

# Kluwer Arbitration Blog

## Jumpstarting Arbitration through Tax Incentives? Macau's Tax Incentive Scheme for Choosing Arbitration

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If you are a party to a lease agreement or a grant of right to use commercial space in Macau, tax considerations may now be critical for determining whether “to arbitrate or not to arbitrate”. In fact, aside from the typical advantages of arbitration over litigation, tax reduction has now become an additional advantage for choosing arbitration to resolve a dispute in Macau following the introduction of the amendment bill on Macau Stamp Duty on 16 December 2020.

### The new arbitration law of Macau

More than a year has passed since [Macau's new arbitration law](#) (Law No. 19/2019) came into force on 4 May 2020 (2019 Law). The new law incorporates the best practices in international commercial arbitration and is consistent with the goal of the Macau Special Administrative Region (SAR) government to promote Macau as a preferred Lusophone arbitration seat. Based on the UNCITRAL Model Law, the 2019 Law transformed the dual arbitration system in Macau into a unified system for both domestic and international arbitration. Also, the new law is more flexible than its predecessor with regard to the formalities of an arbitration agreement, allowing for the conclusion of arbitration agreements by electronic communications evidenced in writing. Under the 2019 Law, arbitral tribunals have wide-ranging powers to issue interim measures. In addition, both the parties and the arbitral tribunal may now seek the Macau courts' assistance in obtaining evidence. All these characteristics have established an arbitration regime in Macau that is fully in line with international practice.

The 2019 Law has presented an opportunity in Macau to launch a new industry. The city has long been very dependent upon its gaming industry. As such, the drive for economic diversification has been one of the government's political and economic goals. Macau's unique position, international characteristics, and legal system have long suggested that legal services and dispute resolution in particular could serve as an economic niche that the city could explore further. Many of [Macau SAR's top officials](#) have urged the need to vigorously promote the development of arbitration, so as to give full play to Macau's advantages as a Sino-Portuguese platform and turn Macau into an arbitral platform for resolving disputes in the context of the PRC's ambitious Greater Bay Area economic plan. In 2020, of 946 cases, ICC registered 199 disputes involving parties from Portuguese-speaking countries, and 21 awards were issued in Portuguese.

Still, those in Macau are well aware of the difficulties of establishing Macau as a major arbitral seat given the heavy competition from Hong Kong and Singapore. The current chief executive, Mr Ho Iat Seng, has pointed out that, given the relative underdevelopment of arbitration in Macau, faith in Macau as a reliable seat of arbitration can only be firmly established by increasing the number of cases and developing sufficient experience. Indeed, Macau, albeit having shown ambitions in the arbitration field for a long time, has never been a major player in this area. While there is no doubt that the new law has provided a better legal framework for the development of arbitration in Macau, cases in the Macau SAR's arbitral institutions (namely, [World Trade Center \(WTC\) Macau Arbitration Center](#) and [Voluntary Arbitration Center of the Macau Lawyers' Association](#)) have remained scarce, with many of the businesses in Macau opting instead to use Hong Kong as their preferred seat of arbitration.

### **Macau's new Stamp Duty regime**

In view of this, the Macanese legislature has decided that if arbitration is to become a more commonly used dispute resolution mechanism, more radical supporting measures are needed. Most innovatively, tax incentives have been introduced in the recent amendments of the Stamp Duty Law (Law no. 24/2020), which entered into force on 30 March 2021, to attract and encourage individuals to use the Macanese arbitration system to resolve disputes. More specifically, a 50% tax reduction in Stamp Duty is offered if an arbitration clause stipulating that a dispute should be resolved through an arbitral institution in Macau is included in (i) a lease contract for immovable property or (ii) a grant of right to use commercial space (*see* Articles 27(3) to (5) and 30B(4) to (6), Stamp Duty Law).

This tax advantage is especially significant in the context of the grant of right to use commercial space, which, under the new Stamp Duty law, is now subject to a 0.5% stamp duty like normal lease agreements. In Macau, it is very common for gaming operators to include large-scale shopping malls within the complex (the so-called integrated resort model). In this case, the rent payable by the retailers can be rather hefty, as the taxable scope is extensive and includes annual remuneration resulting from the grant of right to use the commercial space, machines, furniture or other movable assets within the complex. The introduction of an arbitration clause, however, halves the payable stamp duty on such agreement.

It should be underlined that the tax benefit is only applicable if the arbitration clause submits the dispute to one of the recognized arbitration centers in Macau. This means that an arbitration clause that provides for ad hoc arbitration will not be relevant for the purposes of the tax reduction. Currently, for resolving matters arising from lease or grant of right to use of commercial space agreements, parties can resort to (1) the WTC Macau Arbitration Center or (2) the Voluntary Arbitration Center of the Macau Lawyers Association.

Also, importantly, the law sets out several situations that will lead to the loss of this tax benefit, namely:

1. The arbitration agreement is revoked or expired;
2. There is a decision, with *res judicata* effect, from a court or arbitral tribunal that rules that the arbitration agreement does not exist, is ineffective, or does not produce any effects;
3. The landlord or the grantor filed a lawsuit with the court on an issue that falls within the scope of

the arbitration agreement;

4. The landlord or the grantor, as the defendant in a court case, failed to raise the jurisdictional objection that the case should be heard by the arbitral tribunal.

If one of the above circumstances occurs, the landlord or the grantor must pay back the reduced stamp duty to the Financial Services Bureau within 30 days of the date of the occurrence.

### **Conclusion and expectations**

The introduction of the tax incentive at issue shows how serious the Macau government is with regard to not only encouraging and promoting the use of arbitration but also developing the arbitration industry in Macau. The usage of this tax reduction is ingenious, with Macau taking a radical step toward making sure that its own arbitral institutions will see a steady and growing number of cases. Although the full effectiveness of the measure remains to be seen, this measure has aroused much interest especially for retailers operating in the many large shopping malls and outlets in Macau.

It should be noted that the development of arbitration in Macau is still hampered by its relative lack of experience in this field and that of its arbitral institutions. In this respect, it is worth noting that the rules of Macau's two main arbitral institutions were heavily revised and updated, with the changes having come into effect earlier this year. Still, in comparison with the HKIAC and SIAC rules, they have not incorporated some of the recent arbitral developments such as provisions addressing third-party funding, disputes involving multiple contracts and/or multiple arbitrations, and the possibility of an arbitral tribunal making an early determination regarding a point of law or fact that is manifestly without merit or manifestly outside of the tribunal's jurisdiction.

At the same time, seeking recognition and enforcement in Macau of an award rendered in an arbitration seated outside Macau presents its own challenges. Aside from the parties not being able to benefit from the tax incentives described above, the recognition and enforcement process of a foreign arbitral award in Macau is substantially lengthier than that for a domestic (Macau) award, and it is procedurally more complicated than in Hong Kong. The two-step procedure is first initiated by an application for the recognition of the foreign arbitral award filed with the Macau Second Instance Court. It typically takes at least between three and six months for the court to recognize a foreign award, while in Hong Kong this takes a matter of days. Then the applications for enforcing the reviewed award should be filed with the Macau First Instance Court, which will in turn take at least 12 to 18 months to conclude the enforcement proceedings.

Altogether this means that Macau's more ambitious goal of becoming the main Sino-Portuguese arbitral platform and a major arbitral player is still, somehow, a remote dream. Nonetheless, with its new legislative setting, Macau is now one step closer to developing a more mature arbitration practice.

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