

## Negotiable Instruments, in Particular Bills of Exchange in Macau, China\*

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**Abstract.** The rapid development of Information Technology has revolutionized the way people and business transfer funds and has led European nations to enact new laws to regulate payments conducted electronically. The Macau law of negotiable instruments, mainly stipulated in Commercial Code of Macau and regulations concerning electronic fund transfers, have been influenced by modern European Law and principles in the way of absorbing the current legal expertise from western countries. In Macau, the Electronic Funds Transfer System provides a cost-effective and efficient method to transfer funds electronically directly into a specified bank or building society account. At the same time, it has significantly reduced the importance of the traditional negotiable instruments both in domestic and in international trade.

### 1. Introduction

#### 1.1 General remarks

The general framework of business law is provided by the Civil Code of Macau, approved by Decree-Law 39/99/M, of 3 August. Nevertheless, Macau has a special body of law for negotiable instruments: the Commercial Code of Macau, approved by Decree-Law 40/99/M, of 3 August, amended by Law 6/2000, of 27 April.<sup>3</sup> Book IV of the Commercial Code provides the regulation of negotiable instruments. As stated in the preamble, this regulation contains “a general theory of negotiable instruments” and, moreover, “the Code incorporates the uniform laws on bills of exchange, promissory notes and cheques. This is a merely formal option, in order to avoid the dispersion of instruments essential to commercial activity.” The source of this regulation is, on one hand, the Geneva Convention of 7 June 1930, providing for a Uniform Law for Bills of Exchange and Promissory Notes, and the Geneva Convention of 19 March 1931, providing for a Uniform Law for Cheques<sup>4</sup>. As stated in art. 4, 1 and 2 of Decree-Law 40/99/M, of August 3, these conventions on bills of exchange, promissory notes and cheques have been incorporated in the Commercial Code under articles 1134 to 1211 and articles 1212 to 1268, respectively.

It means basically that the previous regulation continues to apply as such, and this is made clear by art. 7, 2 of Decree-Law 40/99/M, of August 3, on amendments to Commercial Code, providing that any amendment to the provisions on bills of exchange, promissory notes or cheques will only have effects in Macau strictly within the limits allowed by the respective international agreements. Art. 1, 3 of the Civil Code provides that international conventions that are applicable in Macau prevail over ordinary legislation (on international conventions that are applicable in Macau see the Basic Law, in particular, arts. 136 and 138). In this respect, it should be noted that the Court of Final Appeal (Proc. 2/2004, 2/6/04) has decided that both article 5 of Decree-Law n. 40/99/M, of August 3, and article 569, 2 of the Commercial Code are contrary to art. 48, 2 of the Uniform Law on Bills of Exchange and Promissory Notes (which is considered to be in force since 1960 in spite of its incorporation in the Commercial Code), and therefore should not be applied by the courts.

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4 Both published in a supplement to the Official Bulletin no. 6, of 8 February 1960.

## I. 2 Notion, types and features of negotiable instruments

According to the definition of *Vivante*, a negotiable instrument is a “necessary instrument to exercise a literal and autonomous right embedded therein”<sup>5</sup>. The document is necessary not only to prove the existence and content of the right, but also to constitute it. That is the so-called principle of incorporation: the right is incorporated or embedded in the document. Then, the document performs a function of legitimacy, since the right can only be exercised by who has its regular possession (legitimate or good-faith possession – CCom, art. 1071). Moreover, negotiable instruments are featured by literality, meaning that the wording of the instrument provides the content, the limits and the modalities of the right (*quod non est in cambio non est in mundo*). Another feature is autonomy, meaning that the holdership of the possessor is established *ex novo*, regardless of previous holderships and their defects (CCom, art. 1072 concerning defenses opposable against the holder).

The interests that justify the law of negotiable instruments, making it different from credit assignments, are the protection of good-faith of third parties, and the promotion of the flow of these instruments.

The principle is freedom of issue (CCom, art. 1064) and there are several types of negotiable instruments. First, concerning their content, there are: a) instruments of participation that grant a status, such as shares (and bonds) of public companies; b) instruments representing merchandises, such as transportation or carriage notes (e.g., bill of lading); c) credit instruments in strict terms that grant a right to a pecuniary provision, such as bill of exchange, promissory notes and cheques. Second, concerning their normal way of circulation, there are: a) nominative instruments, whose transmission must be noted in a book of registries, otherwise it does not produce effects; b) order or on demand, circulating by endorsement; c) to bearer, that are transmitted merely by deliver (CCom, art. 1065; see also CCom, arts. 1093 ff., 1101 ff. and 1126 ff.).

### 1.2.1 Bills of exchange: origins, economic functions and characteristics

#### A. Origins

Bills of exchange have originated during the Middle Ages in Europe within the exchange contract of merchants. The so-called *cambium per litteras* was mainly a means of security of payments, making the use of money unnecessary. This instrument of safe payment is quite important in international business transactions. Concerning economic functions, bills of exchange perform functions of guarantee, means of payment and instrument of credit. One payment is enough to extinguish a series of pecuniary debits. It has the advantage of a discount, which takes place by endorsement of the bill to a bank that will pay it - discounting an interest that is due for the period from payment until maturity of the instrument.

#### B. Economic Functions

As provided in art. 1134 of the Commercial Code, a bill of exchange must contain: a) the term 'bill of exchange' inserted in the text of the instrument and expressed in the language employed in drawing up the instrument; b) an unconditional order to pay an exact sum of money; c) the name of the person who is to pay (*drawee*); d) an indication of the time of payment; e) an indication of the place where payment is to be made; f) the name of the person to whom or to whose order payment is to be made; g) an indication of the date on which and the place where the bill is issued; h) the signature of the person who issues the bill (*drawer*). Except for the requirements provided in d), e) and g) *in fine*, the bill must contain all these elements, otherwise it is not valid (CCom, art. 1135, 1).

In a bill of exchange, the drawer gives an order of payment to the drawee for the benefit of the payee. The payee can later transfer the holdership of the bill by endorsement. The drawer must guarantee, at least, the payment of the bill (CCom, art. 1142) in case the drawee does not pay or cannot pay. But the obligation of guarantee applies not only to the drawer, but also to the endorsing payee and further endorsers, as well as to the provider of '*aval*' (a personal guarantor similar to the bond ('*fiança*') provider – see CCom, arts. 1163 ff., in special CCom, art. 1165). There is a difference, however: while the drawer has an obligation of guarantee towards any holder of the bill, each endorser only guarantees towards further endorsees.

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<sup>5</sup> See, A. Ferrer Correia (1966). Lições de Direito Comercial – Letra de Câmbio, Vol. III (with the collaboration of Paulo Melero Sendim and José Manuel Sampaio Cabral) Coimbra University, Coimbra.

The exchange guarantee takes place by means of demanding its payment (presenting the bill for payment – CCom, art. 1171 ff; in case payment is not done, the holder of the bill must protest for non-acceptance or non-payment (CCom, art. 1177), unless there is a clause dispensing protest (CCom, art. 1179). The bill benefits a joint liability since each one of the drawers, acceptors, endorsers or guarantors, or all together, can be called to pay (CCom, art. 1180). However, the drawee is only bound to pay upon acceptance of the bill, thereby becoming acceptor (see CCom, arts. 1154 ff.).

### C. Characteristics

Bills of exchange have the following characteristics: incorporation, literality, abstraction, and autonomy.

- *Incorporation* means that the obligation is incorporated in the instrument. In other words, who owns the document owns the right, meaning that it is enough to be the legitimate holder upon a continuous series of endorsements to have the right to claim and receive payment. This is so important because the good faith holder of the bill prevails over a previous holder that unfairly lost its possession (CCom, art. 1149)
- *Literality* means that the existence and content of the obligation is defined by the document (*quod non est in cambio non est in mundo*). This is another dimension of incorporation of the credit in the bill. But it goes further to justify the protection of the good faith holder in terms that several defects of will cannot be opposed to him, thus making circulation easier.
- *Abstraction* means that the causal or underlying business is separated from the bill of exchange. In fact, the defects of the causal or underlying transaction (e.g., *exceptio inadimpleti contractus*) cannot be opposed to subsequent good faith holders of the bill. However, in case they are in bad faith (*exceptio doli*) those defenses can be opposed to them.
- *Autonomy* means that exceptions of the causal transaction cannot be opposed to subsequent holders in good faith (appraised at the moment of acquisition of the bill – *mala fides superveniens non nocet*), and that the legitimate holder of the bill has an autonomous right, and therefore a previous holder that unfairly lost its possession cannot oppose to the legitimate holder the illegitimacy of the prior holder of the bill who has transmitted the bill to him (CCom, art. 1150). In this context, gross negligence means bad faith (*lata culpa est nimia negligentia id est non intelligere quod omnes intelligunt*), for example, in case the holder gets the bill from someone well known to be a thief or an indigent person.

## 2. Legal analysis of negotiable instruments (bills of exchange, cheques, etc.)

This section is devoted primarily to two long-established and popular payment media, the *bill of exchange* and the *cheque*. The negotiable instrument, in particular the bill of exchange, has had a very long history, and has for long occupied a central place in the finance of industry and commerce. At the present time the traditional form of bill of exchange is seldom seen in Macau internal sales, but is still of the greatest importance in export sales. In addition, there is one form of negotiable instrument in public use, namely the cheque. However, since these are merely two members of a class of documents known as *instruments*, it is appropriate to make some brief comments concerning instruments in general.

### 2.1 Overview

#### A. Instruments Generally<sup>6</sup>

An instrument is a document of title to money. As a documentary tangible, it is the physical embodiment of the payment obligation, and its possession (with any necessary endorsement in favor of the possessor) is the best evidence of entitlement to the money it represents.<sup>7</sup>

Whether who holds possession of it is recognized as carrying with it the right to the specific sum of money or security for money depends on the mercantile usage and applicable laws. In practice, there are many distinctive characteristics of the instrument. In other words, without those characteristics, writing is unlikely to be given

<sup>6</sup> See Roy Goode (1995). Commercial Law (2nd ed.). Penguin Books p.518 ff.

<sup>7</sup> For an extensive discussion of this concept of incorporation of the right into the document see D. Cowen & L.Gering (1985), The Law of Negotiable Instruments in South Africa (5th ed.). General Principle (Cape Town, Wetton and Johannesburg), 1, 360-366.

recognition as an instrument. Generally and also traditionally, the document, externally, is concise and no greater in size that enables it to be conveniently carried and transferred; internally, its terms are limited to payment obligations, security for payment and the right to exchange it for the specified bonds or debentures.<sup>8</sup>

Accordingly, given that a document is an instrument, the next question is whether it is negotiable or non-negotiable. It again depends on mercantile usage and statute. The name *negotiable instrument* is not always used in the strict sense, being sometimes employed to indicate any instrument embodying a monetary obligation and transferable by endorsement and delivery, whether or not capable of being transferred free from equities. A non-negotiable instrument is one which, though capable of transfer by delivery (with any necessary endorsement) in the same way as a negotiable instrument, can never confer on the holder a better right than was vested in the transferor.<sup>9</sup> Suffice it to say for the present that the status of a “holder in due course” of a negotiable instrument is essentially that of a *bona fide* purchaser acquiring an overriding title.

### B. Different Kinds of Negotiable Instruments

Generally, negotiable instruments can be subdivided into three large categories, and only the first one will be discussed here. The first one is those representing a claim: these are titles which incorporate claims relating to the payment of sum of money and which are worded to order (bills of exchanges, cheques, promissory notes), to bearer (cheques, bonds, debentures) or exceptionally to a specific person.

The other two categories will not be discussed here: one is those containing the obligation to transfer movable goods, such as a bill of lading or a warehouse receipt. The other is those representing the membership and the patrimonial rights of shareholders in corporations, such as capital shares and other securities, profit-sharing bonds, certificates of share entitlement.<sup>10</sup>

### C. The Classification of Legal System of Negotiable Instruments

In civil law countries, including most European countries, Japan and Latin America, the law of negotiable instruments mainly depends on the system of Geneva. In common law countries, the law of negotiable instruments mainly depends on the English negotiable instrument law. The former is an international convention; the latter, a domestic law. The United Nations published a UN law on negotiable instruments (draft) in 1982; however, it failed to unite the two legal systems. Accordingly, there are still two systems of negotiable instrument. One is the civil law system or Geneva system and the other one is the Anglo-American system.

Due to the historical background, the laws relating to the negotiable instrument in former Macau are mainly from Portugal. Macau did not have its own legislation of negotiable instruments. According to the article 4, of the Law entering the Commercial Code of Macau into force<sup>11</sup>, Macau absorbs the Geneva system almost without modification. After Macau returned to China, Macau government confirmed this position again.<sup>12</sup> So, in a nutshell, even though there are some minor differences with Geneva system in wording, Macau law on negotiable instruments is very similar to the Geneva system. The Macau law of negotiable instruments is mainly stipulated in Commercial Code of Macau, Book IV, Title II - Negotiable Instruments in Special.

From the content of the legislation, the Macau law on negotiable instruments belongs to the civil law family, and sets aside the common law model. However, the Commercial Code of Macau tries to “combine” elements from both systems. Negotiable instruments include the Bills of Exchange, Promissory Notes and Cheques. Most civil law countries recognize that negotiable instruments only include the Bills of Exchange and Promissory Notes. There is a separated law of Cheques in most civil law countries.

## 2.2 Bills of Exchange

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<sup>8</sup> However, negotiable bonds are frequently expressed to be subject to the terms of a trust deed under a trust for bondholders. This is not considered to affect their status as negotiable instruments.

<sup>9</sup> In the absence of some exception to the *nemo dat* rule falling outside the law relating to instruments.

<sup>10</sup> See, Jules Stuyck, Commercial and Economic Law-Belguim. In Floris O W Vogelaar, Jules Stuyck, and B L P van Reeken (Ed.), Cmpetition Law in the EU, Its Members States and Switzerland (pp.489). Kluwer Law International.

<sup>11</sup> See Decree-Law 40/99/M, of 3 August 1999. See <http://www.imprensa.macao.gov.mo/bo/i/99/31/codcomcn/declei40.asp> (11-12-2005)

<sup>12</sup> Law 6/2000, of 27 April 2000. See [http://legismac.informac.gov.mo/orgText/2000/S1/2000\\_17/LEI06C.htm](http://legismac.informac.gov.mo/orgText/2000/S1/2000_17/LEI06C.htm) (11-12-2005)

### A. Definition

There is no formal definition of the concept of bills of exchange in Macau, just as in most of the civil law countries. However, common law often provides a definition, such as the following definition of bills of exchange in England:

*“A bill of exchange is an unconditional order in writing addressed by one Person (the Drawee) to another (the Drawee) signed by the person giving it requiring the person to whom it addressed (the Drawee), who when he signs becomes the Acceptor to pay on demand, or at a fixed or determinable future time a sum certain in money to Or the Order Of a special person, Or to bearer (the Payee)”<sup>13</sup>*

Even though there is no formal definition of bills of exchange in Macau, there are some general requirements of bills of exchanges according to the article 1134 of the Commercial Code of Macau said above.<sup>14</sup> So, generally speaking, an instrument in which any of the requirements mentioned in the proceeding article is lacking is invalid as a bill of exchange.<sup>15</sup> Of course there are some exceptions in the cases specified in the following:

*“A bill of exchange in which the time of payment is not specified shall be deemed to be payable on sight.”<sup>16</sup>*

*“In the absence of a special indication the place specified beside the name of the drawee is deemed to be the place of payment, and at the same time the place of domicile of the drawee.”<sup>17</sup>*

*“A bill of exchange which des not mention the place of its issue is deemed to have been drawn in the place mentioned beside the name of the drawer.”<sup>18</sup>*

### B. Draw

There are threes types of draw in Macau. A bill of exchange can be drawn: (i) payable to drawer’s order; (ii) on the drawer himself; or (iii) by order and for the account of third party.<sup>19</sup> Just as mention at above, these three types of draw must satisfy the requirements of bills of exchange.

Here, the liability of the drawer needs to be referred briefly. According to article 1142 of the Commercial Code of Macau, a drawer guarantees both acceptance and payment of a bill of exchange, and the drawer can release himself from guaranteeing acceptance; every stipulation by which he releases himself from the guarantee of payment is deemed not to be written.<sup>20</sup>

### C. Endorsement

The endorsement of bills of exchange is one of the main methods of transfer.<sup>21</sup> In Macau, just as most other countries, an endorsement can leave the beneficiary unspecified, or can consist simply of the signatures of the endorser (blank endorsement). In the latter case, the endorsement, to be valid, must be written on the back of the bill of exchange or on the slip attached to it.<sup>22</sup>

By endorsing the bill, the endorser transfers all right to the endorsee. Therefore, the endorsement must be unconditional. Any endorsement must be unconditional. Any condition to which it is made subject is deemed not written. A partial endorsement shall be void.<sup>23</sup>

After the endorsement, endorsers have liabilities. In the absence of a stipulation to the contrary, an endorser guarantees acceptance and payment of a bill of exchange. The endorser can prohibit any further endorsement; in this case, he gives no guarantee of payment to persons to who the bill is subsequently endorsed.<sup>24</sup>

<sup>13</sup> The law of England Negotiable Instruments.

<sup>14</sup> CCom, article 1134.

<sup>15</sup> CCom, article 1135

<sup>16</sup> CCom, article 1135, 2.

<sup>17</sup> CCom, article 1135, 3.

<sup>18</sup> CCom, article 1135, 4.

<sup>19</sup> CCom, article 1136.

<sup>20</sup> CCom, article 1142.

<sup>21</sup> See Jianhong Fan and Qing Tian, (2003) Direito do Investimento Internacional das Sociedades Transnacionais.Faculdade de Direito da Universidade de Macau.

<sup>22</sup> CCom, article 1146.

<sup>23</sup> CCom, article 1145.

<sup>24</sup> CCom, article 1148.

#### D. Acceptance<sup>25</sup>

There is no definition of acceptance in Macau law, however, there are usual definitions in common law, such as provided by section 17 Bills of Exchange Act, England, which states that acceptance is:

*“[T]he signification by the drawee of his assent to the order of the drawer.”*<sup>26</sup>

The procedure of acceptance generally can be divided into three steps:

(i) presentation for acceptance; Until maturity, a bill of exchange can be presented to the drawee for acceptance at his domicile, by the holder or even by a mere detainer<sup>27</sup>; (ii) the expression of acceptance; Acceptance shall be written on the bill of exchange itself. It is expressed by the word “accepted” or any other equivalent; the acceptance shall be signed by the drawee. The mere signature of the drawee on the face of the bill constitutes an acceptance. In addition, if a bill is payable at a certain time after sight, or if it must be presented for acceptance within a certain time limit in accordance with a special stipulation, such acceptance must be dated as of the day when the acceptance is given, unless the holder requires that it be dated as of the day of presentation. If it is undated, the holder, in order to preserve his right of recourse against the endorsers and the drawer, must certify the omission by a protest drawn up within the proper time<sup>28</sup>; and (iii) return the bill of exchange. The last procedure is also essential for the validity of the acceptance. Before the procedure is finished, the acceptance can be cancelled. Where a drawee who has accepted a bill has crossed it before returning the bill, acceptance is deemed to be refused; unless there is proof to the contrary, such cancellation is deemed to have place before the bill was returned.<sup>29</sup>

By accepting, a drawee undertakes to pay the bill of exchange at its maturity. In the event of default of payment, the holder, even if he is the drawer, has a right of action arising from the bill of exchange against the acceptor, in relation to all that can be demanded in accordance with articles 1181 and 1182 of the Commercial Code of Macau.<sup>30</sup>

#### E. “Aval”

The “Aval” does not apply only to the bills of exchange, but can also be applied to promissory notes and cheques. Payment of a bill of exchange can be guaranteed by an “aval” as to the whole or part of its amount. This guarantee can be given a third party or even a person who has signed as a party to bill.<sup>31</sup>

Furthermore, the “Aval” can be divided into two categories. One is formal “Aval.” The wording “aval” must be written either on the bill itself or on an attached slip. It is expressed by the words “good as aval” or by any other equivalent formula; it is signed by the giver of the “aval.”<sup>32</sup> The other category is *elliptic* “aval.” It is deemed to be constituted by the mere signature of the giver of the “aval” placed on the face of the bill, except in case of the signature of the drawee or the drawer.<sup>33</sup> Of course, the giver of “aval” supports some responsibility. The giver of an “aval” is bound in the same manner as the person for whom he has become guarantor. His obligation is valid even if the liability which he has guaranteed is void for any reason other defect of form. If the giver of “aval” pays a bill of exchange, he is subrogated in the rights arising from the bill of exchange against the person guaranteed, and against those who are liable to the latter on basis of the bill of exchange.<sup>34</sup>

#### F. Payment

<sup>25</sup> This topic does not apply to Promissory Notes and Cheques.

<sup>26</sup> England Bills of Exchange Act, Section 17.

<sup>27</sup> CCom, article 1154.

<sup>28</sup> CCom, article 1158.

<sup>29</sup> CCom, article 1162. However, there is a limitation of acceptance stipulated in CCom, article 1162, 2: if the drawee has notified to the holder, or to any party who has signed the bill his acceptance in writing, he is liable towards such parties according to the terms of his acceptance.

<sup>30</sup> CCom, article 1161.

<sup>31</sup> CCom, article 1164.

<sup>32</sup> CCom, article 1164, 1 and 3.

<sup>33</sup> CCom, article 1164, 3.

<sup>34</sup> CCom, article 1165.

Generally speaking, there are mainly three steps required to obtain payment of an “aval”: presentation for payment, payment, and handing back of the bill of exchange.

According to article 1171 of the Commercial Code of Macau, the holder of a bill exchange payable on a fixed day or at a fixed period after date or after sight must present the bill for payment either on the day on which it is payable or on one of the two following business days. Presentation of a bill of exchange at a clearing-house is equivalent to the direct presentation for payment.<sup>35</sup> If a bill of exchange is not presented for payment within this time limit, any debtor has the power to deposit the amount with the competent authority at the expense and risk of the holder.<sup>36</sup>

The problems related to this is addressed in article 1173 of the Commercial Code of Macau. The payment can be divided into payment before and on maturity. Whoever pays on maturity is validly discharged, unless he has been guilty of fraud or gross negligence. He is bound to verify the regularity of the series of endorsements, but not the signature of the endorsers.<sup>37</sup> The holder of a bill of exchange cannot be compelled to receive its payment before maturity. A drawee who pays before maturity does so at his own risk.<sup>38</sup>

Finally, a drawee who pays a bill of exchange can demand that it shall be handed over to him with a receipt. In case of partial payment the drawee can demand that mention of such payment shall be made on the bill, and that a receipt be given to him.<sup>39</sup>

### G. Intervention

Intervention mainly refers to the system of acceptance by intervention and payment by intervention.

Acceptance by intervention can take place in all cases in which the holder of a bill of exchange which can be accepted has a right of recourse before maturity.<sup>40</sup> However, there is no system of acceptance by intervention in promissory notes and cheques.

Acceptance by intervention shall be mentioned on the bill of exchange and signed by the intervenor. It shall mention the person for whose honor it has been given; in the absence of such mention, the acceptance is deemed to have been given for the drawer.<sup>41</sup> An acceptor by intervention is liable to the holder and to the endorsers subsequent to the party for whose honor he intervened, in the same manner as such party.

Payment by intervention can take place in all cases in which, either at maturity or before maturity, the holder has a right of recourse on the bill of exchange. There is also a system of payment by intervention. However, this system does not apply to cheques. This Payment must include the whole amount payable by the party for whose honor the intervention was made, and the payment must be made at the least on the day following the last day allowed for drawing up a protest for non-payment.<sup>42</sup>

A person paying by intervention shall be subrogated in the rights arising from the bill of exchange against the party for whose honor he has paid, and against persons who are liable to the latter on the basis of the bill of exchange. However, he cannot re-recourse the bill of exchange.<sup>43</sup>

### H. Recourse

The holder of a bill of exchange, who on the due date is not paid, has a recourse claim against the endorsers, the drawer, the *avaliseurs* and the drawee who has accepted. This action can take place even before the maturity: (i) if there has been total or partial refusal of acceptance; (ii) in case of the bankruptcy of the drawee, whether he has accepted or not, or in the event of a suspension of payments on his part, even if not declared by a judicial decision, or if an execution of his assets has been unsuccessfully attempted; and (iii) in the event of a bankruptcy of the drawer of a non-acceptable bill.<sup>44</sup>

## 2.3 Cheques

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35 CCom, article 1171.

36 CCom, article 1175.

37 CCom, article 1173, 3.

38 CCom, article 1173, 1 and 2.

39 CCom, article 1172.

40 CCom, article 1189.

41 CCom, article 1190.

42 CCom, article 1192.

43 CCom, article 1196.

44 CCom, article 1176.

### A. Definition

As mentioned at the beginning of this chapter, a cheque is a bill of exchange drawn on a banker payable on demand under common law.<sup>45</sup> However, in civil law, a cheque is a negotiable instrument, little more than a written order to a bank to pay the stated sum from the drawer's account.

### B. Draw

There are some requirements to draw cheques. A cheque should contain: (i) the term "cheque" inserted in the text of the instrument and expressed in the language employed in drawing up the instrument; (ii) an unconditional order to pay an exact sum of money; (iii) the name of the person who is to pay (drawee); (iv) an indication of the place where payment is to be made; (v) an indication of the date when and the place where the cheque is drawn; (vi) the signature of the person who draws the cheque (drawer).<sup>46</sup>

An instrument in which any of the requirements mentioned above is lacking does not produce effect as a cheque, except in the cases specified in the following paragraphs:

*"In the absence of special indication, the place specified beside the name of the drawee shall be deemed to be the place of payment. If several places are named beside the name of the drawee, the cheque is payable at the first place named."*<sup>47</sup>

*"In the absence of such indications, or of any other indication, the cheque is payable at the place where the drawee has his principal establishment."*<sup>48</sup>

*"A cheque which does not specify the place at which it was drawn shall be deemed to have been drawn in the place specified beside the name of the drawer."*<sup>49</sup>

### C. Presentation

A cheque presented for payment before the day stated as the date of issue is payable on the day of presentation. There is time limit for presentation for payment stipulated in the Commercial Code of Macau. A cheque issued and payable in Macau must be presented for payment within eight days. A cheque issued abroad and payable in Macau must be presented within a period of 20 or 70 days, according to whether the place of issue and the place of payment are situated in this or in other parts of the world.<sup>50</sup>

### D. Recourse

The right to ask for payment is the first right and the right of recourse is the second right of the holder of the cheque. A holder can exercise his right of recourse against endorsers, the drawer, and other liable parties if the cheque presented in due time is not paid, and if the refusal to pay is evidenced: (i) by a formal act (protest); (ii) by declaration dated and written by the drawee on the cheque, indicating the day of presentation; or (iii) by a dated declaration made by a clearing-house, stating that the cheque has been delivered in due and has not been paid.<sup>51</sup>

### E. Cheques and Bills of Exchange

Due to the share of rules of technique between cheques and bills of exchange, regulations of cheques relating to the transfer,<sup>52</sup> "aval,"<sup>53</sup> presentation and payment,<sup>54</sup> refusal of payment, recourse for no-payment,<sup>55</sup> parts of a set,<sup>56</sup>

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45 See, Robert Lowe (1973), Commercial Law (6th ed.). Sweet & Maxwell.

46 CCom, article 1212.

47 CCom, article 1213, 2.

48 CCom, article 1213, 3.

49 CCom, article 1213, 4.

50 CCom, article 1240.

51 CCom, article 1251.

52 CCom, article 1225-1235.

53 CCom, article 1236-1238.

54 CCom, article 1239-1247.



amendments,<sup>57</sup> time limits,<sup>58</sup> and so on, are very similar. Because of space limitations, however, we cannot examine each of them in details.

### 3. Electronic Negotiable Instrument

The rapid development of Information Technology has revolutionized the way people and business transfer goods and services. Electronic business is real and continues to grow as a medium to order tickets, goods or services. Compared with traditional payment methods, such as checks, electronic payments, indeed, have many advantages. However, electronic payments are often costly, challenging to implement and sometimes technically difficult to understand. When you pay for a good or service in a shop using a credit or debit card, the retailer must pay a commission to the financial institution processing the card details; additionally, there will be operating costs for the system used to process the cards. These hurdles represent a “barrier to entry”, which, if overcome, can give someone the competitive edge. In addition, in this real world, checks are still a viable payment method and will continue to be so well into the future.<sup>59</sup> This section will briefly introduce a very recent development relating to the legal provisions concerning electronic payments in Macau and examine the relations between the electronic payments and traditional negotiable instruments.

#### 3.1 The Recent Legal Provisions

With the rapid development of the global Internet market, online transactions and e-commerce activities have become more and more popular every day. Because of this increasing trend, the Macau government has issued Decree-Law 94/99/M of October 25, 1999<sup>60</sup>, which confirmed transactions done over electronic means (such as Internet, Lease-line, etc) has the same legal effect, as do transactions done over traditional means (such as paper and ink). However, compared with the UNCITRAL Model Law on Electronic Commerce, it is still in its infancy stage. In particular, the distrust of payment through electronic methods cannot be avoided just because the issues of this very general degree.

Recently, the Macau SAR Government has published the “Electronic Document and Signature Law” (EDSL)<sup>61</sup> in order to cope with the development of e-commerce activities in the region. The EDSL ensures that transactions conducted by electronic means (such as Internet, Lease-line, etc) has the same legal effect, as transactions conducted by traditional means (such as paper and ink). The stated purposes of the EDSL include standardizing the conduct of electronic signatures, confirming the legal validity of electronic signatures and safeguarding the legal interests of parties involved in such matters.

In a significant way, the EDSL provides legal definitions for what constitutes an “Electronic Document” and what constitutes an “Electronic Signature.” It also defines how a valid electronic document should be transferred, such as sending and receiving a document, registered document and receipt acknowledgement. In association with the EDSL, the Administrative Regulation no.14/2005 of August 15, 2005 has also been published in order to regulate the punishing system against the administrative offense.<sup>62</sup>

EDSL is intended to remove unnecessary obstacles to the use of electronic media in commercial transactions. The core provisions of the statute provide that merely because a contract or signature is executed in electronic form, it cannot for that reason alone, be denied enforcement.

#### 3.2 Electronic Payments and Traditional Negotiable Instruments

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55 CCom, article 1251-1259.

56 CCom, article 1260-1261.

57 CCom, article 1262.

58 CCom, article 1263-1264.

59 Check volume is increasing by 1.5 billion per year and is estimated to increase 1% - 2% annually until the year 2025. Industry statistics show 200 million Americans have checking accounts and approximately 84% use personal checks as their primary method of payment. Consumers write over 60 billion checks annually, and approximately 11 billion are written at the retail point-of-sale.

60 The degree has been abolished after the published of the Electronic Document and Signature Law.

61 Electronic Document and Signature Law, Law 5/2005, See [http://www.al.gov.mo/lei/leis/2005/05-2005/proposta\\_cn.pdf\(10-12-2005\)](http://www.al.gov.mo/lei/leis/2005/05-2005/proposta_cn.pdf(10-12-2005))

62 REGA 14/2005, Estabelece o regime sancionatório das infracções administrativas relativas à actividade de certificação de assinaturas electrónicas. See [http://legismac.informac.gov.mo/portuguese/sum\\_result\\_p.asp\(11-12-2005\)](http://legismac.informac.gov.mo/portuguese/sum_result_p.asp(11-12-2005))

The recognition of electronic negotiable instruments is outside the scope of the drafting committee's mandate. Attempting to draft a complete electronic negotiable instrument law was deemed premature and improvident at this time, before marketplace acceptance of the concept has been conclusively demonstrated and in the face of possible opposition from financial market regulators and consumer advocates.

However, it indeed opens the door to include electronic payments as a negotiable instrument. Before the publication of this law, the issues dealt with whether the paperless electronic payments could be adjusted under the legal framework of traditional negotiable instruments which are paper-based.

During this processing of the EDSL, some bank regulators and consumers were wary of the introduction of electronic negotiable instrument. Some bank regulators have express skepticism at the idea of granting legal recognition to electronic negotiable instruments for several reasons. The concern of bank regulators is based on fears that electronic negotiable instruments might become too popular and lead to the creation of new financial markets that not clearly subject to existing regulations. Electronic negotiable instruments, such as electronic checks, might fall into a regulatory void somewhere between the regulation of the paper-based check processing system and the wholly electronic world of electronic funds transfers. Even in the U.S, those concerns from bank regulators and consumers also exist.<sup>63</sup> Without any experience to predict the risk of loss, and hence, no adequate basis for developing new regulations, and without enough existing consumer protection laws, bank regulators and consumers will balk at the notion of electronic negotiable instrument in Macau.

Aside from legal issues that may arise, there are still many problems waiting to be resolved in the technology. In effect, Electronic Signature technology can confirm the "chain of title", but cannot alone provide the equivalent of possession of a tangible object. Possession of a negotiable instrument is usually essential to establishing ownership of the instrument, and is also essential to establishing holder-in-due status. Electronic Signatures can guarantee the authenticity of signatures and the integrity of the contents of a relevant record, but unless combined with strong access controls, they would not be sufficient to produce an "authoritative copy."<sup>64</sup> As a practical matter, the only way to accomplish this will be through the implementation of sophisticated security procedures. However, to build such a restricting access to resources stored in the computer is more expensive and difficult to maintain than the kind of computer system used for other business information processing purposes.<sup>65</sup>

In Macau, EDSL has opened the door to the use of electronic negotiable instruments. What remains is the task of enacting laws or regulations associated with the EDSL and a challenge for information technology professionals to design and implement systems that meet the statutory standard. The predominance of the electronic payments and even the shortcomings of the traditional negotiable instruments are evident; *i.e.* the lower costs of originating wholly electronic loans should give non-bank lenders a significant competitive advantage. The electronic payments could restrain the crimes of counterfeiting traditional negotiable instruments or cloning traditional negotiable instruments; and the electronic payments are much more efficient than the traditional methods. Will a market develop for electronic negotiable instruments? At many points, it seems quite possible, and even highly likely.

The development of electronic funds transfer systems has significantly reduced the importance of negotiable instruments both in domestic and in international trade. Though their use remains considerable, it is to be expected that over time, there will be further decline in their significance. Yet the advantages of negotiability cannot be denied. Such as the promissory note remains the basis instrument for forfeiting operations.<sup>66</sup> They are therefore likely to be with us in substantial volume in the foreseeable future

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2. Decree-Law 40/99/M, of 3 August 1999.

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63 Jane K. Winn, BNA Electronic Commerce & Law Report 1060 (October 25, 2000).

64 According to the Federal Electronic Signatures in Global and National Commerce Act (the USA) and also the Uniform Commercial Code of the United States, Prof. Jane K. Winn indicated that the authoritative copy is "authoritative" because it identifies a unique party as the legal owner, who alone has the authority to make changes to the record or to transfer ownership of it. It is a "copy" because in the digital world, information will inevitably be copied over and over as it is processed within a computer system. A transferable record control system must provide a way to distinguish between the authoritative copy and all other copies.

65 *Id.* 63

66 See, Chalmers and Guest on Bills of Exchange (14th ed.).

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