation subject to the common personal law of the cohabitantes is in keeping with the general trend in most legal systems that have dealt with this problem to gradually treat it as equivalent to marriage.⁹² It must, however, be underlined that the legislator did not restrict himself to establishing a bilateral conflicts rule, in accordance with the general system followed by the codification, departing from previous practice on this subject which avoided such a path.

IV. CONCLUSION

The foregoing comments confirm clearly that the Macau conflict of laws codification has respected the essential options and even the majority of the solutions of its predecessor: the conflicts system of the 1966 Portuguese Code. However, this loyalty on fundamental issues (such as the basic concept as regards equal treatment of *lex fori* and foreign laws and their consequences on the bilateral structure of conflicts rules, and on the solutions to problems such as characterization, *renvoi*, public policy, and *status* of foreign law)⁹³ has not excluded

89. For the concept and its general conditions see Articles 1471 and 1472.

90. In the field of paternity (Article 1725), parental responsibility (Article 1765(3)(4)), support of the spouse (Articles 1860 and 1862), adoption (Article 1828), succession on death (Article 1985), limitation of actions (Article 311(1)(a)), and lease of immovables (Articles 998, 1041 and 1043).

91. There is no parallel rule in the Portuguese Code. On this problem on the conflicts level, cf. Ferrer Correia, *Direito Internacional Privado Matrimonial (Direito Português)*, in *Temas de Direito Comercial e Direito Internacional Privado*, 331 n.1 (Coimbra 1989); Geraldo da Cruz Almeida, *Da união de facto. Convivência more uxorio em direito internacional privado*, (Lisboa 1999); Lima Pinheiro, *supra* note 10, at 266, and Sofia Oliveira Pais & António Frada de Sousa, *A união de facto e as uniões registadas de pessoas do mesmo sexo-uma análise de direito material e conflitual*, 59 *Revista da Ordem dos Advogados* 671-730 (1999).

92. Besides the authors cited *supra* note 91, see P. Striewe, *Ausländisches und internationales Privatrecht der nichtehelichen Lebensgemeinschaft*, (Köln 1986), and most recently Caroline Forder & Silvina H. Lombardo, *Civil Law Aspects of Emerging Forms of Registered Partnerships*, (1999); Hans Ulrich Jessurun d'Oliveira, "Registered Partnerships, Private International Law and The European Union. Some Reflections," (to be published in *Rivista di diritto internazionale privato e processuale*); Katharina Boele-Woelki, *Le partenariat enregistré: législation des Pays Bas*, in *Questions d'actualité en droit des personnes dans les Etats de la CIEC. Actes du Colloque pour marquer les 50 ans d'existence de la CIEC*, Université Robert Schumann-Strasbourg, Mar. 26, 1999, at 43-53; Jean Hauser, "Le Partenariat enregistré: projets en cours," *id.*, at 54-59, and Petar Sarcevic, *Private international law aspects of legally regulated forms of non-marital cohabitation and registered partnerships*, 1 *Yearbook of Private International Law* 37-48 (1999).

93. On these topics, see Ferrer Correia, *Une codification nationale à l'épreuve du principe d'égalité: le Code Civil portugais de 1966 revisité*, in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, v. IV, 63-87 (Milano 1987) and Moura Ramos, *Le*

some changes that have been dictated by less felicitous solutions of the Portuguese Code. Nor has it prevented the adaptation of a system conceived only to deal with international conflicts to a situation where, simultaneously, interterritorial conflicts are at stake. In such a context the law of nationality should have lost all its importance, and its place should only have been occupied by the law of habitual residence, in a system that would not abandon a personal status concept. Although it may be said that the guidelines for the adaptation were already firmly laid down, it is also true that the legislator managed to act consistently when making the modifications that were needed, to the extent of introducing some elements in response to postmodern realities,⁹⁴ like cohabitation, and keeping itself up to date, in some matters (*lois de police*), with the most recent doctrinal developments. It is regrettable, meanwhile, that the scope of the rethinking did not also include certain areas, mainly torts and delicts, where the solutions of the Portuguese Code would benefit from some adaptations and developments, mainly in the line of a specialization of the existing conflict rules.⁹⁵

droit international privé portugais à la fin du vingtième siècle: avancement ou recul?, *supra* note 11, at 359-60.

94. See, in this respect, Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne*. Cours général de droit international privé, 251 *Hague Academy Collected Courses*, 11, 237-238 (1995).

95. As is for example the case of the Louisiana Civil Code (Articles 3542-3548) and the Puerto Rico Draft Code (Articles 45-48).

