REVISÃO E APERFEIÇOAMENTO DO DIREITO DA INSOLVÊNCIA EM MACAU: UM ESTUDO HISTÓRICO E FUNCIONAL DE DIREITO COMPARADO

澳門破產法律制度的檢討與完善：歷史與功能比較的視角

The Review and Improvement of Macau Bankruptcy Law: a Historical and Functional Comparative Study

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摘要：澳門關於破產的法律制度主要規定在《民事訴訟法典》中，其主要內容在上世紀三十年代已基本定型，八十年來甚少修改。特別是自回歸以來，澳門的經濟發展取得了顯著的成就，商業環境逐步改善，社會繁榮穩定，居民生活水平有了顯著提升。在這種情況下，仍然沿用幾十年前的破產制度是否合時宜、是否能夠適應澳門社會經濟進一步發展的需要，殊值探討。

具體地，澳門現行破產法律制度有以下幾個值得檢討的問題：首先，澳門以債務人是否為商業企業主為標準，規定了不同的破產程序，這種立法模式是特定歷史條件下的產物，隨著經濟發展水平的提高和社會結構的變化，這一區分已經沒有任何意義，世界各主要國家早已放棄了這種做法；其次，澳門仍未採納個人破產剩餘債務免除制度，債務人須在破產

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清算後繼續為未清償的債務承擔責任，這大大損害了破產人的積極性，恐對社會整體福利的提升無益；第三，澳門仍未採納被證明對拯救企業最為有效的企業重整機制。

以問題意識為導向，以解決問題為目的，在總結域外經驗和教訓的基礎之上，本文嘗試探討重構和完善澳門破產法律制度的可能路徑，提出以下三方面的建議：

第一，改變破產制度與無償還能力制度雙軌並行的結構：或者採納德國的統一破產制度模式，徹底取消破產與無償還能力的區分，使統一的破產程序適用於一切個人和法人，同時允許設置部分特殊規則僅供部分債務人適用；或者轉而採納英國的雙軌模式，即個人破產法與公司破產法雙軌並行，以不同的價值目標和不同程序的簡繁程度為指引，為公司債務人和個人債務人設置不同的規則。

第二，引入個人破產余債免除制度，賦予誠實債務人以重新開始的機會，使其盡快從過去的財務狀況中解脫出來。同時，為了防止該機制被濫用，應借鑒域外經驗，設計嚴格的適用規則。如果規則設計得當，該制度的適用不僅不會損害債權人的利益，反而給債權人提供了二次獲得清償的機會，而且有益于社會整體福利。

第三，引入企業破產重整制度，包括轉讓型重整制度，為當事人提供更多的路徑選擇。同時，預防破產的各項措施與清算應當具有同等的法律地位，允許破產法官或破產當事人根據案件的具體情況選擇對債權人、債務人和社會最為有益的財產變價方式。

最後還須注意的是，破產法是動態的法，破產法的制定和修改，必須與國情和經濟形勢的發展變化相適應，必須牢記一部現代的、優良的破產法所應當追求的價值目標。

關鍵字：破產· 無償還能力· 余債免除· 企業重整· 檢討與完善。

Abstract: The current Macau bankruptcy institute, which was prescribed mainly in in the Código de Processo Civil, was basically formed in the thirties of the last century and was rarely modified in the last eighty years. Since its return, Macau has made great achievements in economic and social development, which made it absolutely essential to review and improve the current regime.

In particular, there are several issues worthy being reviewed in the existing system:

Firstly, the current institutional structure of Parallel of Falencia and Insolvencia is a product of history and has been proved to be insignificant. With the rapid development of economic and the changes in the social structure, those major countries of the world have successively abandoned this practice.

Secondly, Macau has not yet introduced the “Institute of Discharge/ Exoneração do Passivo Restante” and the debtor is still legally required to pay

the residual debt after the liquidation, which will cause damage to the debtor's working enthusiasm and total social welfare.

Thirdly, Macau has not yet adopted the regime of corporate reorganization, which has always been considered as the most effective way to save the business.

Oriented by the problem consciousness, with the purpose of solving the problem, on the basis of studying the experience and lessons of extraterritorial jurisdictions, this paper tries to find the possible paths to reconstruct and improve the current Macau bankruptcy institute, making the following three suggestions:

Firstly, change the current institutional structure of Parallel of Falencia and Insolvencia: one choice is adopting Germany's practice, making the bankruptcy proceedings opened for the assets owned by any natural person or legal person; another choice is adopting Britain's practice, designing respectively proceedings for individuals and proceedings for enterprises because the latter is, in most instances, more complicated than the former.

Secondly, introduce the "Institute of Discharge/Exoneração do Passivo Restante", which will give those honest debtors an opportunity of "fresh-start" and allow them to recover from the past financial situation as soon as possible. At the same time, to prevent this institute being abused, we should also learn from the experience of extraterritorial and formulate strict rules of application. If the rules are properly designed, the institute will not only does not harm the interests of creditors but also provide them a second chance to be paid. This will undoubtedly be very beneficial to the overall welfare of society.

Thirdly, introduce the regime of corporate reorganization and provide the parties involved more opportunities of maintaining the enterprise. At the same time, these measures to prevent bankruptcy should be put in the same status as the liquidation, allowing the judge and the parties in bankruptcy proceedings to choose the most effective ways according to the circumstances of the case.

It should also be noted that bankruptcy law is a dynamic field. No two situations are the same. Any analysis of formulate or revise the bankruptcy policies should be based on the circumstances and economic situation of the Region.

Keywords: Bankruptcy; insolvency; discharge; corporate reorganization; review and improvement.

ESTUDO SOBRE O QUADRO REGULATÓRIO DE MACAU DO FINANCIAMENTO BANCÁRIO ATRAVÉS DE GARANTIAS FLUTUANTES

論銀行以浮動擔保融資的澳門法規制

A Study on the Regulations of Macao Law on Banks' Financing by Floating Charge

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摘要: 金融具有資金融通的功能。而銀行為了緩釋因貸款面對的融資風險及保障實現債權，往往要求借款人提供相應的擔保，以此作為其中一項風險控制的措施。隨著經濟發展，擔保物權成為市場資金融通的媒介角色，從原本具有實現債權的主要核心功能轉向資金的融通並創造信用。銀行作為本地融資活動的壟斷者，其從事批給貸款業務的法律框架則規範於澳門《民法典》的消費借貸合同、澳門《商法典》的銀行合同的銀行信貸之開立以及第13/2023號法律《金融體系法律制度》的經營金融業務的專門性規定。法律上，基於擔保可分作人保與物保兩大類別，因此，銀行一般接受的擔保物分別為借款人整體財產或保證人來擔保借貸的人保並配合出具本票予銀行的擔保工具，以及透過辦理銀行帳戶包括存款和金融產品或股權質押甚或不動產抵押作為擔保物的物保。然而，由於歷來獲銀行採納的擔保物種類狹隘，存在企業尤其是中小企申辦融資難的困境，此現象也不利於澳門為發展現代金融業的企業對於資金融通的需求。基於社會變遷，擔保物從不動產轉向動產靠攏，尤其是非占有型動產擔保創造信用的潛力亦逐漸受到關注。但大陸法系採用動產以占有作為物權法定原則的架

構基礎，使得大陸法系的國家或地區紛紛在其法律體系發掘可以銜接適用於非占有型的動產擔保。反觀澳門早在1999年便已將源自英國的浮動擔保進行立法，但多年卻未被普及而且實踐上更是寥寥無幾。這是由於澳門引入英美法系的浮動擔保制度而存在先天上缺憾？還是制度自身本質上未能契合業界風險管理的需要？在找出問題的癥結下，依次從法律修法、制訂監管機構的指引、政府政策鼓勵和業界間砥礪前行等數個層面的建議。

關鍵詞：浮動擔保；浮動擔保制度的完善；限制性條款。

Abstract: Finance serves as a conduit for financial intermediation, aimed at mitigating financing risks associated with loans and safeguarding the realization of obligatory rights. Banks typically mandate borrowers to furnish corresponding security rights as a risk control measure. Over time, collateral rights have evolved into a means of market financing, transitioning from primarily realizing debt to facilitating capital financing and credit creation. In the local banking sector, financing activities are exclusive, governed by regulatory frameworks outlined in the Macao Civil Code for consumption loans, the Macao Commercial Code for banking facilities within Banking Contracts, and Law no.13/2023 of the Financial System Act of Macao, which oversees financial operations. Legally, security rights can be broadly classified into guaranty and security rights in rem. Banks commonly accept security rights encompassing the entirety of the borrower's or guarantor's property alongside promissory note issuance to the bank. Alternatively, security rights in rem are established through collateral mechanisms such as pledging bank accounts, including deposits and financial products, or pledging equity or mortgaging immovable property. However, the limited range of acceptable collaterals poses challenges for enterprises, particularly small and medium-sized enterprises, in securing financing. This predicament hampers both the accessibility of financial facilities for Macao enterprises and the government's efforts to develop the modern financial industry in Macao. The evolution of collateral has seen a shift from real property as the primary asset to movable property, with a growing focus on the potential of non-possessory movable property to facilitate credit creation. The civil law system's reliance on possession of movables as the foundational principle of property rights has prompted civil law jurisdictions to explore adapting non-possessory movable property security within their legal frameworks. While Macao enacted the Floating Charge system from the UK as early as 1999, its utilization has remained limited and is seldom employed in practice. Is the introduction of the common law Floating Charge System to Macao inherently flawed, or does the system itself fail to adequately address the risk management needs of the banking sector? Consequently, after identifying the

crux of the issue and analyzing international experiences, recommendations have been proposed at various levels, including legislative amendments, formulation of regulatory guidelines, and government policies aimed at incentivizing and advancing cooperation between the banking sector and industries.

Keywords: Floating charge; improvement of floating charge system; restricted clauses.

INTERPRETAÇÃO EXTERNA DO TEXTO CODIFICADO: USANDO A REGRA DO REPRESENTANTE APARENTE COMO EXEMPLO

法典文本的外部解釋 ——以粵澳兩地的“表見代理”規則為例

External Interpretation of Codified Texts: A Case Study of the “Apparent Authority” Rules in Guangdong and Macau

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內容摘要：法典文本的目標讀者是本地的裁判者。在灣區融合的新時代，粵澳兩地法官難免需要查明對方的民商法規則。倘若遇到涵義模糊的不確定概念，無法通過“請示”“批復”的內部程式尋找釋義，只能借助公開的外部性文獻來探求真意。法典文本的外部解釋包括三個方面的意蘊：面對有歧義的法律概念，誰來解釋？解釋什麼？如何解釋？本文從民事實體法的角度，以粵澳兩地“表見代理”規則的差異性為例，探討如何查明涵義模糊或者有歧義的法律概念，為法官查明域外法提供方法論的建議。

關鍵字：域外法查明；法律解釋方法；不確定法律概念；成文法；民事實體法。

Abstract: The primary audience for statutory texts is local adjudicators. In the new era of integration within the Greater Bay Area, judges from Guangdong and Macau will inevitably need to ascertain each other's civil and commercial law rules. When confronted with ambiguous or indeterminate concepts that cannot be clarified through internal procedures such as "requests for instructions" or "replies," judges must rely on publicly available external documents to seek true meaning. The external interpretation of statutory texts involves three key aspects: who interprets ambiguous legal concepts, what is interpreted, and how the interpretation is conducted. This paper, from the perspective of civil substantive law, uses the differing "apparent agency" rules in Guangdong and Macau as a case study. It aims to explore methods for clarifying ambiguous or unclear legal concepts, offering methodological recommendations for judges seeking to ascertain extraterritorial laws.

Keywords: Ascertain extraterritorial law; implication eliciting methodology; indetermined legal terms; statutory texts; civil substantial law.

UMA ANÁLISE NORMATIVA DA INEFICÁCIA RELATIVA DOS NEGÓCIOS JURÍDICOS

法律行为相对不生效的规范分析

The Normative Analysis of Juristic Acts' Relative Inoperativeness

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摘要：《澳门民法典》第809条属于法律行为的相对不生效规范，据此，查封具有相对效力，被执行人就查封财产所为的处分和租赁行为，在其和行为相对人之间有效，但对于申请执行人不生效。相对不生效与无效、可撤销和效力待定均不相同，具有独立性。相对不生效规范与《澳门民法典》第882条不能混同适用，法院只能根据具体案情择一适用。

關鍵字：法律行为 效力瑕疵 相对不生效 查封 处分禁止。

Abstract: Article 809 of Macau Civil Code raises the issue of juristic acts' relative inoperativeness. Sealing up hereby has relative effect. The dispositive and leasing act on the sealed-up property, is valid only between the executed and the counterparty, but inoperative to execution applicant. The inoperativeness act is independent of void, revocable and pending validity act. When applying law, instead of confusing the relative inoperative norm with Article 882 of Macau Civil Code, the court should choose one of them to apply according to cases.

Keywords: Juristic act; defects in validity; relative inoperativeness; seal up; disposing prohibition.

A ORDEM PÚBLICA NO DIREITO INTERNACIONAL PRIVADO DA RAEM

澳門國際私法中的公共秩序

The public policy within the Private International Law of Macau SAR

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Resumo: O Direito Internacional Privado visa identificar o ordenamento jurídico que irá regular a relação jurídico-privada internacional, sem procurar ajuizar sobre a bondade ou não de soluções de direito material exteriores a Macau. Trata-se da procura de uma justiça formal, colocando todos os ordenamentos jurídicos potencialmente aplicáveis numa posição equidistante. Há contudo um conjunto de "válvulas de escape" que não podem ser dispensadas e que devem intervir quando, da aplicação das normas de conflitos, resulte uma solução de direito material manifestamente incompatível com os alicerces estruturantes do sistema. Esta apresentação visa indicar determinadas situações em que a ordem pública é chamada a intervir, nomeadamente no âmbito das relações jurídico-familiares e demarcar, assim, as bases fundamentais de determinados institutos an RAEM.

Palavras-chave: Norma de conflitos; ordem pública; relações jurídico-familiares.

Abstract: Private International Law endeavors to determine the appropriate legal framework to govern international private legal relations, abstaining from judging external substantive law solutions. It strives for legal fairness by treating all potentially relevant legal systems equally. There are, however, certain "escape valves" that cannot be denied and shall intervene in those cases where