

AN EXPLORATORY STUDY OF MACAO'S ROLE AS AN ARBITRATION SEAT AND VENUE FOR SINO-LUSO COMMERCIAL DISPUTES

UN ESTUDIO EXPLORATORIO DEL PAPEL DE MACAO COMO SEDE Y LUGAR DE ARBITRAJE PARA DISPUTAS COMERCIALES SINO-LUSO

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ABSTRACT

Objective: Over the past decade, arbitration has grown in popularity as a method of resolving commercial disputes worldwide. However, this practice is relatively new in Macao SAR. Recently, official plans were announced to make Macao as a seat of arbitration for commercial disputes between China and Portuguese-speaking countries (Hereinafter PSCs). This article is dedicated to explore the possibility of Macao undertaking and implementing such a role. Accordingly, this article addresses the following issues: What are the strengths and weaknesses of Macao as a seat and eventually as venue for hosting international commercial arbitration between Chinese and PSCs entrepreneurs?

Methodology: A mixed-method approach of legal doctrinal and empirical research was used in this article. We first included a thorough study of the concept of arbitration followed by analysis of various legal journals and legislations, including Macao, China, and PSCs' arbitration laws. An empirical research was then used to collect data by surveying and interviewing with both lawyers and arbitration practitioners from Macao, China and PSCs.

Results: This article argues that the strength of Macao resides in the similarities between its legal system and that of the China and PSCs and the languages advantage (Chinese and Portuguese both official languages). In spite of this, arbitration is still relatively underutilized in the region, and there is a limited number of arbitrators and legal professionals with bilingual proficiency.

Contributions: This article contributes to the identification of the opportunities and challenges that Macao faces in its potential future development as a seat/venue of arbitration between China and the PSCs.

Keywords: international commercial arbitration; seat and venue of arbitration; Macao; China; portuguese-speaking countries.

RESUMEN

Objetivo: Durante la última década, arbitraje ha crecido en popularidad como un método para resolver disputas alrededor del mundo. Sin embargo, esta práctica es relativamente nueva en Macao RAE. Recientemente, planes oficiales fueron anunciados para hacer de Macao el mediador (árbitro) para disputas comerciales entre China y los países de habla Portuguesa (en adelante PSCs). Este artículo se dedica a explorar la posibilidad de que Macao pueda asimilar y asumir dicho rol. Respectivamente, este artículo trata los siguientes puntos: Cuáles son las fortalezas y debilidades de Macao como sitio, y eventualmente, como anfitrión para albergar eventos internacionales en los que haga de árbitro o mediador entre la gente de China y los emprendedores PSCs.

Metodología: Un método que mezcla la doctrina legal con la investigación empírica fue usado en este artículo. Primero incluimos un estudio exhaustivo del concepto de arbitraje seguido por un análisis de varias revistas especializadas en leyes y un análisis de legislaciones. Estos incluyen Macao, China y PSCs leyes de arbitraje. La Investigación

empírica fue entonces usada para recolectar datos a través de entrevistas y encuestas a abogados así como practicantes del arbitraje en Macao, China y PSCs.

Resultados: Este artículo argumenta que la fortaleza de Macao consiste en las similitudes entre su sistema legal con el de China y PSCs. También resulta ventajoso el hecho de que Macao domina dos idiomas (Chino y Portugués como lenguas oficiales). A pesar de esto, el proceso de arbitraje es todavía relativamente subutilizado en la región y entonces existen un número limitado de árbitros (mediadores) y profesionales de las leyes con capacidad bilingüe.

Contribuciones: Este artículo se propone a identificar las oportunidades y desafíos que Macao confronta en un futuro potencial, en el que la región se ve como participante y anfitrión del arbitraje entre China y el PSCs.

Palabras claves: arbitraje internacional comercial; participante y anfitrión de arbitraje; Macao; China; países de habla portuguesa.

1 INTRODUCTION

Globalization has led to a rapid expansion of international trade and investment across countries and regions in recent years. The growth in trade and investment relationship between China and the Portuguese-speaking countries (Hereinafter PSCs) is a consequence of globalization. Macao, as a facilitator of this relationship, plays an important role in this regard.

Macao plays a vital role in the trade cooperation between China and the Community of Portuguese-language Countries (CPLP); it is also a part of the Chinese initiatives One Belt One Road (OBOR)¹ and the Guangdong–Hong Kong–Macao Greater Bay Area (GBA)².

To date, five Ministerial Conferences of the Forum between China and the CPLP have been held by the Permanent Secretariat of the Forum for Economic and Trade Co-operation between China and PSCs in Macao (Hereinafter Forum Macao). The central government of China has expressed its full support for Macao's position as a trade and economic platform between China and PSCs. The third, fourth, and fifth Ministerial Level Conferences of the Forum set up action plans to further promote the use of Macao's role as a platform, one of which involves promoting Macao as a

¹ The One Belt One Road initiative of China is a global investment strategy adopted by the Chinese government in 2013 to invest in the infrastructure sector in nearly 70 countries and international organizations aiming to boost China's economic development.

² The Bay Area initiative covers nine cities in Guangdong province and the two Special Administrative Regions—Hong Kong and Macao—aiming to create a world-class city cluster to foster the free flow of goods and resources within the GBA.

commercial arbitration seat for disputes arising between China and PSCs³.

Legal practitioners and academics have long raised the idea of Macao being the arbitration seat between the two sides; some have written articles and books about this idea throughout the years. Nevertheless, now that years have passed since the third Ministerial Level Conference, which took place in 2010, Macao is still not capable of fulfilling this role. Therefore, the purpose of this essay is to re-examine the possibility of Macao being the seat and venue for commercial arbitration between China and PSCs.

Given the fact that such a role has been assigned to Macao by the mainland Chinese government, it was important to explore the possibility of Macao undertaking and implementing such a role. Accordingly, this article addresses the following issue. What are the strengths and weaknesses of Macao as a seat and eventually as the venue for hosting international commercial arbitration between China and PSCs?

This article focuses on international commercial arbitration which mainly involves private entities in China and PSCs, but it does not preclude investor-state arbitration in which parties choose Macao as a seat or venue of arbitration for settling their disputes and using the arbitration legislation of Macao to regulate their disputes.

2 MACAO AS A SEAT AND VENUE FOR ARBITRATION: REVIEW OF THE POLICIES AND CONCEPTS

In the western Pearl River Delta bordering the South China Sea, Macao, formally the Macao Special Administrative Region of the People's Republic of China (MSAR), is a city and special administrative region of China. In the sixteenth century, the Portuguese colonized the city, making Macao the first European settlement in the Far East. The colony was under Portuguese administration until 20 December 1999, when its sovereignty was transferred back to China and became the MSAR.

This chapter will discuss the key principles of arbitration as well as the initiatives of designating Macao as a seat and venue for commercial arbitration between China and the PSCs. Although a thorough discussion of the concept of arbitration is beyond the scope of this article, a review of its key concept serves as an important introduction to analysis the possibility to designate Macao for such role.

2.1 CONTEXT OF DESIGNATING MACAO AS AN ARBITRATION SEAT

This section will discuss the economic relations between China and PSCs, as well as the initiative to promote Macao as a seat for international commercial arbitration

³ See the official website of the Permanent Secretariat of Forum for Economic and Trade Co-operation between China and Portuguese-Speaking Countries (Macao). Available at: <https://www.forumchinaplp.org.mo/ministerial-conferences/>. Access in: 5 Apr. 2020.

between China and PSCs in order to illustrate the significant and irreplaceable role that Macao has played between them over the years, as well as the support shown by governments in this regard.

2.1.1 Economic relations between China and Portuguese-speaking countries

PSCs are a linguistic and cultural block united by a common language, which has led to the creation of the CPLP. This community brings together countries that are bound by the Portuguese language because of the history of the colonization process. The community brings together nine PSCs that span over four continents, including Portugal in Europe; Brazil in South America; Angola, Cape Verde, Guinea-Bissau, Equatorial Guinea,⁴ Mozambique, Sao Tome and Principe in Africa; and Timor-Leste in Asia.

In the past three decades since 1978, the beginning of the 'reform and opening up' policy, China has achieved significant economic growth. China has made clear that the inclusion of PSCs in the OBOR Initiative is possible (CLBRIEF, 2018), likewise has expressed willingness to work with China to promote cooperation within the framework of the initiative (GU; LIN, 2019, p. 1-6). With the exponential growth of China's economy, we can summarise China's interest in the PSCs world into three main reasons.

Firstly, China sees PSCs as important trading partners to secure their supply of crucial primary resources along the way of its expansion. The Lusophone countries play a critical role in the South Atlantic, which has grown in importance because of massive oil reserves concentrated in the Atlantic Basin (RODRIGUES SANCHES, 2014, p. 1-9).

Secondly, most of the CPLP members are from developing countries, and China perceives the community as a huge potential market.⁵

Lastly, China is fully aware of the strategic value of utilizing PSCs to open the doors to regional commercial blocs in South America, Africa, Asia and Europe. Macao in this regard, plays an important role of a service platform connecting and deepening the relationship between China and PSCs.

2.1.2 Initiative on promoting Macao as a seat for international commercial arbitration between China and PSCs

The rapid economic development of the Macao SAR in the last decade has attracted many foreign investors and companies to bring their business to Macao.

⁴ Equatorial Guinea joined the CPLP on 23 July 2014 at the 10th CPLP Summit in Dili, Timor-Leste. Portuguese is one of the official languages in Equatorial Guinea; however, it is practically unused in the country.

⁵ As of 2021, the total population of the CPLP was estimated to be 287 million, according to the official website of the CPLP. Available at: <https://www.cplp.org/>. Accessed in: 8 Jun. 2021.

According to the data retrieved from the Statistics and Census Service of Macao (DSEC) in 2020, the stock of inward direct investment rocketed from 10,412 million USD in 2008 to 42,930 million USD in 2019. At the same time, the Macao court system has been highly overloaded recently. In 2019, there were 22,275 new cases filled and 13,461 cases pending from previous years (STATISTICS AND CENSUS SERVICE OF MACAO, 2020). As a result, more attention began to be paid to the use of arbitration in the region.

Macao has a history of cultural blending between China and PSCs dating back more than 400 years, and it is a natural bridge connecting PSCs with China (ALVES, 1999). Macao has actively developed a service platform for Sino-Portuguese business cooperation since the creation of the Forum Macao in 2003.⁶ The success of the Forum does not only contribute positively to economic and trade relations between China and PSCs but also helps strengthen China's international influence.

To date, the Forum Macao has hosted five Ministerial Conferences between China and the CPLP, with notable results from the introduction and implementation of Strategic Plans for Economic and Trade Cooperation at each Ministerial Conference of the Forum for Economic and Trade Cooperation between China and PSCs.⁷ China's central government has expressed unwavering support for Macao; it is explicitly suggested in the 13th Five-Year Plan (2016–2020) of the PRC government to assist Macao in developing a service platform for Sino-Portuguese business cooperation (MACAO..., 2017).

In the Strategic Plan of the 3rd Ministerial Conferences for the years 2010 to 2013 (FORUM MACAO, 2010, online), it is expressly stated in Clause 13.7 that:

The Ministers agreed to analyse the use of Macao's comparative advantages in the knowledge of the legal systems of China and PSCs, promoting Macao as one of the seats of arbitration for the resolution of possible commercial disputes between China and PSCs.

The Forum's fourth and fifth Ministerial Level Conferences had set up new Strategic Plans for Economic and Trade Co-operation for 2014–2016 (FORUM MACAO, 2014) and 2017–2019 (FORUM MACAO, 2017, online), respectively. It is stated in Clause 14.4 in both plans:

The Ministers reiterated their support for taking advantage of Macao's comparative advantages in the knowledge of the legal systems of China and

⁶ As of April 2022, the members of the Forum Macao are: Angola, Brazil, Cape Verde, China, East Timor, Equatorial Guinea, Guinea-Bissau, Mozambique, Portugal, and São Tome and Príncipe.

⁷ Please refer to the official website of the Permanent Secretariat of Forum for Economic and Trade Co-operation between China and Portuguese-Speaking Countries (Macao) <https://www.forumchinaplp.org.mo/>. Access in: 5 Apr. 2020.

PSCs, including its promotion as the seat of arbitration for the resolution of any disputes arising from trade between entrepreneurs Participating Countries in the Macao Forum.

These provisions show the significant support from the members of the Forum Macao for Macao to be an arbitration seat for commercial disputes between China and the PSCs. The central government of China also expressed continuous support to the Macao legal profession to take advantage of this opportunity to assist mainland companies in accessing the PSCs market through the Macao platform and to increase Macao's international presence.

In March 2011, the Sino-Portuguese Forum (Macao) Training Center was founded in Macao to deepen cooperation between China and PSCs in different fields namely language and human resources. Therefore, this research aims to analyze the comparative strengths and weaknesses of Macao in this role and evaluate the extent to which Macao can play a role as a seat and venue of commercial arbitration between China and PSCs.

2.2 CONCEPT OF THE SEAT AND VENUE OF ARBITRATION

A seat of arbitration is a location selected by the parties as to the legal place of arbitration, which determines the procedural framework of the arbitration. Thus, the seat of arbitration or as referred by others as the 'legal home of the arbitration' (PARSONS, 2018) helps identify the 'nationality' of the arbitration which includes arbitrability of the claim, identifying the law governing the arbitration (*lex arbitri*), defining the competence of the local court in terms of supervising the arbitration process, setting aside or annulling the award recognizing and enforcing the award (BELOHLAVEK, 2015; SAVIC; UGALE, 2022).

There are three ways for selecting the seat of arbitration (HILL, 2014):

- 1- It could be chosen by the parties directly by stating in the contract;
- 2- It could be chosen by the parties indirectly through choosing the arbitration rules of an institution;
- 3- If not agreed by the parties, then, the Tribunal will choose.

In the situation where parties decide to select the seat the following factors must be considered: neutrality of the selected seat (specifically when referring to international arbitration), quality of the legal system; quality of the court system; quality of the legal profession; quality of the arbitration profession and ancillary services, quality of the award – enforceability for example find out whether the countries have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (BELOHLAVEK, 2015; PARSONS, 2018).

The seat is distinct from the place/venue of the hearing. The latter simply designate the physical where the arbitral proceedings actually take place such as the place where oral hearings are held, the place where a witness is interrogated, etc.). Although the seat is defined as a location, it is in fact a legal construct with limited geographical relevance (BELOHLAVEK, 2015; PARSONS, 2018).

The general consensus is that arbitration can take place anywhere and does not necessarily have to take place at the seat of the tribunal (HILL, 2014). This is made clear for example by Article 20 of the UNCITRAL Model Law and the Arbitration Act 1996, which ‘assumes that there is no necessary connection between the seat and the location of the proceedings from time to time’ (HILL, 2014). It is well established that an arbitral tribunal can hold hearings or meetings anywhere it considers convenient⁸ and that the seat of arbitration does not change simply by virtue of the tribunal holding hearings or other meetings at a location other than the seat⁹.

2.3 IMPORTANCE OF SELECTING THE RIGHT SEAT FOR ARBITRATION

The seat of arbitration ought to be a critical element of arbitration. By choosing the seat of the arbitration proceedings, a party is choosing the legal environment of the proceedings. In every arbitration, there is always a national law that governs the proceedings. The national law is generally divided into two distinct components—the law relevant to determining the merits of the dispute (the substantive law or *lex causae*) and the law regulating the arbitral proceeding (the procedural law or the *lex arbitri*),¹⁰ which determines the following issues (BELOHLAVEK, 2015):

- a) the formal validity of the arbitration agreement;
- b) arbitrability of the dispute;
- c) the constitution of the arbitral tribunal and any grounds for challenge of that tribunal;
- d) the auxiliary and supervisory roles of the courts;
- e) the law applicable to the annulment of the arbitral award and its recognition and enforcement and;
- f) the economic efficiency and costs of the proceedings.

⁸ See, for example, UNCITRAL Model Law, Art 20.2; UNCITRAL Arbitration Rules, Art. 18; ICC Rules of Arbitration, Art 18. (UNCITRAL, UNCITRAL ARBITRATION RULES, ICC RULES OF ARBITRATION)

⁹ See, for example, the *Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34. The case was seated in the Turks and Caicos Islands and had hearing in Florida (BAY HOTEL AND RESORT LTD AND ANR V CAVALIER CONSTRUCTION CO LTD AND ANR, 2001).

¹⁰ The New York Convention (1958) employs the criteria of the ‘country where the arbitration took place’ and the ‘country in which the award was made’ Therefore, it establishes a clear territorial connection between the seat of arbitration and the *lex arbitri*.

As a general rule, arbitrators apply the law of the seat of arbitration unless otherwise requested. This is because the national law of the venue serves as a framework for arbitration (SIMÕES, 2012). Selecting the right arbitration seat is very important because it will directly affect the efficiency of the arbitration process and the effectiveness of the award. As a rule, the national law of the seat governs the courts' right to intervene in arbitral proceedings. Some arbitration laws allow local courts to interfere with or even obstruct the arbitral process. It is therefore important for parties to choose a seat where the laws prevent courts from intervening except to provide support during the arbitration process.

As well as reviewing the concepts, it is important to emphasize that the overall purpose of this paper is to explore both empirically and non-empirically the possibility of making Macao a possible seat and venue for commercial arbitration between China and PSCs.

3 RESEARCH METHODOLOGY

This study uses a mixed-method approach that combines legal doctrinal research (3.1) with empirical research (3.2) in order to address the research questions.

3.1 DOCTRINAL LEGAL RESEARCH

The doctrinal legal research focuses on analyzing primary sources such as national legislation including arbitration laws of Macao, China, Angola, Brazil, Cape Verde, East Timor, Mozambique, Portugal, Sao Tome and Principe. Furthermore, international laws, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and model laws, such as the UNCITRAL Arbitration Rules and Model Law, were examined to determine whether Macao's arbitration law is aligned with global standards and whether Macao is a suitable seat for arbitration between China and PSCs.

3.2 EMPIRICAL RESEARCH

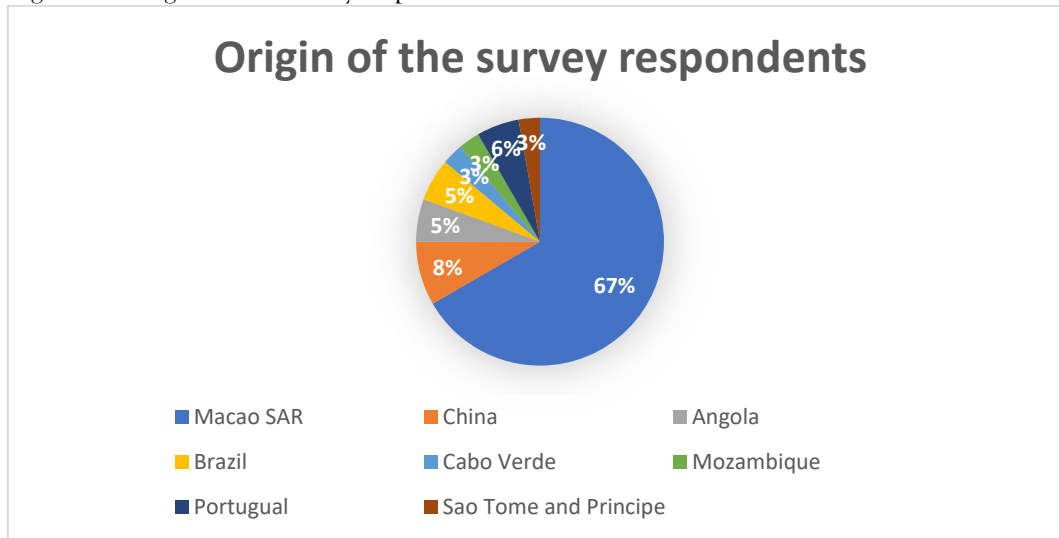
In this research, empirical data were collected by distributing surveys and conducting direct interviews with both lawyers and arbitration practitioners from Macao, China and PSCs.

3.2.1 Profile of the survey respondents

For the purposes of this study, a total of thirty-six legal practitioners were surveyed. The majority of them are from Macao SAR, which accounts for 67%. Two of the twenty-four Macao respondents had prior experience participating in arbitration

proceedings; On the other hand, the number of legal practitioners from Mainland China contributes 8% of the total number, with two-thirds of them having prior experience participating in arbitration proceedings. The number of legal practitioners from PSCs, on the other hand, accounted for 25%, with two participants from Angola, two from Brazil, one from Cabo Verde, one from Mozambique, two from Portugal, and one from Sao Tome and Principe. Six of the nine legal practitioners from PSCs have prior experience with arbitration proceedings.

Figure 1 - Origin of the survey respondents



Source: authors.

3.2.2 Profile of the interviewees

To further analyze and elucidate the underlying factors revealed by the survey results. This study collected data from an additional twenty-three legal practitioners by conducting direct face-to-face interview. Within them, nineteen interviews were conducted with legal practitioners from Macao, eight of whom had experience with arbitration proceedings; On the other hand, two interviews were conducted via online video conferences with legal practitioners with arbitration experience from the PRC, and two interviews were conducted via online video conferences with legal practitioners with arbitration experience from the PSCs. None of these individuals had previously completed my survey.

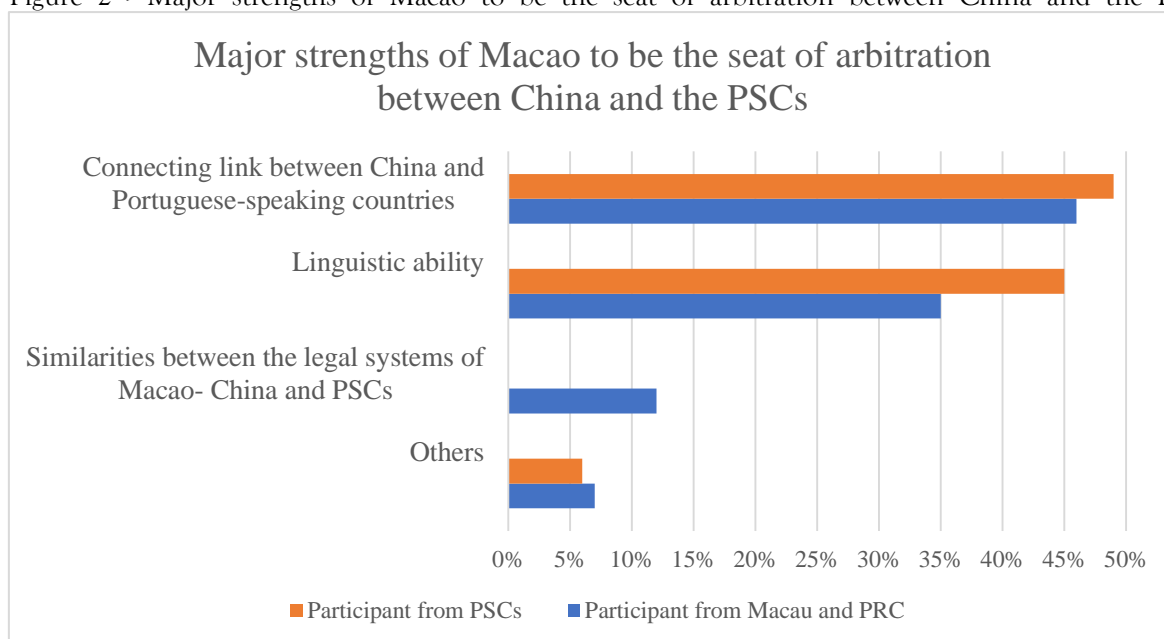
4 FINDINGS: MACAO'S ROLE AS A SEAT AND POSSIBLE VENUE OF ARBITRATION

Based on the analysis of the collected data, the chapter is going to discuss the strengths (4.1) and weaknesses (4.2) of Macao as a seat for arbitration between China and PSCs.

4.1 STRENGTH OF MACAO AS A SEAT OF ARBITRATION

The results of this study indicate that most of the legal practitioners from Macao, China, and the PSC consider Macao's connections with the PSCs to be its strongest advantage, followed by its unique linguistic abilities. Further, some have noted that Macao's neutral position, its government's commitment to promoting arbitration in the region, the adherence of its arbitration law to global standards and norms, and the similarities between Macao's legal system and that of PSCs make it an appropriate seat for arbitration.

Figure 2 - Major strengths of Macao to be the seat of arbitration between China and the PSCs



Source: authors.

4.1.1 Connecting link between China and Portuguese-speaking countries

Approximately 46% of respondents from Macao and China and 49% of respondents from PSCs pointed out the success of Macao as a platform connecting China and PSCs, along with professional exchange, the supply venues, and other infrastructure to support the cooperation between the two sides¹¹. For instance, there have been five Ministerial Conferences between China and PSCs so far, all of which have taken place in Macao. They were held in October 2003, September 2006, November 2010, November 2013 and October 2016 respectively.

Since the establishment of Forum Macao, according to official figures of the IPIM and the China Statistical Bureau in 2021, trade between China and PSCs has

¹¹ The first phase of the construction of the China-PSC Complex was finished in 2019. This building is approximately 50 000 m² in size, and when complete, it will be dedicated to events related to the China-PSC platform, such as trade and investment meetings, exhibits and training courses.

surged in the past decade. The annual value of trade between China and PSCs in 2003 was US\$10 billion and surged to US\$45 billion in 2007, further rocketing to US\$149.6 billion in 2019.

The success of Macao in promoting economic and trade exchanges between the two sides not only enhances the political and commercial relationship between the two sides but, also enhances Macao's status internationally. Forum Macao and the Macao Trade and Investment Promotion Institute (IPIM) both contributed to building PSCs confidence in Macao's ability to serve as an appropriate seat of arbitration.

4.1.2 Language as soft power

Regarding language, 35% of respondents from Macao and 45% of respondents from PSCs indicated that Macao's unique linguistic ability is one of Macao's most important strengths, which increases their inclination to select Macao as the arbitration seat for disputes between China and PSCs.

In the Macao Basic Law, it is stated that Macao is characterized by 'bilingualism', and Chinese and Portuguese are the official languages. Article 9 of the Macao Basic Law states explicitly that in addition to Chinese, Portuguese may also be used as an official language by the executive, legislative, and judicial branches of government in Macao. As a result of this clause, both Chinese and Portuguese have equal status in Macao as the official language.

Thus, requiring bilingual competencies from arbitrators and lawyers could reduce several costs such as translation costs and can highly increase the effectiveness of the arbitration proceedings between China and the PSCs.

As Macao is the only place in the world that offers Chinese and Portuguese as official languages, this soft power subsequently serves as an important strength for the region to serve as a bridge between China and PSCs.

4.1.3 Similarities between the legal systems of Macao -China and Portuguese-speaking countries

Throughout the years, the existence of a 'Lusophone legal system' has been a controversial subject. The similarities between PSCs' legal systems result from their shared colonial history (SIMÕES, 2017)¹². The influence of Portuguese law is still clear at present. Several Portuguese-speaking jurisdictions have adopted legislation influenced by Portuguese law. Brazilian Civil Code 2002 adopted for example rules from the Portuguese Civil Code (VICENTE, 2010); the Portuguese law on voluntary arbitration

¹² Equatorial Guinea is an exception because the Portuguese language has a purely symbolic role and the legal system and governance structures are not a consequence of Portuguese colonial control.

was the direct source of a new law in Guinea-Bissau in the same field in 2000 (VICENTE, 2010); Cape Verde enacted a commercial company code 1999 that reflects the process of modernization of commercial law in Portugal (VICENTE, 2010), and the same happened in Mozambique with the new commercial code 2005 (VICENTE, 2010).

Most Portuguese legislations were extended to Macao during the period of Portuguese administration (TONG; WU, 2010, online). The handover of Macao to Mainland China did not have a huge impact on Macao's legal system. In fact, it is expressly stated in Article 8 of the Macao Basic Law that:

The laws, decrees, administrative regulations, and other normative acts previously in force in Macao shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macao Special Administrative Region in accordance with legal procedures.

The legal system of Macao and PSCs have similar traditions, values, and common languages. This clear similarity of the legal framework with PSCs is an undisputable advantage of Macao. The existence of common legal values and language facilitates Macao's position not only as an effective service platform but also as a valuable arbitration seat when commercial disputes arise between PSCs and China.

4.1.4 Neutrality of macao due to its high degree of autonomy of Macao

Neutrality is one of the main reasons that parties choose arbitration and the seat arbitration to resolve their disputes. Macao is one of two Special Administrative Regions of China in Eastern Asia, along with Hong Kong. Macao has been governed under the principle of "One Country, Two Systems" since it returned to China on 20 December 1999. In Macao, the capitalist economic system has been preserved, along with most of the legal and social systems that were in existence before the handover.

The Macao Basic Law and the Constitution Law of the PRC (MACAO; CHINA)¹³ stipulate that the National People's Congress delegated to the Macao SAR a high degree of autonomy and a wide range of executive, legislative, and independent judicial power, including the power of final adjudication¹⁴. In this regard, Macao has a legal system distinct from other legal systems within the PRC, and China's national laws do not apply in Macao, except as provided in Annex III of the Basic Law (MACAO). Thus,

¹³ Please refer to the Macao Basic Law Art. 2 and Art. 11 and the Art. 31 of the Constitution Law of the People's Republic of China.

¹⁴ Art. 136 of the Macao's Basic Law states that: The SAR may, on its own, using the name 'Macao, China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields.

the SAR has been granted high autonomy making it neutral enough to serve as a seat for arbitration between China and PSCs.

4.1.5 Alignment of Macao's arbitration law to global standards

Since July 2005, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") has been applied in Macao, which means that Macao's courts recognize and enforce arbitral awards subject to the provisions of the New York Convention. Furthermore, Macao has recently reformed its Arbitration Law: Law no. 19/2019 (MACAO, 2019) which reflects the government and the Macao Lawyers' Association's active commitment to promoting Macao as a seat and venue for international arbitration. The new law unifies the laws governing domestic and international arbitrations seated in Macao and is based on the UNCITRAL Model Law on International Commercial Arbitration (SHAH; GRASSI; QI, 2020).

The new arbitration law provides that an arbitral award rendered in Macao has the same executory effect as a judgment rendered by the court of the first instance in Macao, as well as for the confirmation and enforcement of arbitral decisions issued by arbitral courts outside of the boundaries of Macao.

The Supreme People's Court has determined that the agreement between Mainland China and Macao regarding reciprocal recognition and enforcement of arbitration awards, and the recognition and enforcement of arbitral awards between Mainland China and Macao, remains unchanged under the new Arbitration Law (MACAO, 2007).

4.1.6 Adoption of the New York convention by Macao, China, and Portuguese-speaking countries

An arbitration award, regardless of the quality of the reasoning and the terms of the decision, will lose much of its value if it is not enforceable (BRABANT; DIVOY, 2016).

The New York Convention harmonizes the recognition and enforcement of international arbitral awards. As a result, it lessens the uncertainty for the parties to international arbitration and creates confidence to the parties and makes transnational awards enforceable between states parties to the convention.

Currently, Angola, Brazil, Cape Verde, China, Portugal, Macao¹⁵, Mozambique, and Sao Tome and Principe have ratified and are official parties to the New York

¹⁵ Subject to the statement originally made by China upon accession to the Convention, the Government of China extended the territorial application of the Convention to Macao, the SAR of China, on 19 July 2005 (UNCITRAL).

Convention, while three members within the PSCs including Timor-Leste, Guinea-Bissau, and Equatorial Guinea have not yet joined¹⁶. As a result, awards rendered in Macao or under Macao law (as the seat of arbitration) are recognized and enforceable in other jurisdictions (in this case, Mainland China and the PSCs who are a member of the NY Convention).

Ultimately, the common legal framework, values, culture, and in particular the common language between Macao and PSCs enable Macao to be the ideal platform and bridge for China and PSCs. A recent reform of the Arbitration Law 19/2019 demonstrates the dedication and support of the government, which is essential to the development of a successful arbitration hub. In addition to the autonomy granted by the central government of the PRC to Macao, the neutrality of the region makes it an excellent seat and venue for arbitration of business disputes.

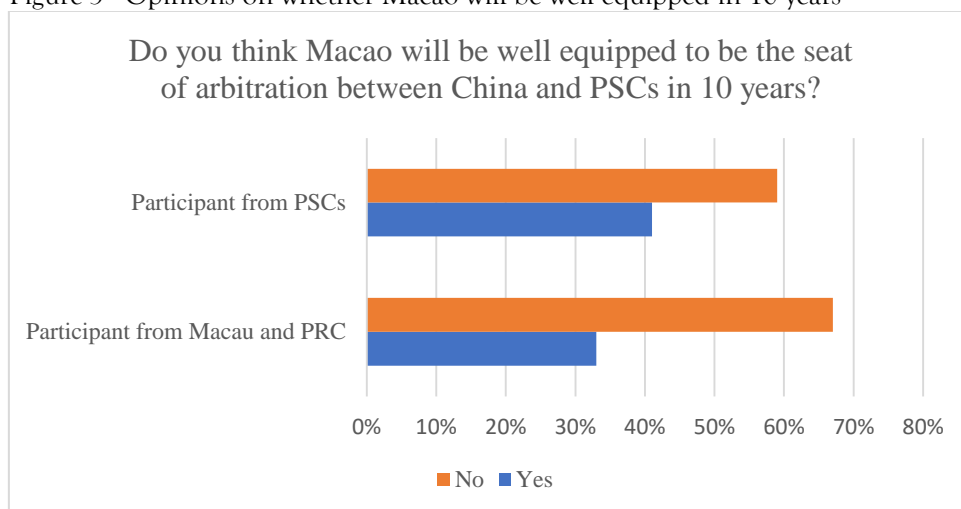
Even though participants indicated that Macao can be an adequate seat and venue for arbitration, several weaknesses were also identified.

4.2 WEAKNESSES OF MACAO AS THE SEAT OF ARBITRATION AND POSSIBLE RECOMMENDATIONS

In spite of all the strengths that Macao possesses, the data collected shows that a vast majority of legal practitioners do not believe that Macao will be well equipped and prepared to become a seat for arbitration in the coming years.

Most participants believe that Macao must overcome certain obstacles in order to become a successful and effective seat for dispute resolution between the two sides.

Figure 3 - Opinions on whether Macao will be well equipped in 10 years

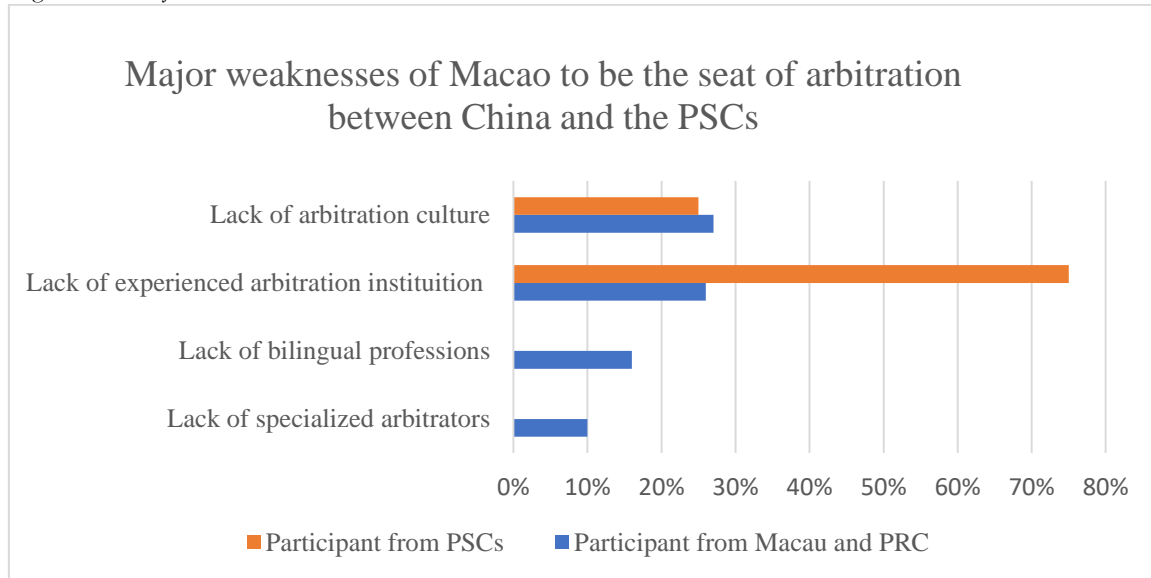


Source: authors.

¹⁶ Please refer to the official website of the New York Convention <https://www.newyorkconvention.org/countries>. Access in 18 May. 2020.

The chart below demonstrates a number of weaknesses of Macao, including the low arbitration culture, the absence of experienced arbitration institutions, qualified and bilingual arbitrators, and the lack of economic diversification within the SAR. The subsections below discuss each of these weaknesses in turn.

Figure 4 - Major weaknesses of Macao to be the seat of arbitration between China and the PSCs



Source: authors.

4.2.1 The absence of an arbitration culture

One of the main weaknesses of Macao is the lack of arbitration culture, which is mainly the consequence of insufficient promotion and lack of confidence on the part of the public. The use of arbitration in Macao is still relatively low at present. In some instances, disputes involving Macao-based companies are arbitrated outside of the region (CASTELLUCCI, 2012), notably in Hong Kong and Singapore¹⁷.

Even after the recent reform that led to the adoption of Arbitration Law No. 19/2019, arbitration remains an unpopular and largely underutilized dispute resolution process in Macao. One of the reasons for such reluctance to use arbitration is the lack of awareness of the general public and business community about the safety and effectiveness of arbitration compared to litigation.

Generally speaking, the majority of respondents from PSCs believe that while Macao has all of the necessary advantages of serving as a perfect seat and venue for arbitration between China and PSCs, the region is still unprepared to perform this function for two reasons: There is no arbitral experience in Macao domestically, nor are there arbitration proceedings between China and PSCs settled in Macao or using Macao as a seat.

¹⁷ ST Group Co. Ltd and others v. Sanum Investments Ltd, SGCA 65, 2019.

Clearly, investors are reluctant to bring their claims to Macao due to a lack of local and international arbitration expertise. Instead, they prefer to bring their claims to Hong Kong, Singapore, London or other recognized arbitral institutions. Consequently, this reflects the lack of confidence of foreign investors in Macao's arbitration record either as a seat or venue.

Academics and lawyers have been raising this issue for more than a decade, but little has been accomplished. In addition to inviting arbitration experts from neighbouring regions, such as Hong Kong and Singapore, to lecture legal practitioners, the Macao government should also invite experts from PSCs.

In terms of recommendation, some interviewees suggested that in order to enhance public confidence in arbitration, the Macao government should act and set an example by making arbitration mandatory for certain government disputes with private companies. Institutions such as the Macao Trade and Investment Promotion Institute (IPIM) should inform and advise their clients on the importance of including an arbitration clause in their contracts.

4.2.2 Lack of experienced arbitration institutions in Macao

There are currently three arbitral institutions in Macao, including the World Trade Center Macao Arbitration Center (WTC), the Macao Lawyers Association Arbitration Center and the Macao Consumer Mediation and Arbitration Center, all of which are considered to be underutilized and have limited experience in resolving disputes. As an example, the Macao Arbitration Center (WTC) was established in 1998 authorized by Order 48/GM/98 (MACAO, 1998a) and began receiving cases in 2010, and the number of cases it has received in recent years has slowly increased. The second center, the Macao Lawyers Association Arbitration Center, was created in 1998 and authorized by Order 26/GM/98 (MACAO, 1998b). However, this center exists only in the law and is not fully operational (SIMÕES, 2012), it does not even have a panel of arbitrators yet. The third one is a specialized arbitration center set up under the Consumer Council¹⁸, created in 1998, authorized by Order of the Governor No. 19/GM/98. The center handles the mediation and arbitration of consumer disputes, aiming to solve civil or business disputes between consumers and traders that arise from the supply of goods or services. The arbitration award is made by a court judicial officer who serves as the arbitration judge in a part-time system (TONG, 2013).

Apart from the aforementioned centers, there used to be two more specialized arbitration centers in Macao; however, they were forced to close in 2020 due to having

¹⁸ According to the Macao Voluntary Arbitration Center of the Consumer Council, a total of 22 cases were handled in 2019 and the amount involved was 554 356.00 MOP. Available at: <https://www.consumer.gov.mo/CAC/Statistics.aspx?lang=en>. Access in: 8 Dec. 2020

received almost no cases in their 10-year period. The first of these arbitration centers was the Arbitration Center for Property Management Affairs, set up by the Housing Bureau of the Macao Special Administrative Region in 2011 (MACAO, 2011). The center focused mainly on the resolution of building management disputes and it was rarely used by the public. There was also the Arbitration Center for disputes concerning insurance and private funds, established in 2001 (MACAO, 2001, 2002). Both arbitration centers were closed in 2020 pursuant to Orders of the Chief Executive no. 112/2020 and 128/2020 (MACAO, 2020a, 2020b).

Thus, as of today, among the three existing arbitral institutions, only the WTC and the Consumer Council Arbitration Center are actually operational.

Aside these issues, respondents indicated that administrative staff at the arbitration centers are not familiar with Macao's arbitration legislation. In some cases, this results in delaying the administrative processing of the cases.

In view of the above, it is important to note that a jurisdiction's legal infrastructure and rule setting must be of a high quality in order to attract international arbitration (SIMÕES, 2012). In terms of venue, World Trade Center Macao Arbitration Center (WTC) is the most important and well-structured suited for the resolution of international commercial disputes (TONG, 2013). There is, nonetheless, room for improvement in terms of size. In order to handle high-profile cases, the WTC must sometimes borrow space from the Macao Lawyers Association Arbitration Center, according to interviewees.

As of today, different forums exist to resolve disputes between Chinese and African parties. The China-Africa Joint Arbitration Center Shanghai (hereinafter referred to as "CAJAC Shanghai") and the China-Africa Joint Arbitration Center Johannesburg (hereinafter referred to as "CAJAC Johannesburg") are examples of such arbitration forums.

Therefore, besides using Macao as a seat of arbitration, the establishment of a proper and dedicated forum (Sino-Luso arbitration center) for the settlement of disputes between China and PSCs could contribute to strengthening Macao's position both as an arbitration seat and as a venue for resolving disputes.

4.2.3 Lack of specialized arbitrators

In total, the WTC has 31 arbitrators on its panel, 20 of whom reside in Macao and 11 in Hong Kong¹⁹. Data collected indicate that it is very difficult in Macao to identify arbitrators with the necessary and specialized skills for arbitrations involving field such as construction and medicine. In the course of the interview, a number of

¹⁹ Data retrieved from the official website of the World Trade Center Macao <http://www.wtc-macau.com/arbitration/eng/arbitration.htm>. Access in: 15 Jun. 2022.

respondents addressed the issue of difficulty in selecting arbitrators in Macao from the panel list, where the majority are lawyers. Some lawyers (potential arbitrators) may have conflicts of interest due to their previous involvement in the case as lawyers. As a result, it may take longer than one or two years to appoint arbitrators. It may also result in greater costs (in terms of lost revenue) for the parties and damage the credibility of arbitration, which is touted as being fast and efficient.

4.2.4 Insufficient bilingual lawyers to assist parties

The Macao Lawyers Association president, Dr. Jorge Neto Valente, stated that the proportion of Portuguese native-speaking lawyers in Macao has dropped dramatically, from 70% three decades ago, to less than 30% in 2021 (MACAU BUSINESS, 2021). Moreover, he mentioned that in recent years, the number of Portuguese lawyers who come to Macao to practice their legal profession has declined (MACAU BUSINESS, 2021).

The Macao Lawyers Association's data shows that there were 359 lawyers registered with the organization as of 31 December 2016, with 224 of them speaking Portuguese, 135 speaking Chinese, and 48 speaking both languages. In addition, the Association has 109 trainee lawyers enrolled, 18 of whom are bilingual (SUN, 2017). In recent years, the number of bilingual lawyers has steadily increased. However, it is still far from sufficient to make Macao stand out from other arbitration centers.

The other issue that represents a weakness of Macao as a seat and eventually as a venue for the settlement of disputes between China and PSCs concerns the recent choice by Macao courts to favor the use of Chinese language in litigations. Currently, decisions are more often produced in Chinese during criminal proceedings than during civil proceedings. Though such a situation is less likely to occur in arbitration, it may send the wrong message if it is extended to other fields of dispute resolution.

5 CONCLUSION

Macao has served as an instrument for promoting Chinese interests ever since its return to China (MENDES, 2014). Moreover, Macao is officially designated as a platform to promote relations between China and the PSCs. The Forum for Economic and Trade Cooperation between China and PSCs (Macao Forum) was established in 2003 to reinforce this intention. Following the establishment of this platform, several forums have been held in Macao between China and PSCs in an effort to foster their cultural, trade, and investment relations. In the fourth and fifth Ministerial-Level Conferences between China and PSCs, the focus was on deepening this cooperation from cultural, economic, and legal perspectives. It was believed that legal cooperation

would provide a safety net for the business activities of entrepreneurs from both sides. Accordingly, in response to this initiative, the purpose of this study was to investigate from an empirical perspective Macao's role as a seat and, eventually, as a venue for arbitration between China and PSCs.

As a result of this study, the most significant advantages of Macao are its connections with PSCs, followed by its unique linguistic ability, the similarity of legal systems, the recent reform of arbitration law, and Macao's experience in fostering cultural, trade, and investment relations between China and PSCs.

Yet, based on the empirical evidence, Macao still has a long way to go before it is able to successfully serve as a seat and eventually a venue for arbitration between China and PSCs. A number of factors contribute to this lack of strength, including an absence of arbitration culture, experienced arbitration institutions, and a lack of bilingual legal professionals and specialized arbitrators.

In terms of recommendations, it is important to consider the respondents' concerns shown in the findings of this article over Macao's viability as a seat of arbitration between China and PSCs and, eventually, as a venue for holding these conflicts. Among others, there are: Promotion of an arbitration culture in Macao; the establishment of a specialized Sino-Luso arbitration center to capitalize on its strengths and, to address its weaknesses accordingly for Macao to become a viable and successful arbitration center.

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NOTE

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