

Commercial Arbitration between China and the Portuguese- Speaking World

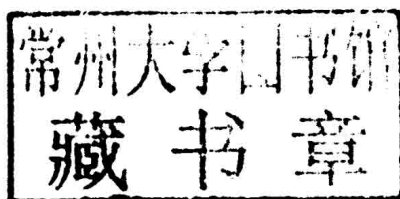
FERNANDO DIAS SIMÕES



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For Crisália and Leonor

About the Author

Originally from Portugal, where he graduated from the Faculty of Law of the University of Coimbra, Fernando Dias Simões holds a Ph.D. from the Faculty of Law of the University of Santiago de Compostela (Spain) with a dissertation on the liability of supermarkets for defective products sold under their private labels. Since 2011 he has been Assistant Professor at the Faculty of Law of the University of Macau (China), where he teaches Contract Law and Commercial Arbitration. He is Visiting Professor at the Institute of International Studies in Bangkok (Thailand) and has held visiting scholarships at the Faculty of Law of McGill University (Canada) and Emory University School of Law (United States of America). He has authored and co-authored books and articles on International Commercial Arbitration, Products Liability, Contract Law, Consumer Law, and Legal Ethics.

List of Abbreviations

AAA	American Arbitration Association
ACP	African, Caribbean, and Pacific Group of States
Art.	Article
ASA	Swiss Arbitration Association
ASEAN	Association of Southeast Asian Nations
CEAC	Chinese European Arbitration Centre
CEEAC	Economic Community of Central African States
CIETAC	China International Economic and Trade Arbitration Commission
CPLP	Community of Portuguese-speaking Countries
ECOWAS	Economic Community of West African States
ed.(s)	Editor(s)
EU	European Union
Ff.	And following
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
Macau SAR	Macau Special Administrative Region of the People's Republic of China
MERCOSUR	Southern Common Market
n.	Note
OAS	Organisation of American States
OHADA	Organisation pour l'harmonisation en Afrique du Droit des Affaires

List of Abbreviations

Para.	Paragraph
PRC	People's Republic of China
PSCs	Portuguese-speaking countries
SADC	Southern African Development Community
SIAC	Singapore International Arbitration Centre
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)
US	United States of America
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Preface

Located in the Southern coast of China, the city of Macau has long performed a distinctive role as an economic and cultural platform between China and the West, especially the Portuguese-speaking world. Beijing's government acknowledges Macau as a valuable gateway for China's growing economic interests in Portuguese-speaking countries. The unique conditions presented by Macau's political and economic system together with the cultural and language linkages combined to endow Macau with unique conditions to serve as a services platform. Over the last years it has been suggested by public officials, businessmen, and scholars that Macau should diversify its role as a services platform. One dimension of this is the promotion of Macau as a seat of arbitration between entrepreneurs from China and Portuguese-speaking countries. This endeavour is, naturally, a considerable cultural and legal challenge. The aim of this book is to question whether Macau has the necessary conditions to achieve this purpose, and what the ingredients for success are.

The first chapter analyses the growing economic interdependence between China and some of the Portuguese-speaking countries, the role currently played by Macau, and the possibility of deepening the territory's role as a platform by offering arbitration services. The second chapter is focused on the importance of the choice of the seat of arbitration. It discusses the elements that parties consider when selecting a location and analyses how globalisation triggered a fierce competition between different countries around the world to host arbitration proceedings. In Chapter 3 the reasons why arbitration proceedings between Chinese and Portuguese-speaking companies should take place in Macau are discussed. The goal is to answer the question 'why should arbitration proceedings take place in Macau?' Chapter 4 focuses on the challenges and hurdles Macau needs to overcome in order to succeed in this endeavour. Macau is not recognised by the international business and legal communities as a traditional seat of arbitration. In order to change this situation, a new alliance needs to be formed among different stakeholders: governments, scholars, businessmen, and the community at large. An ambitious roadmap is presented in the hope of contributing to the dawn of a new age in the Sino-Lusophone relationship.

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Fernando Dias Simões

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CHAPTER 1

Macau: Where China Meets the Lusophone World

§1.01 CHINA'S INTEREST IN THE LUSOPHONE WORLD

[A] The Chinese 'Go Global' Policy

The rise of China as a major economic and political actor is one of the defining features of the twentieth-first century.¹ With an export-led economic model, the country became the world's number one exporter after beating Germany in 2009. In the next year, China surpassed Japan as the world's second largest economy. The 'Middle Kingdom' is expected to claim the first place from the US within the next two decades, culminating the nation's three-decade shift from isolated communist state to global economic powerhouse.

Much of China's growing power comes from its ever-expanding economy. Beijing's government has been energetically stimulating the so-called 'go out' or 'go global' policy, inciting Chinese entrepreneurs to enter the global competition and seek new markets, resources, technology, and know-how. The internationalisation of Chinese enterprises is seen as a pivotal part of the country's economic reform. In an age of intense market integration and economic competition, China's global resources quest is changing geopolitics around the world.²

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1. Chris Alden, *China and Africa: From Engagement to Partnership*, in *China and Angola: A Marriage of Convenience?*, 10 (Marcus Power & Ana Alves eds, Pambazuka Press, 2012).
 2. Sigfrido Burgos & Sophal Ear, *The Hungry Dragon. How China's Resource Quest is Reshaping the World*, 18 (Routledge, 2013).

[B] The Lusophone World

The PRC's government has identified Portuguese language business network as being strategic for its international interests.³ The country's increasing presence in PSCs offers a graphic example of the rising complexity and sophistication of China's modern economic strategy. Even though this interest has received little attention thus far, closer examination shows that this is a notable facet of China's foreign policy.⁴

The Portuguese-speaking world – also known as the ‘Lusophone world’ – bridges four continents and encompasses eight countries: Portugal in Europe; Brazil in South America; Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe in Africa; and East Timor in Asia. In the Macau SAR⁵ – a Chinese territory that was administered by Portugal until 1999 – Portuguese is an official language along with Chinese. Additionally, there are a few territories where Portuguese or a Portuguese dialect is still in use: the former ‘Portuguese India’ (Goa, Daman, and Diu) where Portuguese is still spoken by the Indo-Portuguese communities; and Malacca (in Malaysia) where Malaccan Portuguese (otherwise known as *Papiá Kristang* – Christian language) is still spoken by a small community.

These territories have in common the Portuguese language – and, to some extent, the Portuguese culture – and are part of a network of more than 200 million people. Portuguese ranks as the sixth most spoken language in the world⁶ and the fifth most used language on the internet.⁷ According to Bloomberg Rankings, Portuguese is also the fifth language most useful for business.⁸ China's interest in the Lusophone world evidences the country's comprehension of the potential advantages deriving from the use of the Portuguese language as a means of strategic projection and market expansion.

‘Lusophone’ is a term derived from ‘Lusos’, the inhabitants of ‘Lusitania’, an ancient Roman province located where is now mainland Portugal. The expression ‘Lusophony’ (from the Portuguese *Lusofonia*) was coined in the last decade and refers to the countries that have Portuguese as an official language, along with Portuguese-speaking communities abroad, otherwise known as the ‘Portuguese diaspora’. The concept is frequently used to allude to the need to maintain political, economic, and

3. Fernanda Ilhéu, *The Role of China in the Portuguese Speaking African Countries. The Case of Mozambique (Part II)*, 16 *Economia Global e Gestão* 41, 47 (2011).

4. Loro Horta, *China's Relations with Portuguese-Speaking Countries: A Growing but Unnoticed Relation*, 1, <http://www.dtic.mil/dtic/tr/fulltext/u2/a567646.pdf> (accessed 17 Mar. 2014).

5. There is a divergence as to the proper spelling of the territory's name: ‘Macau’ or ‘Macao’. The former is the common spelling in Portuguese language while the latter is the traditional English spelling. The government of Macau considers both to be acceptable English spellings of the name, whereas in Portuguese ‘Macau’ remains the official spelling. It has also become increasingly more common in English-language sources, and thus shall be used throughout this book.

6. Ethnologue: Languages of the World, *Statistical summaries*, <http://www.ethnologue.com/statistics/size> (accessed 17 Mar. 2014).

7. Internet World Stats, *Internet world users by language*, <http://www.internetworldstats.com/stats7.htm> (accessed 17 Mar. 2014).

8. Language Magazine, *English, Chinese, French most useful for business*, http://language-magazine.com/?page_id=2882 (accessed 17 Mar. 2014).

cultural cooperation between all of the PSCs.⁹ The term has raised some controversy due to its symbolic power, connoted with the Portuguese language as the idiom of the former colonial power. Nowadays it frequently serves as a buzz-word repeated by political figures in the post-colonial Portuguese-speaking world.¹⁰

[C] **Reasons of Interest: Diverse Markets and Resources**

In order to expand its blossoming economy, China needs to tap into new markets. The Lusophone world represents a vast marketplace, especially if one takes into account that most PSCs are developing economies well-suited for acquiring low-cost Chinese goods; and that some of them (namely Brazil, Angola, and Mozambique) are growing rapidly and thus present a chance for additional expansion. Chinese companies may use such markets as training laboratories for their process of internationalisation. As these economies develop and mature, Chinese businessmen may reap the benefits of continuous presence and experience.

The thunderous expansion of the Chinese economy also results in an insatiable appetite for almost every sort of natural resource. The country is home to nearly a fifth of the world's population and is experiencing the fastest industrialisation process of all times. China perceives these diverse countries as new opportunities for resource prospecting and exploration. Energy resources like oil and gas are one the strongest reasons behind China's interest in the Lusophone world. Indeed, some of the PSCs happen to have plenty of such valuable resources. China depends on these countries for abundant supply; in return, most PSCs rely on China for assistance to exploit their untapped resources or gain leverage to negotiate better deals.¹¹ As a result, China and some Lusophone countries are becoming more and more economically interdependent.

Evidently, the Chinese interest in Lusophone countries is driven by different reasons.¹² The eight countries are in diverse stages of development and belong to different regional economies. Furthermore, despite being united by language, these nations are not connected geographically. The Lusophone world is a linguistic block but not a contiguous physical area. The Chinese interest is directed at countries located in different continents and latitudes, requiring a substantial effort in terms of logistics management and proper knowledge about the inner characteristics of each market.

9. Isabel Ferin Cunha, *Immigration in Portugal: An Approach to 'Lusophone' Media System*, 2 Journalism and Mass Commun. 442, 444-445 (2012).

10. Onésimo T. Almeida, *Lusofonia – Some Thoughts on Language*, 1, <http://escholarship.org/uc/item/6sp4b6j6> (accessed 17 Mar. 2014).

11. Iong Hoi Sun, *Macao and Chinese Foreign Relations: A Possible Platform for China and Portuguese-Speaking Countries*, in *Macao and U.S.-China Relations*, 241 (Yufan Hao & Jianwei Wang eds, Lexington Books, 2011).

12. Naturally, PSCs are also interested in the Chinese market. However, none of them has the same economic or political power as that of China nor can any of them be considered, for the moment, as a major investor in the Chinese economy.