



BY HUGO LUZ DOS SANTOS

Mixing Honey and Milk

Mediation and Gaming in Macau

Justice in Macau stands at a crossroad. Concerns about the adequacy of the judicial system in pursuit of civil justice goals have been pointed out for some time. Advocate-controlled, costly, lengthy, underpinned by an obsolete adversarial model¹ that exacerbates acrimony² between parties,³ Macanese justice has failed in delivering a fundamental right to its citizens: effective access to justice (art.º 36.º, n.º 1, of Macau Basic Law).

Judicial courts in Macau are overcrowded. Overburdened dockets (and multitudinous backlogs) are seemingly the (usual suspects and, in this case, indeed) culprits. Room for the perverse ramifications of Murphy's Law is blossoming vigorously: the more citizens that demand an effective response from courts as to guidance of their rights, the less courts are able to deliver it to them. With this in mind, Macau's legal system is in dire need of other dispute resolution mechanisms capable of solving disputes in an amicable and conciliatory way. This

will buffer the deleterious effects of the loss of trust and trustworthiness⁴ in Macau's legal system, which are mounting exponentially on a daily basis.

Shedding light on Macau's cultural background

Litigation (or interchangeably, court-adjudication) is not the only way to solve disputes. In Macau's case, there is one detail that can pave the way to mediation thriving: its cultural background, deeply embedded in Confucianism traits. This is not to say this is a pristine approach or a revolutionary one. The

propensity of Chinese culture to propel conciliatory means of solving disputes has been pointed out by prominent scholars.⁵ Regarding the aptitude of the Chinese culture to adhere hastily to amicable means of solving disputes (especially mediation),⁶ scholars like Jerald Auerbach⁷ have written of the Quaker, Chinese and Jewish communities' reliance on mediation because of their distrust of alien legal culture.⁸

No surprise stems from the fact that Chinese culture is prone (deeply entrenched in Confucianism traits) to

embrace amicable and placid dispute resolution mechanisms dating back centuries⁹. Whilst this finding seems obvious, seldom have steps been taken by Macau's lawmakers towards the creation of a proper and sound mediation legal framework. It is quite startling that there is no mediation legal framework to this day, in spite of the fact that Macau's legal system would benefit exponentially from such an enactment, as would a swift, prompt and streamlined dispute resolution process. A gaming legal framework should not fall far behind these two frameworks.

Why milk (gaming) and honey (mediation) should mix

With this backdrop in mind, milk (gaming) and honey (mediation) should intermingle with each other, especially in Macau. Handling (better said: mediating) a multi-million-dollar, complex and intricate dispute which has arisen from the breadth of gaming law could have positive long-term effects, as opposed to an everlasting battle fought in Macau's weary and inefficient judicial system. Not all disputes require court-adjudication. Mediation can address both the underlying issues of the dispute while preserving (and oftentimes restoring) the relationship between the parties, which can be kept unscathed; something that court-adjudication may be unable to achieve. Once parties push the "litigation-mode button," it is difficult to turn back.

Mediation is suitable for solving disputes arising from side betting

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and proxy betting (both wrapped in opaqueness), outstanding chips, and tip pooling, as these legal disputes tend to be lengthy and costly in judicial courts. Mediation and gaming can (and should) be tightly interlocked in the forthcoming future.

After all, mediation and Confucianism, the cradle of Chinese legal culture, have always gone hand-in-hand throughout the long road of China's history aimed at preserving social harmony. As asserted by Peter Chan, "Under the Confucian ideology, disputes of a civil nature should be settled through conciliatory means so that the amicable relations of the disputants can be maintained. The culture of face-saving and the maintenance of cordial relations remains a distinctive characteristic of the modern Chinese society."¹⁰ As such, Confucianism envisaged the ideal society as one free from litigation (wu song). "Disputes should be resolved through mediation to preserve social harmony... Litigation should be the last resort."¹¹ Mediation in gaming law can fulfill that long-held hope, something that prospective Macau lawmakers should bear very firmly in mind.

Myth-Breaking

There are lingering myths that are in dire need of quashing. One of them is that all the intricate and complex disputes are preferably solved through litigation (and litigation only). There are a vast array of disputes which are far more suitable to be solved through amicable or conciliatory means. Disputes relating to the gaming law's breadth constitute a fine example of that. No matter how cumbersome the disputes in gaming law might seem to be, there is always room to strike a (good) deal as opposed to getting a delayed court decision (thus wrapped in tokenism), which only furthers the wrestle with justice. There would be no procedural gain to be accounted for in such cases. This would certainly be a lose-lose situation. **CGL**

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1. See Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'", *Harvard Negotiation Law Review (HNLR)*, 17 (2012): 61.
 2. This trend has been pointed out earlier by several scholars such as Robert Kimberlee Kowach, "The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice", *Cardozo Journal of Conflict Resolution (CJDR)*, 7 (2005): 60-61 (predicting that the vanishing trial will lead to mediation becoming like arbitration).
 3. For this very reason, doctrine is advocating for a paradigm shift in the realms of justice, in which ADR (especially Mediation) shall play a role of paramount importance; in Italian doctrine, Michelle Taruffo, "Un'alternativa alle alternative: modelli di risoluzione dei conflitti", *Revista de Processo*, 152 (2007): 319-331; in Portuguese doctrine, Paula Costa e Silva, "De minimis non curat praetor. O acesso ao sistema judicial e os meios alternativos de resolução de controvérsias", *O Direito*, 140 (2008): 735-736; in German doctrine, Peter Gottwald, "Mediation und gerichtlicher Vergleich: Unterschiede und Gemeinsamkeiten", *Festschrift für Akira Ishikawa zum 70. (2001): 137-155*.
 4. The relationship between justice and trustworthiness was shown to be reciprocal; see Jason A. Colquitt/Jessica B. Rodell, "Justice, Trust, and Trustworthiness: A Longitudinal Analysis Integrating Three Theoretical Perspectives", *Academy of Management Journal (AMJ)*, 54 (2011): 1183.
 5. S. Shiga, "A Study of Chinese Legal Culture Focusing on the Litigation Landscape", *Journal of Comparative Law*, 3 (1988): 18-26.
 6. As so well pointed out by esteemed doctrine "The success of China's alternative dispute resolution can be attributed to its historical value on Confucianism and mediation, the traditional inaccessibility of Chinese courts for most citizens"; Jiali (Keli) Huang, "One Country, Two Systems: Hong Kong's Unique Status and the Development and Growth of Arbitration in China", *Cardozo Journal of Conflict Resolution* 18(2) 2017: 432.
 7. See Jerold S. Auerbach, *Justice without Law? Resolving Disputes without Lawyers*, (1982): 8 ff.
 8. Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'", *cit.*, 61 ff.
 9. Peter C.H. Chan, "The Enigma of Civil Justice in Imperial China, A Legal Historical Enquiry", *Maastricht Journal of European and Comparative Law*, 19 (2012), p. 317-337.
 10. Peter C.H. Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *The Legal History Review* 85 (2017): 577-602.
 11. Peter Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *cit.*: 578.