Blueprint to a prospective pre-suit court-connected mandatory mediation with an easy-opt out in Macau

Plan para una posible mediación pre-procesal judicial obligatoria con una fácil opción de exclusión voluntaria en Macao

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Abstract: This paper aims to drill into, and shed light on, the reasons that warrant the creation of a prospective pre-suit court-connected mandatory mediation with an easy opt-out in Macau. Such model is bound to be a natural follow-through of the prone cultural background in which Macau sits. Such assertion lies at heart of this essay.

Resumen: El objetivo del presente artículo es profundizar y arrojar luz sobre las razones que fundamentan la creación de una posible mediación pre-procesal judicial obligatoria con una fácil opción de exclusión voluntaria en Macao. Dicho modelo tiene vocación de ser una continuación natural del contexto cultural en el que se inserta Macao. Dicha afirmación constituye el núcleo de este artículo.

Keywords: Prone Cultural Background, Legal Chinese Confucianism, Court-Connected Mandatory Mediation, Standards of Quality, Mediator Misconduct.

Palabras clave: contexto cultural propenso, confusionismo legal chino, mediación judicial obligatoria, estándares de calidad, mala praxis del mediador.

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Introduction

Justice in Macau stands at a crossroad. Advocate-controlled, expensive, lengthy, underpinned by an outpaced and outdated adversarial (Cortina, 2007) model (Kovach, 2005) that augments acrimony between disputants (Taruffo, 2007; Silva, 2008 & Gottwald, 2001), Macau has clearly (untapped and) unfulfilled the promise to affording a fundamental right to its residents: effective access to justice (art. º 36.º, n.º 1, of Macau Basic Law). This gruesome situation is in dire need of quashing. To cater for that, Macau must embrace a (top-notch and state-of-the-art) court-connected pre-suit mandatory mediation with an easy opt-out. The overriding goal of this paper is to lay down the foundations upon which such a model should stand.

This paper revolves around two research questions: (i) to (briefly) determine the real function of mediation in the context of a specific culture (especially the Confucian culture) (ii) whether a pre-suit court-connected mandatory mediation regime is suitably tailored for Macau. The reason for this axiom is as clear as straightforward: Macau has a prone cultural background (deeply embedded in Confucianism traits) that is bound to prop up the myriad of benefits of, and arisen from, mediation.

Macau should take advantage of its prone cultural background to spur a pre-suit mandatory mediation with an easy opt-out

Judicial courts in Macau are overcrowded. Overburdened dockets (and clogged backlogs) are to be blamed. Against this backdrop, Macau´s legal system is in dire need of ferreting out other dispute resolution mechanisms capable of solving disputes in a conciliatory manner. This would circumvent the deleterious effects of the loss of trust (Jhering, 1981); Marasco, 2006 & Severin, 2011) and trustworthiness (Colquitt & Rodell, 2011) in Macau´s system of administration of justice, which are mounting exponentially as we write.

Litigation (or interchangeably, court-adjudication) is not the only way to solve disputes (Menkel-Meadow, 2002). In Macau´s case, there is one slight detail that can pave the way to the flourishing of mediation: its prone cultural background deeply embedded in Confucianism traits. The propensity of Chinese culture to propel conciliatory means of solving disputes has been pointed out by polymath scholars (Shiga, 1988). Drawing upon the proclivity of the Chinese culture to adhere hastily to conciliatory means of resolving disputes (especially and neatly mediation) (Huang, 2017), learned scholars like Jerald Auerbach (1982) have extensively written of the Quaker, Chinese and Jewish communities' reliance on mediation on the heels of their utter distrust of alien legal culture (Nolan-Haley, 2012), which would often run afoul with the fundamental tenets of their legal culture.

It should not amount to a flummoxing finding that the Chinese culture proneness (deeply soaked in Confucianism traits) to embrace amicable dispute resolution mechanisms dates back centuries (Chan, 2012). Whereas this finding seems blatant and arrant, scant (if any) have steps been undertaken by Macau´s lawmakers and policymakers towards the creation of a comprehensive and full-fledged mediation (as opposed of arbitration) legal framework. It is mind-boggling (even bewildering) that there is no mediation legal framework to this day, in spite of the fact that Macau´s system of administration of justice would reap uncountable benefits from such an enactment, as would a swift, fuss-free, cost-effective and streamlined mediation process. A prospective pre-suit court-connected mandatory mediation with an easy opt-out legal framework must not fall short of matching the fundamental tenets of an effective access to justice. This paper will concisely lay down the foundations upon which a forthcoming mediation legal framework in Macau should sit (Santos, 2019).

Blueprint to the prospective court-connected pre-suit mandatory mediation with an easy opt-out: the dire need for the implementation of both triggering laws and procedural laws

The overall dismay with Macau´s system of administration of justice is lurking, drawing near and thus is looming large. This to-be-frowned-upon situation spawned the loathsome «sporting theory of justice» (Pound, 1908), which conserves the great bulk of its freshness to this day. This disheartening, jarring, dispiriting, time-consuming, energy-draining epiphenomenon is in dire need of quashing.

To cater for that, Macau´s prospective pre-suit court-connected mandatory mediation with an easy opt-out must have triggering laws (to trigger the mediation process) and procedural laws (to deal with the process of mediation) (Alexander, 2008). The dichotomy between triggering laws and procedural laws would serve to both facilitate the (and nudge) disputants towards mediation (triggering laws) and to designing (and craft) key aspects of mediation process, ranging from the commencement, protocol, termination of mediation to the enforcement of mediated settlement agreements (procedural laws) (Alexander, 2008).

Why a court-connected pre-suit mandatory mediation with an easy opt-out is utterly necessary in Macau as opposed to a voluntary mediation framework: the disputants lack mediation education to spawn informed decisions

A pre-suit court-connected mandatory mediation with an easy opt-out is needed in Macau because disputants lack

mediation education as to equip them to make informed (Nolan-Haley, 2013) dispute resolution choices (Fogel & Strong, 2016). Both laypeople and disputants have no in-depth knowledge about mediation in Macau as a full-fledged and comprehensive mediation is yet to be carved out on this dazzling jurisdiction. Which means that they are woefully ill-equipped to shoulder the burdensome responsibility to choose mediation over arbitration, conciliation, negotiation, or court-adjudication. Against this backdrop, voluntary mediation is not befitted to Macau for the time being (Sander, 2007).

A court-connected pre-suit mandatory mediation with an easy opt-out in Macau would attain two laudable goals at the same time. Firstly, it would enable the Macau residents to reconnect with their pristine legal culture (being that resolving disputes in an amicable manner rather than a contentious one). Secondly, it would foster their mediation education in the long-term as the disputants would be increasingly acquainted with the multitudinous benefits of mediation while brushing aside (and foremost hamstringing) the noxious dependence on lawyers´ dispute resolution choices. To that end, a far-reaching grassroot mediation education must be launched in Macau.

The perceived need to weed out lawyers from court-connected pre-suit mandatory mediation in Macau

Against this background, the bevy of poignant calls to dwindle the intervention of lawyers in both joint-mediation sessions and caucuses are neither unwarranted (Shestowsky, 2018) nor uncalled for. The sought-after robustness of party autonomy hinges upon the enhancement of disputants´ dispute resolution education. A sole and square reliance on lawyers´ self-centred and (egoistical) dispute resolution choices (Shestowsky, 2017) would not suffice to, and thus would fall short of, accomplishing that commendable goal. The rationale behind this assertion is hardly befuddling. Often, lawyers grapple with agency problems (Borbely, 2011) for they tend to maximize their own interests (in the form of a mirage to cash in enhanced fees in litigation) and minimize their clients´ underlying interests in resolving (or haggling) the dispute. To add to their woes (so to speak), lawyers tend to use mediation to shield themselves from malpractice lawsuits (Welsh, 2001) while bringing along an unwanted adversarial mind-set to the table of mediation (Nolan-Haley, 2018) that deserves nothing but to be openly upbraided and excoriated.

For those reasons alone, the prospective Macau lawmaker should seriously contemplate the possibility to cast off lawyers from both joint mediation sessions and caucuses. With a view to assist disputants to navigate through the uncharted waters of court-connected mandatory mediation, the prospective Macau lawmaker should create a new-fangled legal profession. The Brazilian legal profession of public defender would be a befitted option to account for (Martins, 2016).

Creating procedural nudges to steer disputants to pre-suit court-connected mandatory mediation with an easy opt-out: tax reliefs and public credits convertible into money

The prospective Macau lawmaker must set forth befitted nudges (Sunstein, 2015; Thaler & Sunstein, 2009) aimed at not only beguiling disputants to partake in mediation sessions in good faith (Woolf, 1995), but to coax them to avoid exercising the opt-out option. What procedural nudges are those? Ranging from a cost-effective (thus exempt of any costs) access to justice, a tax relief in the event of hammering out a mediated settlement agreement or public credits convertible into money in the event of a voluntary acceptance with the outcome of the mediated settlement agreement, would amount to procedural nudges to eschew the usage of the easy opt-out option. Yet there are limits to be drawn. Disputants are not to be chastised in the event of opting-out from court-connected mandatory mediation, nor are they to be imposed costs if they had partaken in mediation sessions in good faith (Dunnet v. Railtrack) (año??). Such is one of the ways to protect (and respect) the quintessential principle of party autonomy. Additionally, this would amount to a befitted way to squarely aligning private interests (party autonomy) (Rampall & Feehily, 2018) with the crave for the overall efficiency of Macau´s system of justice (general interests).

«Sizzling hot topics» to be included within the remit of a pre-suit court-connected mandatory mediation with an easy opt-out

The prospective Macau lawmaker must delve in, and throw light on, Macau´s underlying social reality (Eberle, 2009) aimed at ferreting out, and pin down, the silent forces of dispute resolution in Macau. To that end, a host of bodies of empirical research must be undertaken to capture the gist of the foregoing silent forces of dispute resolution in Macau. Upon completion, the legislator must be able to withdraw invaluable conclusions as to which «sizzling hot topics» are in dire need of being included in the remit of pre-suit court-connected mandatory mediation. Gaming law contracts and gaming concessions should be included within such remit given its paramount importance to Macau´s economy. The same goes to matters related to child support, child custody and alimony. These are topics that usually breed strife between the estranged (and often) frazzled disputants. Court-connected mandatory mediation would tone down the simmering temperature of those disputes while striving to spawn a rational decision making in the process (Musinger & Philbin, 2017).

Accreditation of mediators, training, and enrolment in pre-suit court-connected mandatory mediation rosters

The accreditation of mediators, training, and enrolment in pre-suit court-connected mandatory mediation rosters plays a pivotal role in building a sought-after credibility to Macau´s forthcoming pre-suit court-connected mandatory mediation. To cater for that, an Independent Committee of Mediation of Macau is to be created. Which begs the question: to what end? Which incumbencies are to be allotted to that paramount body of administration of justice?

The Independent Committee of Mediation of Macau is to shoulder the responsibility for/to:

- overseeing the accreditation of mediators;
- providing appropriate training to mediators;
- zoom out (and zoom in) the enrolment of the accredited mediators on the court-connected mandatory mediation´s rosters;
- entertaining any complaints lodged against mediators or mediators-arbitrators on the grounds of mediator´s misconduct (ranging from exerting coercion in mediation (Sander, Allen & Hensler, 1996)
- failing to display unshakeable impartiality throughout joint mediation sessions or caucuses; or using threats (Welsh, 2011) or any other reproachable demeanours alike). The foregoing remarks chime in with the pressing need to set forth sterling standards of quality and codes of conduct while laying down styles of mediation to keep allegations of mediator´s misconduct at bay.

Standards of quality, codes of conduct and styles of mediation: mediator ethics to dwarf mediator misconduct

In a bid to weed out phony (and mountebank) mediators from pre-suit court-connected mandatory mediation in Macau, robust standards of quality and codes of conduct are to be carefully crafted. Notorious cases such as Karpin (Hinshaw, 2016) and Everett are to be both cast off and swept aside if a given system of administration of justice is to strive for overall efficiency and functional credibility. To prevent those heinous phenomena from happening in Macau, mediation needs to be punctiliously regulated (Hinshaw, 2016) with a view to spur, and to aggrandize, the levels of mediation ethics (Menkel-Meadow &. Abramson, 2011). Taken together, these topics are bound to be the linchpins of a full-fledged, comprehensive, and functional pre-suit court-connected mandatory mediation framework in Macau. Something that the prospective Macau lawmaker should never lose sight of.

As hinted above, there is no such thing as a full-fledged, comprehensive, and functional court-connected mandatory mediation framework devoid of, and decoupled from, brawny and full-bodied standards of quality. To shun allegations of mediator misconduct, freshly accredited mediators (likewise: seasoned and experienced mediators) must keep abreast with the newest developments in the purview of mediation. The Independent Committee of Mediation of Macau is bound to play a starring role in this regard.

As captioned, the Independent Committee of Mediation of Macau is to be ascribed the momentous task to provide appropriate training of prospective mediators. The cohort of prospective mediators must become acquainted with the various styles of mediation amidst a multicultural and variegated world we live in. The bulk of the most important styles of mediation range from transformative mediation (Bush & Folger, 2004), narrative mediation (Winslade & Monk, 2008), evaluative mediation (Riskin, 1996), directive mediation (Riskin, 2003), and insight mediation (Picard, 2016). The wider is the training provided to the mediators, the narrower will be the room to the allegations of mediator misconduct. At the end of the day, solving a dispute (Michaelis, 2005) is what matters the most as opposed to zoom out (and zoom in) the mediator´s behaviour in joint mediation sessions and caucuses (Galton & Allen, 2014).

Enforcement of domestic and cross-border mediated settlement agreements

Enforcement (Pound, 1908) is the primary driver of, and one the crowning achievements of, an effective and functional system. To fulfil the long-held desire of becoming a dispute resolution hub in the Far-East, Macau must outline a brisk and streamlined procedure to enforce domestic mediated settlement agreements.

By the same token, Macau ought to cajole China (a signatory party to the Singapore Convention on Mediation) with a view to extending the application of Singapore Convention on Mediation to this tiny and riveting territory (art.º 13.º (1) of Singapore Convention on Mediation). Thus allowing the enforcement of international (Sussman, 2018) and cross-border mediated settlement agreements in Macau.

Brief proposal for a prospective pre-suit court-connected mandatory mediation with an easy opt-out in Macau against the backdrop of Confucianism: The (directive) style of mediation counts in Southeast Asia

As adumbrated at the introduction of this paper, Confucianism is deeply woven into the fabric of China (and within which core Macau). No surprise stems from the fact that Confucianism is one of the propelling forces behind the fast-paced economic growth which has blessed People´s Republic of China in the past few decades. One must not be baffled by this intrinsic linkage: a sustainable economic growth is utterly untenable devoid of, and decoupled from, both a robust social harmony and a durable social cohesion in a given country.

China is no exception in this regard.

Both social harmony and social cohesion stand as two founding pillars of Confucianism without which such a behemoth country would be ungovernable.

Against this background, Macau (an inextricable part of a humongous country called China), which also sits in a culture deeply steeped in Confucianist traits, must leverage on its prone cultural background with a view to spur the usage of mediation.

Drawing on the wide range of reasons brought forth above, Macau must set out a court-connected mandatory mediation framework with an easy opt-out in which certain types of disputes would be subject to mandatory mediation prior to any other dispute resolution mechanism.

To honour the Confucianist traits in which its cultural background sits, the usage of mediation must be maximized. Mediation ought to be awarded primacy in the purview of conflict resolution in Macau accordingly. Other dispute resolution mechanisms (ranging from conciliation, negotiation, arbitration to court adjudication) must therefore play a (mere) ancillary role as opposed to a pivotal one as far as conflict resolution in Macau is concerned.

To cater to that, the mediator´s role must be suitably tailored to the Confucianist-fraught cultural background in which Macau rests upon. The mediator must therefore be proscribed to resort to either of the foregoing styles of mediation (ranging from narrative to facilitative) whenever the disputants are Chinese citizens. For a simple reason: the mediator´s role in China (and Southeast Asia in an overarching sense) stands in stark contrast with the role normally allotted to mediators (working) in western jurisdictions.

In Southeast Asian countries (amongst which China), the mediator plays a role of an educator who is expected to steer disputants towards the best procedural outcome from a cultural standpoint. It follows that the mediator is expected to resort to a directive style of mediation thus offering his own views on the case while assisting disputants in ironing out long-standing hindrances that could hamper a sought-after settlement of the dispute. Although this stands as an exception in western jurisdictions, it is pretty much the norm in Southeast Asian cultures. Like Macau, China.

Whenever disputants fail to display good faith in mediation settings (either in joint mediation sessions or caucuses), they must be imposed hefty costs in a bid to discourage similar behaviours from other disputants. Which would also give credence to the Confucianist traits in which Macau sits. Something that future lawmakers and policymakers should never lose sight of in carving out a prospective court-connected mandatory mediation with an easy opt-out in Macau, China.

Conclusions

1. Against the background of a prone cultural background, Macau must embrace a pre-suit court-connected mandatory mediation.

2. Considering the lack of mediation education, a far-reaching program of grassroot mediation must be launched in Macau.

3. Macau must cajole Mainland China to extend the territorial application of the Singapore Convention on Mediation, which would boost the overall functionality of mediation in this riveting jurisdiction.

4. In Southeast Asian countries (amongst which China), the mediator plays a role of an educator who is expected to steer disputants towards the best procedural outcome from a cultural standpoint.

5. It follows that the mediator is expected to resort to a directive style of mediation thus offering his own views of the case while assisting disputants in ironing out long-standing hindrances that could hamper a sought-after settlement of the dispute.

6. Something that future lawmakers and policymakers should never lose sight of in enacting a prospective court-connected mandatory mediation with an easy opt-out in Macau, China.

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