Portugal obtained the territory on lease, although there was no transfer of sovereignty until 1670. In 1887, it became a free port under the Protocol of Lisbon.

The culture of Macau has always been a mixture of Chinese and Portuguese. Although Chinese and Portuguese are both the official languages of Macau, more than 97% of the people speak Chinese, only 0.7% of the people speak Portuguese and the remaining speak English, Filipino, or some other language.

§3. Political System[1]

I. Macau People Ruling Macau and the Area's High Degree of Autonomy

3. In accordance with China's 'One country, Two systems'', formula,[2] Macau retains a high degree of autonomy in all matters other than defence and foreign affairs, keeping its former laws and economic system for a period of fifty years from the handover from Portugal (until the 20 December 1999).

The essence of 'Macau people ruling Macau' means the local people of Macau shall administer their own affairs. According to the Basic Law of the Macau Special Administrative Region of the People's Republic of China (the Basic Law), the definition of 'Macau people' refers to the permanent residents of the MSAR, including the Chinese, Portuguese and other nationals who meet the qualifications of the Basic Law. According to the law, the executive organs and the legislature of the MSAR must be composed of local residents. The Chief Executive, principal officials, members of the Executive Council and the Legislative Assembly, the President of the Court of Final Appeal and the Attorney-General of the MSAR must be permanent residents of the region. Some of these posts (e.g., the Chief Executive, principal officials, members of the Executive Council, the President and Deputy President of Legislative Assembly, the President of the Court of Final Appeal, and Attorney-General) can only be assumed by the Chinese who are also permanent residents of the MSAR.

The 'High Degree of Autonomy' principle means that the National People's Congress of PRC (NPC) authorizes the MSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication. The MSAR has the right to issue its own currency, keep its financial autonomy and does not need to pay tax revenues to the Central People's Government. However, a high degree of autonomy does not mean complete autonomy. To safeguard China's unification and uphold state sovereignty and territorial integrity, the Central People's Government of PRC may still intervene when necessary. For example, according to the Law of the PRC on Garrisoning the Macao Special Administrative Region, in the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the MSAR, decides that the Region is in a state of emergency, the troop garrisoned in Macau shall perform its duties to stabilize the order in accordance with the laws that the Central Government decides to apply in the Region.

1. Basic Law of Macau SAR, Ch. IV Political Structure Section. See José Casalta Nabais, *Região Administrativa Especial de Macau: Federalismo ou Regionalismo?*, BFD, issue 77 (2001), 433–448.

2. In general, the principle of 'One country, Two systems'', was originally proposed by Deng Xiaoping, then Paramount Leader of the People's Republic of China, for the reunification of China during the early 1980s, when the lease of the New Territories (including New Kowloon) of Hong Kong to the United Kingdom and the lease of Macau to Portugal were about to expire at the end of 1990s. He insisted the sovereignty of one China over Hong Kong and Macau, but suggested that independent Chinese regions such as Hong Kong and Macau (and Taiwan), could have their own capitalist economic and political systems, while the rest of China uses the socialist system. Under the suggestion, the two SARs of Hong Kong and Macau should be responsible for their domestic affairs including, but not limited to, the judiciary and courts of last resort, immigration and customs, public finance, currencies and extradition. Diplomatic relations and national defence of the two SARs, however, is the responsibility of the Central Government in Beijing. This principle was affirmed in the Joint Declaration on the Question of Macau between China and Portugal, and finally implemented after China resumes the exercise of its sovereignty over Macau in 1999. See *One Country, Two Systems'*, retrieved on 2008-01-04, available at <www.china.org.cn/english/features/dengxiaoping/103372.htm>.

II. Executive Structure

4. The Government of the MSAR which is headed by the Chief Executive is the executive authority into the region.

The principal officials of the MSAR must be Chinese who are permanent residents of the region and have ordinarily resided in the region for a continuous period of not less than fifteen years. They shall declare their property and assets to the President of the Court of Final Appeal of the MSAR for the record at the time of assuming office.

The responsibilities of the Government of the MSAR include formulating and implementing policies, conducting administrative affairs, conducting external affairs as authorized by the Central People's Government of the PRC under the Basic Law, drawing up and introducing budgets and final annual financial accounts, introducing bills and motions, drafting administrative regulations, and designating officials to sit in on the meetings of the Legislative Assembly to hear opinions or to speak on behalf of the Government.

The Government of the MSAR must abide by the law and be accountable to the Legislative Assembly of the region. It will implement laws passed by the Assembly, and those laws already in force. It shall also present regular policy addresses to the Assembly, and answer questions raised by the members of the Assembly.

III. The Chief Executive

5. The Chief Executive is the head of the MSAR and shall represent the region. The Chief Executive shall be accountable to the Central People's Government of PRC and the Legislative Assembly of the MSAR.

The Chief Executive of the MSAR shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the region and has ordinarily resided in Macau for a continuous period of not less than twenty years. The Chief Executive is selected by election or through consultations held locally, and is appointed by the Central People's Government of the PRC. The term of office of the Chief Executive is five years. He or she may serve for not more than two consecutive terms.

The Chief Executive is responsible for leading the Government of the MSAR. His or her duties include: (1) to implementing the Basic Law and other laws which apply in the MSAR; (2) to sign and promulgate the acts passed by the Legislative Assembly; (3) to sign budgets passed by the Legislative Assembly, and report the budgets and annual financial accounts to the Central People's Government of the PRC for the record; (4) to decide on government policies and issue executive orders; (5) to make and implement administrative regulations; (6) to nominate and report to the Central People's Government of the PRC for the appointment of principal officials, and recommend the removal of these officials; (7) to appoint part of the members of the Legislative Assembly, to appoint and remove members of the Executive Council; (8) to nominate and report to the Central People's Government of the PRC for the appointment of the General Attorney, and to recommend to the Central Government of the PRC about the removal of the General Attorney; (9) to appoint and remove public official in accordance with legal procedures; (10) to implement the directives issued by the Central Government of the PRC in respect to the relevant matters provided for in the Basic Law; (11) to conduct external affairs and other affairs as authorized by the central authorities of the PRC on behalf of the Government of the MSAR; (12) to approve the introduction of motions regarding revenues or expenditure to the Legislative Assembly; (13) to decide whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Assembly or its committees in the light of security and vital interests; (14) to confer medals and titles of honour of the MSAR in accordance with law; (15) to offer a full pardon to persons convicted of criminal offences or commute their penalties in accordance with law; and (16) to handle petitions and complaints.

IV. The Executive Council

6. The Executive Council of the MSAR is an organ assisting the Chief Executive in policy-making. The Executive Council is presided over by the Chief Executive and meets at least once a month. Its members are appointed by the Chief Executive from among the principal officials of the executive authorities, the members of the Legislative Assembly, and public figures. Their appointment or removal is decided on by the Chief Executive. The term of office of members of the Executive Council shall not extend beyond the expiration of the term of office of the Chief Executive who appoints them. Members of the original Executive Council will remain in office until the new Chief Executive is selected. The Executive Council is composed of seven to eleven members. The Chief Executive may, as he or she deems necessary, invite other persons concerned to sit in on the meetings of the Executive Council.

V. The Legislature

7. The Legislative Assembly of the MSAR is composed of permanent residents of the region. The majority of its members are elected by popular vote. The term of

office of the Legislative Assembly of the MSAR is four years, except for the first term.

In the first term that was finished on September 2001, the Legislative Assembly consisted of twenty-three members, eight of who were reinstated through direct elections, the other eight through indirect elections,[1] and the remaining seven through appointment by the Chief Executive. In the second term, which was initiated in October 2001 and lasted until 2005, the Legislative Assembly was composed of twenty-seven members, of whom ten were instated through direct elections, ten through indirect elections, and seven through appointment by the Chief Executive. In the third and subsequent terms, the Legislative Assembly shall consist of twenty-nine members, of whom twelve shall be instated through direct elections, ten through indirect elections and seven through appointment by the Chief Executive.

The method for electing the members of the Legislative Assembly shall be specified by an electoral law introduced by the Government of the MSAR and passed by the Legislative Assembly.

If there is a need to change the method of forming the Legislative Assembly of the MSAR in and after 2009,[2] such amendments must be made with the endorsement of a two-thirds majority of all the members of the Assembly, and the consent of the Chief Executive. Such changes shall also be reported to the Standing Committee of the NPC, for the record.

The Legislative Assembly of the MSAR has a President and a Vice-President who are elected by and from among the members of the Legislative Assembly. The President and Vice-President of the Legislative Assembly are Chinese citizens who are permanent residents of the MSAR and have ordinarily resided in the region for a continuous period of not less than fifteen years.

The Legislative Assembly has powers to enact, amend, suspend, or repeal laws, to examine and approve budgets introduced by the government, and to examine the report on audits introduced by the government.

The Legislative Assembly is also responsible for deciding on taxation according to government motions, and approving debts to be undertaken by the government. They also receive and debate the policy addresses of the Chief Executive, and debate any issues concerning public interests.

Under certain circumstances, the Legislative Assembly may pass a motion to impeach the Chief Executive by a two-thirds majority of all its members and report it to the Central People's Government of the PRC for a decision.

1. Indirection election refers to the process that certain members of Legislative Assembly are not directly elected by the public voters, but indirectly elected by members respectively representing four 'functional constituencies' (i.e., industrial, commercial and financial sector; professional sector; the sector of workers; and the sector of social service, culture, education and sport). Indirect election is limited to organizations registered as 'corporate voters'.
2. The current election law is Law 3/2001, amended by Law 11/2008.

VI. The Judiciary

8. The courts of the MSAR exercise judicial power independently. They are subordinated to nothing but the law and are not subject to any interference. The

MSAR has primary courts, a Court of Appeal and a Court of Final Appeal. The power of final adjudication is vested in the Court of Final Appeal of the MSAR.

The primary courts of the MSAR may, when necessary, establish special courts. The previous system concerning criminal prosecution has been maintained.

The MSAR has an administrative court, which has jurisdiction over administrative and tax cases. If a party refuses to accept a judgment by the administrative court, he or she has the right to file an appeal with the Court of Appeal.

Judges of the courts of the MSAR at all levels are appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, lawyers and eminent personalities. The presidents of the courts of the MSAR at all levels are chosen from among judges and appointed by the Chief Executive. The President of the Court of Final Appeal must be a Chinese citizen who is a permanent resident of the region, and the appointment and removal of the President of the Court of Final Appeal shall be reported to the Standing Committee of the NPC for the record.

The public attorneys of the MSAR exercise their functions as vested by law, independently and free from any interference.

VII. Commission Against Corruption[1]

9. The Commission Against Corruption functions independently, and its Commissioner is accountable directly to the Chief Executive. The Commissioner and subordinate entities enjoy all the rights stipulated in law and act free from interference by any public service, member of governments, or public figures. The Commissioner Against Corruption is the Government's most powerful instrument in combating corruption.

The Government of the MSAR has defined a series of measures to counter corruption, including anti-corruption and prevention campaigns, legislative measures, and educational means to work towards establishing a clean and fair society.

The Commission Against Corruption also has another important function as ombudsman to ensure the legality and promote the merits of the actions of the public administration of the MSAR.

1. <www.gov.mo/egi/Portal/index.htm>.

VIII. Commission of Audits[1]

10. In harmony with the provisions of the Basic Law, the Commission of Audit functions independently and free from any interference. The Commissioner of Audit is accountable to the Chief Executive.

The main tasks of the Commission of Audit are to review the accounts and financial records of the public administration of the MSAR and to rationalize the management of resources in government agencies, thus promoting the efficiency of the public administration of the MSAR.

1. *Ibid.*

IX. Macau Customs Services[1]

11. The Macau Customs Services, established in 2001, is responsible for the task of monitoring outbound trade activities and ensuring the protection of industrial and intellectual properties. These tasks were previously jointly executed by the Economic Services Department and the Marine and Customs Police. The General Director of the Customs Services, which is one of the principal officials of the MSAR, was appointed by the Central People's Government of the PRC in July 2000. In harmony with the provisions of the Basic Law, the position was assumed in September, 2001.

1. *Ibid.*

X. Unitary Police Service[1]

12. The Unitary Police Service is responsible for commanding the Public Security Police and the Judiciary Police, ensuring the close cooperation between these two branches of the police forces.

The General Commissioner of the Unitary Police Service, who is one of the principal officials of the Government of the MSAR, in accordance with the Basic Law, was appointed by the Central People's Government of the PRC in November 2000 and has assumed his position in September 2001.

1. *Ibid.*

XI. Municipal Organs

13. The municipal organs of the MSAR are not organs of political power. Entrusted by the government of the region, they provide services in such fields as culture, recreation and environmental sanitation, and can be consulted by the government of the region on the above mentioned affairs.

§4. Population, Employment and Production Statistics

I. Population[1]

14. The population of the MSAR was estimated to be 541,200 people in the census of 2006.[2] Population density is over 18,535/km^2, and the northern part of the peninsula is one of the most densely populated areas in the world.

The population of the MSAR has undergone rapid demographic growth in the last two decades, increasing at an annual rate of around 4%. There is also an impressive flow of people in and out of the territory, with 25 million entries and exits recorded annually.

Macau's population is 51.2% female, 15.2% of Macau residents are under fifteen years old, and 77.7% are aged between 15 and 64. Those aged 65 years and older

Chapter 2. Economic System

18. Articles 5, 6 and 103 of the Basic Law stipulate that the socialist system and policies shall not be practiced in the MSAR, and the previous capitalist system and way of life shall remain unchanged for fifty years. It is affirmed that the right of private ownership of property, the right of individuals and legal persons to acquire, use, dispose of and inherit property, shall be protected by law. People are entitled to compensation for lawful deprivation of their property including, specifically, the ownership of enterprises, as well as the investments from outside the region. Chapter V of the Basic Law regulates the economic system in detail.

19. The economic system of Macau has historically been based on the principles of typical liberal capitalism. It rests on the protection of private property and free enterprises. Government intervention is kept at a limited level, mainly only in the areas of building infrastructure, education, health, security, the promotion of tourism and exports, the general supervision and regulation of economic activities, and the administration of justice. Articles 104 and 105 of the Basic Law state two key rules regarding the finances of the MSAR. First, the finances of the region are separate from those of the Central People's Government of the PRC. Second, the region should strive to achieve a fiscal balance, avoid deficits, and keep a budget commensurate with the growth rate of its gross domestic product.

Macau is also an island-type economy whose development is inevitably constrained by its limited domestic market, its resources, and its own structural limitations. Though Macau has a relatively small economy, it pursues an open economic policy. It has an important place with regards to other regional economies. Export has been a key industry in Macau, and becomes more and more important every day. Notwithstanding its limitations, Macau remains one of the most dynamic economies in the Asia-Pacific region. In 2003, Macau's GDP exceeded 69 billion (USD 8.8 billion). GDP per capita was 142,638 Macau *patacas* (local currency unit, hereafter refers to as the 'MOP') (USD 17,700), about 60% of that of Hong Kong. In the first six months of 2004, Macau's GDP exceeded MOP 40.9 billion (USD 5.2 billion). Macau's gross domestic product (GDP) stood at MOP 141.17 billion MOP in 2008 at constant prices of 2002, which is 3.1 times the 1999 figure. This translates into USD 39,000 of the GDP per capita in 2008 – one of the highest in Asia. As of the end of 2008, the MSAR's foreign reserves had reached MOP 127.2 billion.[1]

1. <www.gov.mo/egi/Portal/index.htm>.

20. Macau is a free port. Goods, capital, foreign exchange, and people flow freely in and out of Macau. Customs duties are only levied on liquor, tobacco, and motor vehicles. After the handover, economic policy in Macau has focused primarily on protecting and streamlining its free market economic system. Now it has cultivated a world-recognized, free, open, fair, and orderly market environment. The World Trade Organization (WTO) conducted a review of trade policies in March 2001. The report confirmed that Macau has abided by the WTO's regulations and noted that the economy has functioned well since the establishment of the Special

Administrative Region. The report also stated that Macau remains one of the freest and most open regions in the world in terms of trade and investment policy.[1] There has been a national policy of promoting the regional integration of the Macau economy within the Pearl Delta River and facilitating commercial exchanges between Macau, Hong Kong and Mainland China, namely by setting aside customs and excise duties.

1. *Ibid.*

21. The level of taxation in Macau is significantly lower than other countries or territories. Article 106 of the Basic Law says that the MSAR shall, taking the low tax policy previously pursued in Macau as reference, enact laws, on its own, concerning types of taxes, tax rates, tax reductions, allowances and expenditures, and other matters of taxation. It clearly forbids a major overhaul of the taxation system.[1] Macau has adopted new legislation on the international exchange of information to fight tax evasion, money laundering, and the financing of terrorism in 2009 to avoid being considered a 'tax haven'.[2]

1. Jorge A.F. Godinho, *Macau Business Law and Legal System* (Hong Kong: LexisNexis, 2007), 6–7.
2. Law 20/2009.

22. Macau does not rely on standard taxation for most of its income, but on the revenue from gambling.[1] Its burgeoning tourism and gaming industry leads the economy of Macau. Tourism and gaming, manufacturing, finance, and insurance, as well as construction and real estate, are regarded as the four pillars of Macau economy. The signing of the 'Mainland and Macau Closer Economic Partnership Arrangement' (the CEPA) in 2003 has increased trade and strengthened the economic cooperation between the two markets. The arrangement also attracts foreign investment from different parts of the world. Under the 'individual travellers' policy, tourism and the gaming industry are on the fast lane of growth.

Besides the CEPA, by which the government of the MSAR strengthens the economic cooperation between Macau and Mainland China, the government is also strengthening economic and trade cooperation with other members in the Asia-Pacific region, the European Union, Spanish-speaking countries and especially Portuguese-speaking countries, in order to play a more active role as a mediator among these countries, Mainland China, and the regional economic organizations.

The overall economic policy of the MSAR aims to grasp opportunities, create a quality environment for development, enhance local competitive advantages, promote regional economic cooperation, assist small and medium-sized enterprises (SMEs), facilitate adjustments and improvements to the economic structure, continue to nourish the gaming industry, stabilize traditional industries, foster newly developed industries, accelerate the pace of economic recovery, maintain and consolidate the trend of local economic development, and to lay down a solid foundation for the long-term, stable and healthy development of Macau's economy.[2]

1. J.H. Rato *Rainha, Receitas públicas do Território de Macau: origem e evolução (1980–1989)* [Public revenue of the Territory of Macau: origin and evolution (1980–1989)], ARAPM 1 (1990):

However, the doctrine of 'regulation of merchants' asserts that all acts by a merchant will be considered to be acts of commerce. Thus, this kind of social relationship is regarded to be legal-commercial relationship and must be regulated by commercial law. On the contrary, acts not performed by merchants will be considered civil activities. This kind of social relationship is regarded to be only a legal-civil relationship, and should be regulated by civil law.

The Macau Commercial Code applies the modern doctrine of 'regulation of merchants', emphasizing commercial enterprise is the core of commercial law and legal commercial relations. The code begins with the notion and scope of the commercial subject in Article 1. The commercial entrepreneurs include individuals and legal persons who create commercial enterprises for their benefit on behalf of their own names or through third parties, as well as commercial companies. A commercial enterprise means any organization utilizing productive factors for the exercise of an economic activity aimed at production for systematic and lucrative exchange, unless such organization is not separable from the person exercising it. In addition, the commercial code emphasizes that acts performed by a commercial subject are considered to be an act of commerce, unless such acts are not in the exercise of the respective enterprise. The concept of commercial enterprise and commercial acts are of great importance to the Commercial Code.

Furthermore, according to the preface of the Macau Commercial Code, the continuation of the existing law, doctrines, and traditions formed by judicial opinions have been considered when enacting the Commercial Code. The code absorbs the experience and practice from the Roman-Germanic mode of modern commercial laws, especially those regulations that are similar to the Macau legal system. In addition, as it is a global trend to unify the commercial laws in international aspects, it is suggested that the Macau Commercial Code shall apply common commercial practice in some legal areas.

II. Legal Framework of the Macau Commercial Code

27. In fact, the Commercial Code resembles other international regulations. It complies with the European Communities (EC) directives reflecting the regime of companies and the annual accounts of entrepreneurs in the commercial concession contract area.[1]

In essence, the Commercial Code adopts the framework of the commercial codes of Germany and Portugal. In systematic aspects, it is separated in four books:

Book I states the general provisions of the exercise of commercial enterprise, especially in firms (business names), commercial bookkeeping, rendering of accounts, commercial managers and assistants, liability for the creation of enterprises, civil liability of commercial entrepreneurs, and regulation of commercial enterprises (including a right of ownership over the enterprise, its scale, lease, and pledging) and competition law.

Book II regulates the creation of collective enterprises and cooperation in the creation of those enterprises, regulating companies, economic interest groupings, consortium contracts, and association in participation contracts.

Book III covers the external activity of enterprises, comprising a number of general provisions related to commercial obligations and regulation of a large number of contracts, namely contracts for sale or return, supply contracts, commission contracts, forwarding contracts, agency contracts, commercial concession contracts, franchising contracts, brokerage contracts, advertising contracts, carriage contracts, deposits in general warehouses, lodging contracts, current account contracts, securities lending contracts, banking contracts, guarantee contracts and insurance contracts.

Book IV concerns negotiable instruments, including an extensive general part and provisions for specific regulation of bills of exchange, promissory notes and cheques. This respective regime is copied from the Annex of the Convention on the Unification of the Law relating to Bills of Exchange and Promissory notes, as well as the Convention Providing a Uniform Law of Cheques.

1. EU directive N.o 78/660 and EU regulation no 4087/88.

III. Recent Reform of the Commercial Law

A. Law No. 6/2000 in 2000

28. The Macau Commercial Code faced strong criticism from the public and the commercial community since the date of its publication, requesting the MSAR government to amend or suspend its implementation. Thus, the MSAR government set up a Committee to follow-up on the application of the Commercial Code, formed by nine members (hereinafter referred to 'Committee') in 2000. The purpose was to collect data and information on the application of the supplementary regulations for analysis, and provide regular reports so as to evaluate whether the regulations cater to actual community needs. Legislative measures will be taken if problems were found.

In fact, members of the Committee[1] believed that the Commercial Code had actually taken the mode of regulating the European enterprises to restrain Asian-style enterprise. This is one of the reasons why the Commercial Code is not totally suitable for Macau, resulting in lots of negative influences on the development of Macau.

The Committee later proposed some amendments in relation to the Commercial Code, which became the context of the existing Law No. 6/2000. The purpose of the amendments was to counterbalance the safeness and simplification of the legal regulations and of the legal procedures, as well as to improve the respective regime step by step so as to lessen the influences caused by rapid change. The structure of the Law No. 6/2000 is classified base on the characteristics of the amendments, mainly: in order to diminish the inconvenience caused to the commercial activities, Article 23 (requiring the name of individual commercial entrepreneur with certain indication) and Article 103 (requiring a very strict procedure in relation to the transfer of enterprise's property right), which were previously mandatory stipulations, were adjusted to optional; unsuitable articles were deleted or amended if not met the reality of the Macau society, such as Article 39(1) and (4) (keeping and making

Chapter 5. Company Law of Macau

§1. Notion and Elements of Company

30. According to the notion of company (in Portuguese, *sociedade*) provided for in the Civil Code, companies are legal persons whose members bind themselves to enter with goods or services into a common exercise focused on a certain economic activity, which is not for mere enjoyment, in order to share in the profits arising from such activity or to achieve savings.[1] According to the Civil Code,[2] there are civil companies (in Portuguese *sociedade civil*) and commercial companies (in Portuguese *sociedade comercial*). Civil companies and commercial companies are distinguished from each other simply in accordance with: (1) the nature of activities carried out by them, and (2) the organizational form expressly adopted by them to carry out those activities. In detail, civil companies are those that are not engaged in a commercial enterprise, and have not expressly adopted one of the types of commercial company forms enumerated in the statute; commercial companies are all other companies, as long as they adopt one of the statutory types of commercial companies, such as general partnerships (in Portuguese *sociedades em nome colecivo*; in Germany *Offene Handelsgesellschaft*), limited partnerships (in Portuguese *sociedades em comandita*; in Germany *Kommanditgesellschaft*), private companies (in Portuguese *sociedades por quotas*; in Germany *GmbH*) or public company (in Portuguese *sociedades anónimas*; in Germany *Aktiengesellschaft*), irrespective of their object.[3]

1. See Art. 184(1) of Civil Code.
2. See Art. 184(2) and (3) of Civil Code.
3. See Art. 184 (3) of Civil Code and Art. 174(1) of Commercial Code.

31. At this stage, we would like to make it clear to our readers that in this book we are mainly discussing business organizations created for some economic purpose, that is, to carry on a business for gain. For such purpose, thereafter, while referring to the term 'company' without specific indication, it solely means 'commercial company'; civil company will not be a subject of study in this book. However, to say that companies are merely for gain or profit-seeking would be wrong and misleading for two reasons. First, the law provides vehicles in addition to the company that people can run gainful business. For example, individuals can exercise a commercial enterprise, in their own name, as commercial entrepreneurs, without the necessity to form a company.[1] Second, companies incorporated under the Commercial Code may be used for a purpose in which profit-seeking is not the exclusive main object. As mentioned above, the object of a commercial company is irrelevant as long as it adopts a proper statutory form.[2] Although the law prohibits companies from only carrying out non-economic activities (e.g., political, religious nor strictly cultural activities[3]),[4] this does not mean that the purpose of creating a company can narrowly be reserved for just making profits for sharing among partners or among shareholders. Economic activities in relation to material interests are allowable, for example, activities with a view to increase the shareholders' or

partners' capital in value. It is necessary for the readers to cautiously bear this point in mind.

1. See Art. 1(a) of Commercial Code.
2. See Art. 174(1) of Commercial Code.
3. See annexes to Business Tax Rule, approved by the Law No. 15/77/M.
4. This rule is implied from the words of Art. 9(a) that commercial entrepreneurs (e.g., companies) cannot be 'legal persons which do not have material interests as their object'.

§2. Types of Companies

32. As stated above, there are four types of companies: general partnerships, limited partnerships, private companies, and public companies. Companies that form for the purpose of carrying out a commercial enterprise have to adopt one of these forms, but the reverse is not true as there are some companies that do not form for the purpose of carrying out a commercial enterprise, for example, an engineering consulting company.

The rule that a company must adopt one of these four statutory forms thus places a limit on the freedom of contract. In other words, it is not possible for people to mix regulations of two different types and create a new type of company, nor is it possible to stipulate in the Articles of Association clauses that are against imperative norms establishing the typical features of each legal type of company. The rationale behind this limitation on the freedom of contract (Civil Code, Article 399) is legal certainty, in order to protection of creditors of the company, the public in general, and even shareholders, because all these constituencies will have a very clear understanding about what they can do and what they can get in dealing with the company.

§3. Clarification of Terminology

33. For the readers who have a common law background, they might easily be confused of the terminology used in this book and the Commercial Code. In common law countries, especially English-speaking countries like the UK and US, the term 'company' is clearly distinguished from 'partnership' based on the differing liability arrangement.[1] Even though, in certain areas, these two business forms do share some common features: for example, unlimited companies[2] can be established while limited liability partnerships are not unusual in modern life. However, it still looks strange to say that 'general partnerships' and 'limited partnerships' are two types of 'companies', as the Commercial Code provides.

Indeed, this is an unavoidable problem due to the gap between continental legal systems and common law systems, and a technical obstacle of translation between different languages (Portuguese, Germany, English and Chinese). In order to facilitate understandings for our readers, a clarification of terminology is necessary. In the following parts of this book, we will divide the category of 'company' into two sub-groups: 'corporations' and 'partnerships'. This classification follows the method that is normally used in common law system, that is, the difference of access

III. Transferable Shares

36. The capital of an SA has to be divided into shares with equal nominal value, which are represented by stock instruments (see *infra* paragraph 67). In principle, these shares represent items of property that are freely transferable, and the freedom of members to transfer their shares is readily attained through incorporation. The transferability of shares is especially important in the case of creating a company through public subscription, since normally many public investors participate in the company with an expectation that they can sell their shares for profit in the future.

However, in certain situations, the power to transfer shares may be subject to restrictions. It is affirmed in the Commercial Code 1999 (hereafter CCom) that shares of companies created by a public offer are always freely transferable (Article 407, CCom), but in an SA incorporated without a public offer of shares, there is no legal objection to allowing the Articles of Association to design some restrictions on transferability of shares. Furthermore, shares held by the promoter(s) are not transferable within a certain period (see *infra* note 20).

IV. Management under a Board Structure

37. An interesting feature of the SA is that it provides a delicate structure in which the power of management is solely reserved to a board of administration (Article 454(1), CCom). In other words, the managerial role is delegated to a small group of business professionals who constitute or who are accountable to the board. Shareholders may not directly interfere with the daily management of the company.

This formality of corporate structure, featured as the separation of management from 'ownership' (i.e., shareholding), can significantly increase the efficiency of decision-making of large companies (typically in the form of an SA). In such companies, a dispersed ownership structure may be common such that the company has hundreds of thousands of shareholders living in different places and without a strong incentive to get involved in the company's management.[1] A consensus-based decision-making model, through shareholder participatory democracy may thus fail, and an alternative model, through a concentration of decision-making power to a small group (i.e., the board of administration), may be more efficient.

1. There are a number of factors to explain the indifference or 'apathy' of shareholders. For example, the inappreciable fraction of an individual shareholder's interest in the company, and the so-called 'free-riding' problem can serve as some possible explanations.

§2. Formation of the SA

I. Methods of Formation

38. An SA may be formed by two different methods, depending upon whether a public offer of shares is made during the incorporation process. If there is no such public offer, the promoters subscribe to all the capital of the company, and the

general rules in relation to incorporation are applied to an SA as applied to all other forms of commercial companies. However, if a public subscription is launched, some specific rules need to be referred to, which are in particular designed for a purpose of protecting public investors who purchase shares.

II. General Requirements

39. No matter whether or not the SA is created by means of a public offer of shares, the following general requirements must be complied with:

(a) There must be at least three shareholders (Article 393(1), CCom).[1]
(b) The capital of an SA cannot be lower than 1,000,000 Macau *patacas* (local currency unit, hereafter 'MOP'), and the capital shall be divided into shares, all of the same nominal value, which cannot be lower than MOP 100 (Article 393(1), CCom).
(c) The act of incorporation, in the form of a written document, is necessary. Before 1999, the conclusion of the act of incorporation could only be done by public deed. However, the Commercial Code 1999 relaxed this requirement, and now promoters have a choice about the form of the act of incorporation, either in the form of a private document with certification of the signatures of shareholders[2] or in the traditional form of a public deed.[3] Both forms are allowed, unless the contribution of shareholders consists of goods that in nature can only be transferred by a specific form[4] (Article 179(1) CCom).
(d) The SA cannot be formed until its capital has been fully subscripted. In other words, all shares must be allotted to shareholders (Article 394(1), CCom).
(e) At least 25% of the capital must be paid-up upon incorporation (Article 394(1), CCom). The remaining payment, up to 75% of the capital, may be delayed to a specific date no longer than five years (see *infra* paragraph 57). However, it is important to notice that contribution in kind and the payment of the share premium are not allowed to be delayed (Articles 394(2) and 409(5), CCom).

1. Before the adoption of the Commercial Code 1999, the minimum number of shareholders of an SA was ten.
2. The act of incorporation has to be signed by a number of shareholders equal at least to the minimum legally required for the type of company that is proposed to be formed (Art. 179(6), CCom). In the case of creating an SA, the signatures of at least three shareholders are required.
3. At the beginning, the Commercial Code completely eliminated the requirement of notarization. But as amended by Law no. 16/2009 (of 10 Aug. 2009), the form of public deed has revived.
4. For example, if a member's contribution involves a transition of real property, the act must be done by public deed.

III. Procedures of Formation

A. *No Public Offer of Shares*

40. If an SA is not created through public subscription, normally the incorporation process could be divided into three parts: the choice of the company's name, the conclusion of the act of incorporation, and the registration of the company.

1. Company Names[1]

41. In practice, the first step of formation is to define the activity that would be carried out by the prospective company, and the promoters choosing one name for their intended company.[2] Certainly, it is up to the promoters themselves to choose a trade-name for their intended company. However, this does not mean that the promoters can select whatever name they like. First of all, the proposed name must not be misleading, and not identical or closely similar to the name of other registered firm Articles 15 and 16, CCom). Moreover, the name cannot be contrary to public ethics and good morals (*bons costumes*), and it must not include some words to the detriment of other people's reputation (Article 18, CCom). Second, the name must be in Chinese, Portuguese, or both.[3] English may also be used when the company's name is written in both official languages (Article 17(1), CCom). Third, it is required that the name of an SA must end with the words 'public company' in Chinese or Portuguese (while written in Portuguese, it can be abbreviated to 'SA') (Article 28, CCom). Finally, the proposed name must be submitted to the Bureau of Commercial and Personality Registrar (Conservatória dos Registos Comercial e de Bens Móveis) (hereafter 'Registrar'), applying for a certification in which the authority confirms that the name could be legally registered. If the registrar considers the name unacceptable due to one of the reasons described above, it may reject the intended name and clearly explain the reason in its statement (Article 30, Commercial Register Code (CRC)).

1. It is regulated that, without prejudice to the provisions of special laws, the company name, as well as its registered office, must appear on all contracts, correspondence, publications, announcements, webpage (if it exists), and all other documents addressed by the company to third parties (Art. 328, CCom).
2. See Paulo Olavo Cunha, *Direito das Sociedades Comerciais*, 4.ª edição (Maio: Almedina, 2010), 201.
3. However, there are some exceptions to this requirement of official languages (Art. 17(3), CCom). For example, the name of the company may include some words which are generally used by the public but without a proper translation in the official languages.

2. The Act of Incorporation

42. The act of incorporation is an important part of the constitution of the SA, and is also an indispensable document in the formation process. As mentioned above, the act of incorporation must be in a written form, drafted in Chinese or Portuguese, in the form of either a private notarized document or a public deed (see

supra paragraph 39). As for the contents of the act, the Commercial Code provides that certain information must be included:

(a) Date of conclusion of the act of incorporation.
(b) Identification of all shareholders and, if any, of their representatives.
(c) The declaration of the shareholders' intention to form a company and specify the chosen type.
(d) The capital subscribed by each shareholder.
(e) The Articles of Association that regulate the functioning of the company. The content of the Articles is discussed in the following paragraph (see *infra* paragraph 43);
(f) The appointment of the administrators, a single supervisor or the members of the supervisory board, and the company secretary.
(g) If the act of incorporation is in the form of public deed, it must clarify that the formation is in compliance with legal requirements. If the act is in the form of a private document in which the signatures of the shareholders are certified, a declaration issued by a lawyer must be attached, stating that, having followed all the process of incorporation, the lawyer verified the absence of any irregularities in it (Article 179(2) and (4), CCom).

3. The Articles of Association

43. The Articles of Association may be considered a fundamental component of the company's constitution, which can provide more details about the operation of business affairs, including the corporate structure and decision-making authority. Normally, it is left to shareholders themselves to decide how to draft the Article of Association, by either adding some clauses not mentioned in the law or even design some rules different from those stated in the law.[1] However, this freedom is sometimes limited by the law in two ways: first, the law compulsorily requires some elements to be contained in the Article; second, the law expressly forbids certain kinds of rules or disallows any modification of certain rules. In this sense, it is useful for a purpose of analysis to classify clauses into three groups: essential clauses (those that the Article must include), non-essential clauses (those that shareholders are free to include in the Article), and forbidden clauses (those that may not be included in the Article):

(a) Essential clauses cannot be Excluded from the Articles of Association (Article 179(5), CCom):
  - The type of the company, as well as its name (see *infra* paragraph 41).
  - The object of the company. It is required that the object must be indicated in a manner that can properly and clearly describe the activities that the company intends to carry out and that constitute such object. It is not allowed to use any expression that may induce third parties to believe that the company operates activities that it cannot conduct, especially those that can only be exercised by companies regulated under special rules or are dependent upon administrative authorization (Article 180, CCom).[2]

- The registered office of the company which shall be a determined place (Article 181, CCom).[3]
- The company capital (in MOP (Article 182, CCom)), with indication of the method and the time limit of its payment.
- The composition of the administration and supervisory body of the company.
- In the case of an SA, the Articles of Association shall also contain some additional information: the nominal value and number of the shares; the nature of the instruments representing the shares, either nominative or to bearer, and rules of conversion between them; the authorization for the issue of bonds; the amount up to which the administration can raise the company capital without the need for a resolution by shareholders; the types of shares (ordinary or preference); and the various categories of ordinary shares (if equal rights do not attach to all of them) (Article 395, CCom).

(b) The shareholders may include clauses that they regard as appropriate or necessary in the Articles of Association, even though these clauses are not found in the law or are different from the default arrangement of the law. Some examples are provided here:

- The Articles of Association may stipulate a specific duration of the company (if no duration was stated, the duration of a company is for an undetermined period of time) (Article 183, CCom).[4] The determination of the duration may also be made by reference to a fixed term – for a specific number of years or until a certain date – or a factor '*certus an incertus quando*': for example, until the conclusion of the job or until the death of a given shareholder or partner.[5]
- The Articles of Association may create special rights of certain shareholders, for example, the right to participate in the administration of the company or the right to profits in a proportion different from the shareholding. Such special rights cannot be suppressed or modified without the agreement of the respective holder, unless there is an express provision to the contrary in the Articles (Article 184, CCom).
- The Articles of Association may allow the board of administration of the SA to decide the issue of bonds (Article 437(1), CCom).[6]

(c) Some clauses are forbidden by the law and therefore void:

- No stipulation may appear in the Articles of Association that a shareholder shall receive a fixed remuneration from his or her capital or labour service to the company (Article 195(2), CCom). The idea is that when the company is created, it is the legal owner of its own assets, transferred by the shareholders' contribution. Thus, shareholders cannot claim any payment from the company's property.
- It is prohibited to grant to any shareholder a special right of obtaining information on the activity of the company (Article 195(3), CCom). This is intended to avoid potential serious 'information asymmetries' between shareholders.
- Any provision depriving a shareholder from sharing in the profits of the company, or exempting him or her from responsibility in its losses, shall be void (Article 197(2), CCom). No member should be allowed to grab all the profits but leave all loss to others.

- Any clause excluding or restricting the liability of administrators is forbidden (Article 246(1), CCom).

1. The theoretical basis of this position is on the traditional view that regards the act of incorporation as a company contract in which contractual parties (i.e., shareholders) are free to negotiate its terms. See Art. 980 of Civil Code of 1966, providing that: 'Company contract is one kind of contract in which two or more persons have obligation to contribute goods or services for the joint exercise of some economic activity that is not only for mere fruition, but in order to share the profits resulting from that activity.' Of course, in the case when it is created by a single shareholder (i.e., single shareholder private company or one-man company) or by a legislative act, then it will not be a contract but rather a unilateral legal transaction.
2. Although the object may stay as a restriction on the company's activity and the powers of administrators, such restrictions only have an internal effect, and shall not be referred against the right and interest of a person dealing with the company in good faith, see *infra* para. 131.
3. The administration body of the company can freely move the registered office within Macau, and the company can stipulate of a special domicile, different from its registered office, for certain transactions (Art. 181(2) and (3), CCom).
4. If shareholders decide to extend the duration of the company, they shall do it before the expiry of such duration, through a resolution in accordance with the rules relating to the modification of the Articles of Association.
   As for extension of duration after its expiry, the original provision of the Commercial Code 1999 regulates that such extension can only be achieved by unanimous agreement of shareholders, except if there is a legal provision to the contrary. This rule is now amended by Law no. 16/2009, which provides that, in such a situation, the extension of the duration can be done through a special resolution. The procedure and majority required for passing such a resolution are the same as those for the dissolution of the company, unless there is a higher requirement specific for this purpose. For the shareholders who still intend to exonerate himself or herself from the company, the rules of redemption of participations shall be applied (see *infra* para. 209). See also Arts 183(2) and 323-A, CCom.
5. See António Menezes Cordeiro, *Manuel de Direito das Sociedades, I, Das Sociedades em Geral* (Junho: Almedina, 2004), 423.
6. If there is no such specific arrangement in the articles, the default rule is that bonds issues must be decided by shareholders.

4. Registration

44. Registration is the final step in the formation of a company. The application for registration shall be filed within fifteen days from the date of the act of incorporation with the commercial registrar (Article 187(1), CCom). It is the duty of administrators and the company secretary to apply for registration, but shareholders also have legitimacy of application (Article 187(2) and (3), CCom). The company must also be registered with the Financial Department (Repartição de Finanças) for taxation purposes. A declaration of commencement of operation has to be submitted at least thirty days before the start of operations.[1]

Registration is an indispensable step. The company is formally created and only enjoys legal personality with the registration of the act of incorporation, (Article 176, CCom). On the other hand, if a company keeps running a business without registration for more than three months, the Public Prosecutor will promote its liquidation (Article 187(4), CCom).

1. Article 8 of Regulation on Industrial Tax, approved by L 15/77/M (31 Dec. 1977).

45. It is possible that, prior to registration, the company may have already started to run its business. It is common that the promoter may sometimes pay the cost and expense arising from the process of incorporation with their own money before the company is actually created, with the expectation of a refund by the company after its registration. Pre-registration acts will thus raise legal questions in several aspects.

First, as for the cost and expense (e.g., the registration expenses, taxes and fees inherent in the process of incorporation) that are pre-paid by the promoters, it is provided that the registered company should compensate those people (Article 188(1), CCom). The company can also pay a service fee to those promoters for their work during the process of incorporation. However, such compensation and payment can only be made by an action of the administration board, which shall be communicated to the pre-paid parties within thirty days from the date of registration (Article 188(2), CCom).

Second, concerning pre-registration activity, according to Article 190, CCom, those who act on behalf of the unregistered company, as well as the shareholders who authorize them to act, shall be jointly and severally liable, without limit, for these acts. This liability does not depend upon the full exhaustion of the company's assets (Article 190(2), CCom). However, after registration, the company may assume the rights and obligations arising from any pre-registration acts in its name, provided that two conditions are satisfied: (1) the company is registered within the time limit of fifteen days mentioned above in Article 187(1), CCom, and (2) such acts were carried out by persons who are entitled to bind the company after its registration (e.g., an administrator). This assumption will immediately release from all responsibility the persons who would otherwise be personally liable for pre-registration acts (Articles 188(4) and 190(1), CCom).

Third, inter-shareholder relationships prior to registration are regulated by the provisions of the Articles of Association and by the rules applicable to the type of company at issue, with any necessary adjustments, and with the exception of those that presuppose registration (Article 189(1), CCom). However, any *inter vivos* transfer of contribution and the amendment of the Articles of Association before registration must receive unanimous agreement of the shareholders (Article 189(2), CCom).

B. *Public Offer of Shares*

46. It will normally be the case that an SA seeking to raise substantial capital may make a public offer of shares during the formation process (though it can also offer its shares to the public later after incorporation). This practice gives the company an advantage in gaining access to a larger pool of funds so as to meet potential demands of mass production and size economy needs. However, if the SA is formed through public subscription, more complicated procedures and stricter rules must be complied with.[1]

1. Of course, no matter whether or not there is a public offer of shares, general procedures must be followed: for example, approval of the company name; the conclusion of the act of incorporation; the registration of the company.

47. To begin with, the core actor of the procedure is undoubtedly the promoter(s), individuals or legal persons, who shall initiate the public subscription and are jointly and severally liable for the process until the registration of the company (Article 396(1), CCom). The promoter(s) must subscribe and pay, in cash, at least MOP 1,000,000 or 20% of the capital, depending on which is higher (Article 396(2), CCom).[1] The remaining capital will be the object of the public offer.

1. It is necessary to note that the shares subscribed by the promoter(s) cannot be freely transferred or charged before the approval of the accounts of the third accounting period. See Art. 396(2), CCom.

48. It is then the responsibility of the promoter(s) to prepare a prospectus, that is, a discussion of the company's prospects, which must contain the following contents (Article 397(1), CCom):[1]

- The full draft Articles of Association, precisely explaining the business and object of the company.
- The number, nature, and nominal value of shares, as well as the issue premium (if it exists).
- The estimated amount of costs paid by promoters, if these are to be refunded by the company (see *supra* paragraph 45).
- The time limit for subscription and the credit institutions (banks) through which the public offer of shares will take place.
- The time limit within which the incorporating meeting shall be held.
- A detailed and genuine study discussing technology, economic and financial factors, as well as, forecasting the operation of the company for the first three years. The full identification of the author(s) of this study, if different from the promoter(s), must be disclosed (Article 397(2), CCom).
- If necessary, rules on the allocation of the subscription.
- The conditions under which the company can or cannot be incorporated if the public subscription is incomplete.
- The amount of subscribed capital that must be paid in the act of subscription, the time limit for payment of the remainder, and the time limit for refund of such amount if the company is not created.

1. A copy of the prospectus shall be submitted to the Monetary Authority of Macao (Autoridade Monetaria de Macau) (before 1999, it is called 'Monetary and Foreign Exchange Authority of Macao' (Autoridade Monetaria e Cambial de Macau)).

49. Given the fact that the prospectus is normally the only source for the public investors to understand the business of the company and that those investors will rely on this information to make their investment judgment, it is essential to guarantee the authenticity and completeness of the prospectus. It is provided that all promoters are personally, jointly, and severally liable, without limit, for the accuracy of the factual elements in the prospectus (Article 398, CCom).[1]

1. For this purpose, the authors of the study attached in the prospectus are also considered as promoters. So they will also be personally liable for falsehood in the prospectus. Furthermore, it is stressed

Moreover, if the Articles of Association grant to a shareholder a special right to participate in the administration, he or she cannot be dismissed by resolution of the other shareholders (Article 389(1)–(3), CCom).[1]

Although it is possible to dismiss an administrator without just cause, this does not deprive the administrator of his or her right to remuneration. In this case, he or she should receive as compensation the remuneration that he or she would have earned until the end of his or her term of office or, if there is an undetermined term, the sum of remuneration of two years (Article 387(3), CCom).

An administrator can also be dismissed by decision of the court, upon request of any shareholder or administrator, if there is just cause. A serious or repeated breach of the duties of administrator is considered as just cause for dismissal, especially referring to the following acts: (a) the non-registration or the late registration, or the lack of maintenance in order and updating of the company books; (b) carrying out, for his or her or other persons' benefit, an activity in competition with the company (except if there is prior assent by shareholders) (Article 389(4), CCom).

Dismissal cannot be invoked against bona fide third parties, before the company informs them by adequate means (Articles 389(6) and 388(4), CCom).

1. In this situation, the only way to force such shareholder-administrator out of office is by judicial dismissal, as discussed later in this paragraph.

IV. Supervisory Body and Company Secretary

227. Only those SQs of relatively large size are compulsorily required to include the supervisory body and company secretary (Article 214(2), CCom). For other SQs, it is up to them to decide whether or not to have these corporate bodies.

§5. Books and Accounts, Merger and Division, Dissolution and Liquidation

228. General rules apply to all types of companies on these matters (see Chapter 1).

§6. Single Person Company

I. Introduction

229. The form of a single person company has been introduced by the Commercial Code 1999. It is now allowed that any individual or legal person[1] can create a private company, the capital of which consisting of a single share, with him or her being initially the sole holder (single shareholder private company, *sociedade por quotas com um único sócio*) (Article 390(1), CCom). By establishing a single person company, even individual traders may be able to enjoy the benefits and protections of limited liability.[2]

Single shareholder private companies are regulated by general rules on SQ's, with necessary adjustments (Article 390(4), CCom), and also by the specific regulation mentioned in Articles 390–392, CCom. It is important to note that all these specific rules apply equally to two types of single person companies: private companies that were created with a single shareholder and the single shareholdership continues (i.e., 'initial single person companies'), and private companies whose number of shareholders have been reduced to one (e.g., due to redemption or transfer of shares), and after ninety days, the plurality of shareholders is still not re-established (i.e., 'survival single person companies') (Article 390(3), CCom).

1. Before the amendment by Law no.16/2009, a single person company could only be created by an individual.
2. See J. Pinto Ribeiro, 'O novo regime das sociedades commerciais em Macau', BFDUM 9 (2000): 99 et seq.

II. Restriction

230. Although a legal person is permitted to form a one-man company, there is one important exception: a single person company cannot become the single shareholder of another single person company. In other words, a single person company is prohibited from establishing a single shareholder private company, nor can it acquire the sole share of a single shareholder private company (Article 390(2), CCom).

III. Transactions between the Single Shareholder and the Company

231. In order to minimize the risk of self-dealing and protect the interest of creditors of the company, the law imposes strict limits on legal transactions agreed upon, directly or through an intermediary, between the single shareholder and the company: any such transactions shall always be done in writing, and must be necessary, useful, or convenient for the pursuit of the company object; otherwise, it is void (Article 391(1), CCom). Moreover, the legal transactions must always be subject to a prior report made by an auditor with no connection to the company, and this report shall particularly declare that the interests of the company are duly protected and that the transaction is in accordance with normal market conditions and price. Without such a report, the legal transaction cannot be concluded (Article 391(2), CCom).

IV. Decisions of the Single Shareholder

232. The single shareholder must make decisions in person on matters that, in accordance with the law (Articles 216 and 381, CCom), fall into the competence of shareholders. All decisions shall be recorded in a book specially kept for such purpose, and shall also be signed by the shareholder and by the company secretary, if there is one (Article 392, CCom).

Chapter 2. General Partnership (*Sociedade em Nome Collective* (Hereafter 'SNC'))

§1. General Elements

I. Characteristics

238. The name of SNCs shall have the addition 'General Partnership' in either official language, or, if written in Portuguese, the initials 'S.N.C.', so as to indicate its nature. Anyone who is not a member of the SNC shall be extremely careful not to allows his or her name to appear in the name of a general partnership; otherwise his or her allowance will render him or her jointly liable with the partners for the obligations of the company (Article 24, CCom).

As mentioned above, all partners are personally and unlimitedly liable for the partnership's debts, even if these debts have been contracted prior to the date when he or she joined. However, this does not mean that creditors of the partnership can at any time call any partner to pay for the debt. Indeed, the liabilities of partners are on a subsidiary basis: they are called to pay when the partnership's assets are insufficient to cover all its obligations (Article 333(1), CCom). Before the exhaustion of the assets of the partnership, creditors cannot put their hands in the pockets of partners for payment.

From an external angle, each partner is jointly and severally liable with the other partners for the liabilities of the partnership. In this sense, creditors can pursue any partner for the remaining payment after the full execution of the partnership's assets. However, from an internal perspective, the assumption of liabilities among partners is in the proportion to which partners share in the losses of the partnership.[1] Thus a partner who by himself or herself pays for obligations of the partnership has a right to demand compensation from the other partners in such proportion (Article 331(2), CCom).

Furthermore, in SNC's, joint liability is also reflected in two aspects: first, in the circumstance that a partner's participation is made in kind. If, for any reason, there is a negative difference between the value of the goods at the date of their payment and the value resulting from the appraisal, such partner is responsible for the payment of the difference in cash; other partners are subsidiarily liable in relation to the partner at issue, and jointly and severally liable among themselves for the payment of the difference in cash (Article 331(3), CCom). Second, if a person who, not being a member of the partnership, acts in any way towards third parties as if he or she was, this person is jointly and severally liable with the partners towards the third parties who have negotiated with the partnership in the belief that the person was a partner (Article 331(4), CCom).

1. In principle, partners shall assume the losses of the company in accordance with the proportion of the nominal value of their respective capital participations, except if there is a provision of the law or of the Articles of Association to the contrary (Art. 197(1), CCom). However, it is necessary to note that, in SNC's, partners who contribute with labour or service do not share in losses, unless there is a clause of the Articles of Association to the contrary (Art. 334(2), CCom).

II. Partners and Contributions

239. The minimum number of partners of an SNC is two. Unlike the requirement on corporations, partners can contribute with capital (either in cash or in kind), as well as with labour or services (Article 332(1), CCom). Therefore, there may be two possible categories of partners in an SNC: capital-contributing partners, and labour-contributing partners (*sócio de indústria*).

As for capital-contributing partners, their status is not very different from that of shareholders in a corporation on matters of payment of capital participation. The payment of capital participation can be delayed for a time limit not longer than five years (Article 332(2), CCom).

As for labour-contributing partners, the value of their contributions is not calculated based on the capital of the SNC (Article 334(1), CCom). In internal relations, they do not share in losses, except if the Articles of Association provide otherwise (Article 334(2), CCom).[1] This means that, in principle, a labour-contributing partner who is called to pays for obligations of the partnership, has a right to demand full compensation from those capital-contributing partners.[2]

1. This may raise a problem of determination of the SNC's capital when it is created only by labour-contributing partners. First, as mentioned below, since the value of their contributions is not calculated based on corporate the capital, the company is indeed incorporated with no capital. Second, because company will start its business with no capital, the supposed guarantee function of corporate capital will thus be disrupted, and it will cause some problems to the functioning of 'capital maintenance' doctrine.
2. However, the law is unclear about how the internal relations shall be shall be arranged regarding loss-sharing, when the SNC is merely composed of labour-contributing partners and the Articles of Association are silent about this matter. It is unknown whether a labour-contributing partner, who is called to pay all debts of the SNC, has a legitimacy to claim any compensation from his counterparts (even if he or she can do so, it is still not clear how the proportion of loss-sharing shall be determined, since the default rule in company law, that is, deciding the issue based on capital structure, does not work in an SNC with zero capital).

III. Articles of Association

240. Other than those essential contents (e.g., name, type and object) required by general rules, the Articles of Association of an SNC shall especially mention two additional provisions: (a) the complete name of each partner, and (b) the value of labour or services contributed by the partner, for the purpose of determining the distribution of profits (Article 333(1), CCom). Labour-contributing partners must, in an attached statement with the Article of Association, describe by a summary form the activities that they undertake on behalf of the SNC (Article 333(2), CCom).

IV. Competition

241. In general, partners are prohibited from competing with the SNC, either directly or indirectly (e.g., by participating in another competitor company). Article 335(1), Ccom), regulates that, only with the express consent of all the other

partners[1] can a partner exercise, for his or her own or other persons' benefit, an activity covered by the object of the SNC, or become an unlimited liability partner of another partnership, or be a shareholder with a participation of more than 20% in the capital or in the profits of a partnership or company whose object coincides totally or partly with the SNC's object.

The SNC can demand that the partner transfers to it the right to the profits obtained or to be obtained due to the breach of non-competition rule, and shall do so within thirty days from gaining knowledge of the forbidden fact and, in any case, within six months from its occurrence (Article 335(2), CCom). In other words, the SNC has a right to recover the profit the partners has made by reason and in the course of competition, and the partners shall be liable to account for profit.

1. The consent is presumed if the exercise of the activity or the participation in another partnership or company is prior to the joining of the SNC, and all the other partners had knowledge of such facts (Art. 335(3), CCom).

V. Right to Information

242. Besides the general rules on the right to information (see *supra* paragraphs 93–97), a partner of an SNC who is not an administrator has an extra right to be informed of the state of business and the property state of the partnership. The administrators shall allow such partner to inspect the property of the SNC and to consult, at the registered office, the accounts, books, and other documents. During the course of inspection and consulting, the partner can be accompanied by an expert, and can also properly make copies of relevant documents. (Article 336, CCom).

VI. Transfer of Participation

243. The SNC is the most closed type of commercial companies, and thus any *inter vivos* transfer of participation of a partner is subject to the consent of all the other partners. Moreover, special rights are not transferred together with the participation (Article 337, CCom).

§2. Redemption, Decease, Execution, Exoneration and Exclusion

I. Redemption

244. The participation of a partner shall be redeemed in the following cases: (a) death of the partner, except if the law provides otherwise (see *infra* paragraph 243); (b) execution of the participation in accordance with the law (see *infra* paragraph 244); (c) exclusion or exoneration of the partner (Article 338(1), CCom).

If the redemption is not accompanied by a reduction of the capital, the participations of the other partners shall be proportionally increased, and this fact shall be registered (Article 338(2), CCom). Alternatively, partners can pass a unanimous

resolution to create one or more participations of a nominal value equal to the one that was redeemed and extinguished for immediate transfer to partners or third parties (Article 338(3), CCom).

After registration of the redemption, the liability of the partner or of his or her heirs in case of death continues for two years, in relation to transactions concluded prior to the registration (Article 338(5), CCom). Put another way, creditors of the SNC need to take actions within two years if they intend to call a former partner to be liable for the obligations of the partnership.

In any circumstance, the redemption cannot be detrimental to the principle of capital maintenance. If, after the payment of the redemption, the net worth of the SNC will become lower than its capital, the redemption shall not take place (Article 338(6), CCom).

II. Death

245. The death of partner is cause for redemption of participation. The remaining partners shall redeem the participation of the deceased partner and pay to his or her heirs, if the Articles of Association do not provide to the contrary. However, the remaining partners also have two alternative options: they can either decide to continue the partnership with the heirs as a partner if the latter agree to this within ninety days, or instead decide to dissolve the partnership, in which case they shall inform the heirs within sixty days from the moment at which any of the partners had the knowledge of the death (Article 339(1), CCom).

If the partnership continues with several heirs, they can freely divide among themselves the participation of the deceased, or entrust one or some of them with it for management (Article 339(2), CCom).

III. Execution

246. Concerning the personal debts of a partner, if the partner refused to voluntarily perform his or her obligation, the creditor has the right to execute his or her property in accordance with the law (Article 807, CC). The participation of the partner in the SNC may be the object of execution. In other words, the partner's creditors are entitled to enforce the payment of money by execution of participation in the partnership.

If other assets of the partner are sufficient for the payment, a creditor of such partner can only execute the right to profit and to share in the liquidation (Article 340(1), CCom). In this case, the creditor cannot ask for the redemption in order to satisfy his or her credit.

However, if the other assets of such partner become insufficient to cover his or her obligation, the creditor can then demand the redemption of his or her participation (Article 340(2), CCom).