

In turn, health insurance follows the specific regulation of personal accidents insurance.

It is possible to conclude the contract without the permission of the insured.

The specific regulation of personal accidents insurance includes a definition of personal accident (article 1056, CCom) and of the scope of coverage (article 1057, CCom), as well as the rule according to which the statement of the risk shall always be made by the insured (article 1058, CCom).

### § 129. Group insurance

Group insurance relates to a situation where a policyholder arranges coverage for a set of persons (the 'adherents') who have a legal relationship of the same type with the policyholder (article 1060, CCom), eg employees.

The specific regulation addresses the need to protect the adherent: it is not possible to exclude an adherent arbitrarily (article 1062, CCom); there is a duty to provide information on the coverage and operation of the policy (article 1063, CCom).

## CHAPTER V

### Company Law

#### A. INTRODUCTION

#### § 130. Sources; sequence

The 1999 Commercial Code<sup>494</sup> regulates the four types of companies recognised in the legal system of Macau in Title I<sup>495</sup> of Book II (articles 174 to 488) and therefore is the single major source of company law. It replaced the 1888 Commercial Code and the Law on Private Companies (*Lei das Sociedades por Quotas*) of 1901.<sup>496</sup>

Although the regulation of companies is based on the European model and on Portuguese law in particular,<sup>497</sup> it is by no means a copy of Portuguese law. Title I of Book II departs from it in many cases, namely achieving a more simplified and straightforward regulation. On the other hand, Title I of Book II takes into account the regulation of companies in the Asia-Pacific region and borrows various institutes from common law legal systems.

A few months after the approval of the Commercial Code, Law no 6/2000, of April 27, introduced a number of important amendments to the Code. As sometimes occurs after the introduction of major legislative changes, some of the new provisions generated a reaction which led to amendments. These are considered below in the appropriate sections.

The Commercial Code divides the regulation into six chapters. The first is a general part. The four following chapters cover the four types of companies

494 For an English language unofficial translation, see JORGE GODINHO, *Commercial Code*, Imprensa Oficial de Macau, Macau, 2003. The text is available online at [www.imprensa.macao.gov.mo/boi/99/31/codcomen/](http://www.imprensa.macao.gov.mo/boi/99/31/codcomen/).

495 This Title is based on a draft prepared by Dr José António Pinto Ribeiro which was commissioned in 1988, finished in 1990, presented and publicly debated in 1991. At the time, the intention was to approve a separate law or code on commercial companies. Subsequent evolution dictated the insertion of the draft, substantially unchanged, in the draft Commercial Code. The author of the draft did not participate in the work leading to the Commercial Code. For his critical views on the final text, see J PINTO RIBEIRO, 'O novo regime das sociedades comerciais em Macau' [The new régime of commercial companies in Macau], *BFDUM* 9, 2000, 81 ff.

496 The 1888 Commercial Code did not regulate the private company limited by shares (*sociedade por quotas*) as this type of company was first introduced by the *Lei das Sociedades por Quotas* of 11 April 1901.

497 Especially the Portuguese Commercial Companies Code of 1986 (*Código das Sociedades Comerciais*).

traditionally regulated in Roman-German legal systems.<sup>498</sup> The emphasis of the regulation is on the general part: it is the longest chapter and includes all rules common to all companies, developing most key issues. The individual chapters on each company only cover specialized matters. The last chapter has penal provisions whereby certain breaches of company law are punishable with criminal penalties.<sup>499</sup>

There is no specific regulation of groups of companies.<sup>500</sup> On the other hand, there are additional layers of public law regulation applying to certain activities, namely financial services,<sup>501</sup> gaming and insurance.<sup>502</sup>

As to the organization and sequence of this chapter on company law, given the emphasis that the Commercial Code places on the general rules,<sup>503</sup> it would possibly be adequate to, taking this cue from the law, consider most issues in a general part. However, this shall not be the case. On one hand, partnerships are seldom used and, despite some notable exceptions, there are not many public companies in Macau. On the other hand, it is clear that the private company is by far the most frequently used. Therefore, the private company is the object of special attention: all common concepts are touched regarding it.<sup>504</sup> A separate chapter on public companies only considers a number of issues which are the object of special regulation. Partnerships are only briefly analyzed in the introduction, mainly with the purpose of identifying their key characteristics.

498 The continuation of the regulation of these four types of companies was a policy put forward by the Government of Macau; J PINTO RIBEIRO, 'O novo regime das sociedades comerciais em Macau' [The new regime of commercial companies in Macau] (note 495), 83. Clearly, the only debatable issue would be the continuation of the regulation of the limited partnership, given that it is a type which is simply not used in Macau. The Code has tried to provide an incentive for its use by allowing the general partner to be a limited liability company; see *infra*, § 133, (e).

499 There is also one criminal law provision in the chapter on public companies; see *infra*, § 160, (d). For a critique of the inclusion of criminal provisions in private law Codes, see A. MENEZES CORDEIRO, *Direito das Sociedades*, vol I, *Das Sociedades em geral*, Almedina, Coimbra, 2004, 126.

500 But see note 565 and respective text. On groups of companies, see JOSÉ ENGRÁCIA ANTUNES, 'The liability of polycorporate enterprises', *Connecticut Journal of International Law*, 1999, 197 ff; JOSÉ ENGRÁCIA ANTUNES, *Os grupos de sociedades. Estrutura e organização jurídica da empresa plurissocietária*, Almedina, Coimbra, 1993.

501 DL 32/93/M, of July 5 (known as *Regime Jurídico do Sistema Financeiro*, or RJSF). The object of the regulation is financial institutions. These are defined as a 'business whose main activity is the concession of credit facilities, the holding of stakes in companies, the conduction of financial investments or the intermediation in the monetary, financial and foreign exchange markets' (article 1(a), RJSF). In fact, three types of financial institutions are then separated: credit institutions ('a business whose main activity is to receive deposits or other refundable funds from the public and to concede credit on its own risk'); financial intermediaries ('any individual or moral legal person who, for profit and habitually, exercises an activity of buying and selling, on behalf of third parties, of securities or instruments transacted on monetary, financial and foreign exchange markets, or of mere acceptance of orders from investors regarding those assets'); and other financial institutions, a residual category.

502 DL 27/97/M, of June 30.

503 The general part (articles 174-330, CCom) tries to cover all common issues and is therefore quite long; J PINTO RIBEIRO, 'O novo regime das sociedades comerciais em Macau' [The new regime of commercial companies in Macau] (note 495), 87 f.

504 On the chapter on private companies, the reader should keep in mind that when the provisions quoted from the Commercial Code are articles 174 to 330, these are provisions of the general part, applicable in principle to all types of companies; articles 356 to 392 are the specific provisions on private companies.

### § 131. Concept of company

A company is an incorporated and registered business organisation, with legal personality,<sup>505</sup> created by exercising freedom of association and freedom of economic enterprise, in order to carry on a business for profit. A company is a legal structure for conducting business: it is not in itself a business but rather a means to carry on a business and, especially in the case of public companies, to raise capital.

Article 184(1) of the Civil Code puts forward a legal concept of company:

a people-based legal person whose members bind themselves to contribute, with goods or services, to the exercise in common of a certain economic activity, not merely of enjoyment, with the purpose of sharing the resulting profits or of generating an economy.

Some remarks on this definition are in order.

Regarding the minimum number of shareholders, it should be pointed out that, unlike the previous Code, current law does not openly state that there must be 'two or more persons'. The traditional idea was that one sole person could not incorporate a company and therefore the minimum number of members of a company was two, and sometimes more. This is no longer the case as the Commercial Code now allows the existence of private companies with only one shareholder (articles 390 ff, CCom), whether created from the outset by a single person, or arising from companies that had their number of shareholders reduced to one. On the other hand, the minimum number of shareholders of a public company has been reduced to three (article 393, CCom).<sup>506</sup>

By forming a company, its promoters undertake an obligation of entry: the obligation to contribute with goods or services, as agreed in the articles of association. This is the most immediate obligation arising from the creation of the company, the other being the obligation to pay for losses, where such obligation exists. The sum of the members' contributions, as defined in the articles of association, is the registered capital of the company; the fractions of that amount are the shares. The entry does not necessarily have to be a sum of money, although in the vast majority of cases it is. Any good that can be given an economic value and that can be seized in civil executive proceedings is acceptable for the payment of entries in kind.<sup>507</sup> It is also possible, but only in general partnerships (and in limited partnerships, in the case of unlimited liability partners), for a partner to contribute with his work.

The economic activity is carried on in the name of the company, which is a separate legal entity. The entrepreneur is the company — not the shareholders.

Any industrial or commercial enterprise can be conducted through a company. However, activities which are not detachable from the person exercising it — such as that of liberal professions — are not regarded as commercial enterprises and therefore can only be exercised under a civil law company, which follows the regulation on general partnerships (article 2(2), CCom; articles 184(3) and 185(2), CC), but not under private or public companies.

505 For a detailed account of the evolution of the concept of legal personality, see A. MENEZES CORDEIRO, *Direito das Sociedades*, vol I, *Das Sociedades em geral* (note 499), 32 ff.

506 The previous requirement of at least ten shareholders for a public company was generally regarded as being too high and, accordingly, the 1999 Commercial Code decreased it significantly.

507 See *infra*, § 138, (a).

The activity has to involve some sort of production of goods or services. It cannot be just a form of co-ownership.

A company exists to generate profits: that is its function.<sup>508</sup> As seen from the definition of a company, the law embraces a wide concept of profit, by stating that the purpose may also be to make a saving; obviously, in nearly all cases the purpose is to generate profits, in the form of an annual dividend. It should be also stressed that '[t]he capacity of commercial companies comprises the rights and obligations necessary, useful or convenient to the achievement of their aims'. The law clarifies that, in principle, companies cannot make donations,<sup>509</sup> or provide personal or real guarantees for obligations of other persons.<sup>510</sup>

All companies are regarded as commercial entrepreneurs (article 1, CCom) and therefore subject to the obligations mentioned in Book I of the Commercial Code.

### § 132. Limited liability

By conducting a commercial enterprise by means of a limited liability company, the risk of financial loss is reduced to the amount of capital invested in the company. Generally speaking, limited liability means that when a limited liability company is liquidated, if it does not have sufficient assets to meet its liabilities, then the members, provided that they have already paid to the company the shares subscribed by them, are not liable to pay any further amount to meet the company's liabilities, and other assets that they may own cannot be executed to pay for the company's debts.<sup>511</sup> Limited liability works as a protection of the shareholders and clearly as a disadvantage for the company's creditors.

However, the liability of shareholders varies according to the type of company. Not all companies have limited liability. Where it exists, limited liability is achieved in the moment of registration of the company's act of incorporation (article 176, CCom).

With the 1999 Commercial Code, it is now possible for an individual entrepreneur to enjoy limited liability by forming a private company having a single shareholder. Previously, this was not possible as it was understood that a company had to have at least two shareholders.

508 The draft commercial companies law proposed the elimination of this requirement, thereby allowing the company form to be used by non-profit entities. The Commercial Code did not adopt this view. See J PINTO RIBEIRO, 'O novo regime das sociedades comerciais em Macau' [The new régime of commercial companies in Macau] (note 495), 89.

509 An exception is provided for donations that may be considered of usage, in accordance with the circumstances of the season and the conditions of the commercial company itself (article 177(2), CCom).

510 Exceptions are allowed where there is an own interest of the company, which must be declared and reasoned in writing by the organ of administration (article 177(3), CCom). This may happen in the case of groups of companies, where it may make sense for a company to provide guarantees to obligations of companies of the same group. On the other hand, it is clear that banks can provide independent guarantees, as a paid service to their customers (on independent guarantees, see *supra*, § 61).

511 See Ac TSI 4 March 2004 (process 40/2004). In this case, a private company was sued by a creditor. The latter intended to execute half of an immovable owned by shareholder C, half of another immovable owned by shareholder D and a share of D in another private company. The court rejected the execution of these assets, noting that they are not owned by the debtor and that the shareholders have limited liability.

### § 133. Types of companies

#### (a) Introduction

Macau law recognizes and regulates four different types of commercial companies, designated as follows:<sup>512</sup>

- (a) private company limited by shares (*sociedade por quotas*);
- (b) public company limited by shares (*sociedade anónima*);
- (c) general partnership (*sociedade em nome colectivo*);
- (d) limited partnership (*sociedade em comandita*).

The 'pure' models of companies are, on one hand, the public company (the most open) and, on the other, the general partnership (the most closed). The limited partnership is a direct cross between these two types; the private company can be said to be a middle ground between the two types.<sup>513</sup>

When creating a company, it is necessary to choose one of the four types offered by the law. There is no freedom of contract in this regard: it is not possible to create new types of companies. This is therefore a limitation of the general private law principle of freedom to state the contents of contracts.<sup>514</sup> The explanation for this is that it is in the public interest, in order to create transparency and protect expectations, that during business relations, its firm should suggest what kind of organization it is.<sup>515</sup> This does not mean that all applicable rules are imperative, but just that the basic rules of each type of company cannot be modified.

The most popular type of company is by far the private company limited by shares. The vast majority of companies incorporated in Macau are of this type. Notably, this is also the most recent type, as its introduction occurred in 1906.<sup>516</sup>

512 One note is due to explain the terminology adopted. The use of the word 'partnership' may be criticized because in common law legal systems there is a clear distinction between company law and partnership law. However, partnerships are organizations without limited liability, exist to conduct an activity for profit, can be designated by the '& Co' suffix and all partners represent the company (DOBSON and SCHMITTHOF, *Business Law*, Sweet & Maxwell/Stevens, 15<sup>th</sup> ed, 1991, 282 ff), which means that these strong similarities to a general partnership (*sociedade em nome colectivo*) make it their functional equivalent. Similarly, under English law, it is possible to create limited partnerships (according to the Limited Partnership Act 1907), which, exactly like a Macau limited partnership (*sociedade em comandita*), 'may be described as a cross between a partnership and a limited company', where the limited partners, who do not manage the company, have limited liability (DOBSON and SCHMITTHOF, *Business Law*, 15<sup>th</sup> ed, cit, 305). Similarly, in England, the limited partnership is not very much used (GOWER, *Principles of Modern Company Law*, Sweet & Maxwell, London, 5<sup>th</sup> ed, 1992, 49). On the other hand, public companies can also be designated as joint stock companies. For the sake of simplicity and given that it is the designation used in English law (including the suffix 'plc': public limited company), it is preferable to speak of public companies. For the difference between public and private companies in English law, see GOWER, *Principles of Modern Company Law*, 5<sup>th</sup> ed, cit, at 12. On the rough similarities between English companies and civil law companies, see also A. MENEZES CORDEIRO, *Direito das Sociedades*, vol 1, *Das Sociedades em geral* (note 499), 81.

513 Therefore, authors debate whether in private companies the essential element is the members (like in a general partnership) or the capital (like in a public company). The fact is that the private company is somewhere inbetween, with various elements pointing in opposite directions.

514 See *supra*, § 30.

515 Therefore, the mere indication of the type of company immediately provides information on the liability of shareholders and suggests the size and capital that the company might have, eg the minimum of a public company is much higher than that of private companies; public companies normally have more employees than private companies.

516 The year in which the 1901 Portuguese law on private companies was extended to Macau.

The other types of companies were mentioned in the 1888 Portuguese Commercial Code and were known before. Therefore, it can be said that the introduction of the private limited company was a huge success. The reason is that this company, while providing the key feature of limited liability, has a much less complicated structure than a public company, making it ideal for small businesses.

On the other hand, public companies are economically the most important ones as they account for larger concentrations of capital. Some commercial enterprises have by law to be carried on under the form of a public company.<sup>517</sup> General partnerships and limited partnerships are not so popular, although the rules on general partnerships are important as they apply to civil law partnerships. Our study concentrates on private and public companies.

The basic criterion to distinguish the various types of companies is the liability of the shareholders.

#### (b) Private company

In a private company limited by shares (*sociedade por quotas*) or private limited company, the liability of each shareholder is limited to the amount of shares subscribed. Once a shareholder has paid to the company the whole value of his share, he does not have the obligation to pay additional funds to meet the company's debts and liabilities. There is, however, an important additional liability: members are jointly liable for the payment of shares to the company (articles 356(1) and 362, CCom). This means that if a member fails to pay his share, any of the other members can be called to pay for it. This rule may be explained by various factors: the capital of private companies is usually relatively low; the number of shareholders is usually low (typically, two); the shareholders usually know and trust each other.

The law of Macau recognizes that, in addition to the limitation of liability by shares, it is possible to stipulate that certain shareholders are also directly responsible towards the creditors up to a certain stated amount (article 357 CCom), that is, 'limitation of liability by guarantee.'

In a private company, the capital is divided in shares that can be of different amounts. The shares cannot be embodied in negotiable share certificates, and their transfer is formalized by means of a private written document (article 366, CCom). The transfer of shares to outsiders may be and usually is subject to restrictions, which gives the company a somewhat closed nature.

The structure of a private company is normally made of a general meeting plus the administration. Although possible, it is not common for private companies to have a supervisory board and a company secretary.

This type of company is suitable for a small number of persons who want to conduct a small or medium sized business and do not need to raise large amounts of capital.

#### (c) Public company

In a public company limited by shares, or joint stock company, or public company (*sociedade anónima*), shareholders are liable only for the payment of

<sup>517</sup> For example, in Macau, banks must be public limited companies with a minimum registered capital of MOP\$ 100,000,000 (article 21(1), RJSF).

their shares (article 393(3), CCom). The capital of the company is represented by negotiable certificates which are all of the same value (article 392, CCom). These may be issued to bearer and are freely negotiable (eg in a stock market: the public company is suitable for public listing and trading). As private companies cannot have more than 30 shareholders (article 358(1), CCom), the public company is clearly the preferred type for having large numbers of shareholders.

Public companies must have four bodies: general meeting, administration, supervisory board and company secretary.

This type of company is especially suitable for a large number of parties who need to raise capital for running a large commercial enterprise.

#### (d) General partnership

The main feature of a general partnership (*sociedade em nome colectivo*) is the total absence of limited liability: all partners are personally liable for the debts of the partnership. The partners can be called to pay, without limit, for the partnership's liabilities if all its assets are not sufficient (article 333(1), CCom).

Although it is not expressly stated in the law, the members of a general partnership have to be individuals. Other distinctive characteristics of this type of company are the following: all partners are administrators (article 345(1), CCom); decisions are taken according to the principle 'one man, one vote' and not according to the share of capital (article 344(3), CCom) and the transfer of shares to outsiders (article 337(1), CCom) or the modification of the articles of association (article 344(2), CCom) have to be approved by an unanimous partners' resolution, which gives it a closed nature. The capital is divided into shares that can be of different amounts. The participation cannot be represented by certificates.

General partnerships are made of two bodies: general meeting and administration.

In broad terms, a general partnership is suitable for a small number of parties who know each other well and who wish to carry on a low-risk commercial enterprise. Clearly, the widely undesired feature of unlimited liability makes it quite unpopular. In practical terms, and given the elimination of the regulation of civil companies, the main field of application of the regulation of general partnerships is to partnerships of lawyers, auditors, accountants and other liberal professionals.

#### (e) Limited partnership

A limited partnership (*sociedade em comandita*) is made of two elements: a general partnership and an investment of funds. Accordingly, there are two types of shareholders: with limited liability and without limited liability (article 349, CCom). The minimum number of shareholders is two (article 355, CCom). The capital of the limited liability shareholders can be represented by negotiable share certificates (but does not have to), exactly like that of a public company.

This type of company combines the characteristics of a general partnership with those of a public company and represents a mix of these two types. As a result, it is regulated by a small number of specific provisions (articles 348-355, CCom). All matters not specifically covered by these rules follow the regulation of general partnerships or public companies, depending on the issue (article 351, CCom).