

A FRESH LOOK AT THE CASINO GAMING CONCESSIONS IN MACAU¹

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Summary: This paper offers an overview of the legal regime for the operation of games of chance in a casino and its concession regime to persons not fully familiarized with the local legal system. It shall discuss the public legal framework applicable to administrative concessions, namely to gaming concessions, and make reference to relevant aspects of the gaming law of Macau. Some issues with regards to casino gaming sub-concessions, competition law and non-casino gaming will be highlighted. We shall follow closely on our past views.

Keywords: Public concessions; administrative contracts; gaming concessions; gaming law; competition law; casino gaming; non-casino gaming.

1. Introduction

Macau is an old gaming jurisdiction, with almost 170 years of legalized gaming. Exclusive gaming concessions were awarded, under the benefit of

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- 1 The present paper follows closely on our past writings on the topic, published namely as Chapter 3 (*Gaming Concessions in Macau*) of the collective work “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 47 ff.
 - 2 The views expressed here are those of the author and do not necessarily reflect those of the Legislative Assembly of the Macau SAR or any other public entities: luisp@umac.mo.

a monopoly, at least since 1930.³ Traditional Chinese games have long been offered to the general public, namely “Fantan”, which was widely popular, and started to be licensed at around 1849.⁴ Modern table games, namely Baccarat, were introduced perhaps as soon as 1937, and roulette was offered in the island of Taipa in the 1930s, even if the legal basis remains unclear.⁵ The legalization of the lottery of the Holy House⁶ and the “Pacapio” lottery⁷ occurred somewhat earlier,⁸ with horse racing been offered to the public probably around the same time, in the fringes of the Portuguese jurisdiction by the local British community, prior to the foundation of Hong Kong.⁹ It may be worth remembering that all this took place ahead of what was the *state of affairs* with regards to gambling in Portugal, where there was a long tradition of prohibition, which only ended in 1927,¹⁰ when casino gaming started to be awarded as a territorial exclusive, by means of public concessions, which are contractual arrangements ruled by administrative law. The end of the era of the monopolistic gaming concessions in Macau came only in our century, with the current cycle of multiple casino gaming concessions, with three concessionaires and three sub-concessionaires, competing and operating jointly, since 2002-2006. This cluster of casino gaming concessions will expire in 2020/2022.¹¹

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- 3 JORGE GODINHO, “A History of Games of Chance in Macau: Part 1 – Introduction”, in *Gaming Law Review and Economics*, Vol. 16(10), 2012, 552 ff.
 - 4 JORGE GODINHO, “A History of Games of Chance in Macau: Part 2 – The Foundation of the Macau Gaming Industry”, in *Gaming Law Review and Economics*, Vol. 17(2), 2013, 113-116. There may have been more than two hundred “Fantan” houses or stalls licensed in that period.
 - 5 MACAU GOVERNMENT, *O Jogo em Macau*, Inspecção dos Contratos de Jogo (Editor), 1985, 2.
 - 6 The lottery was authorized by the Royal Charter of 5 October 1810.
 - 7 The “Pacapio” lottery was authorized in January 1847.
 - 8 JORGE GODINHO, “A History of Games of Chance in Macau: Part 2 – The Foundation of the Macau Gaming Industry”, in *Gaming Law Review and Economics*, Vol. 17(2), 2013, 111-112.
 - 9 This can be seen as a forerunner to the Hong Kong Jockey Club. Horse racing was legalized in Macau only in 1927, by Legislative Diploma 14, of 22 March 1927. See JORGE GODINHO, *Direito do Jogo*, Vol. I, CRED-DM, 2016, 240-242 (footnote 483).
 - 10 Casino gaming was legalized in Portugal by Decree 14.643, of 3 December 1927. See LUÍS PESSANHA, Chapter 3 (*Gaming Concessions in Macau*), in “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 50 (footnote 8).
 - 11 We are at the end of the first period of the *age of the mega-resorts* (since 2002), with the end of the current casino gaming concessions in 2020/2022. See JORGE GODINHO, “A History of Games of Chance in Macau: Part 1 – Introduction”, in *Gaming Law Review and Economics*, Vol. 16(10), 2012, 555-556; NELSON ROSE, “A tale of two cities, Macau and Las Vegas”, in *Gaming Law Review and Economics*, Vol. 17(6), 2013, 393 ff; FERNANDO VITÓRIA/ÓSCAR ALBERTO MADUREIRA, *Direito do Jogo em Macau – Evolução, História e Legislação*,



2. Regional autonomy for gaming policies

Gaming policy is to be set by the government of the Macau SAR, and is to be understood to be within the scope of regional autonomy of the Macau SAR, as it is established under article 118 of the Basic Law.¹² The Macau SAR is entrusted to pursue its own policies on *tourism* and *entertainment*, to promote its overall interests. It is accepted that this broad allusion to the tourism sector includes gaming, and that the Basic Law avoided a direct reference to the gaming industry for reasons of political sensitivity to the topic. Hence, the gaming policy of Macau is under the regional autonomy (own powers) of the government of the Macau SAR.¹³ This was also the case prior to the handover, and hence the same conclusion arises furthermore out of the general principle of continuity, that dictates that unless stated otherwise, the prior existing *status quo* will endure after the entry into force of the Basic Law.

3. Gaming as a privileged business

Gaming operators can be understood to be privileged enterprises, since there is no individual right to conduct a gaming business and therefore gaming operators can only lawfully develop their gaming activities under the benefit of a public authorization, currently issued by means of a public concession. It permits that a certain private party, the concessionaire, is allowed by the government of the Macau SAR, which grants the concession, to offer games of chance to the public, or any other legal gaming activities, under certain requirements, namely that the concessionaire develops the gaming business at his own expense and risk. The concessionaire shall be compensated by the income generated by the gaming activity itself and shall pay taxes on the gross gaming income. Gaming concessions are administrative contracts by which the government transfers to a private party the power to offer gaming to the public, which could be offered by the government directly,¹⁴ but can also be awarded to a private party, by means of a public concession, ruled by administrative law.

CREDDM, 2015, 9 ff.

12 A reading translation of article 118 of Basic Law might provide that:

“The Macau Special Administrative Region shall, on its own, make policies on tourism and recreation in light of its overall interests”. (our translation)

13 JORGE GODINHO, *Direito do Jogo*, Vol. I, CRED-DM, 2016, 315-318.

14 ANTÓNIO KATCHI, “O Regime Jurídico da Exploração de Jogos de Fortuna ou Azar em Macau”, in *Boletim da Faculdade de Direito da Universidade de Macau*, VII, 15, 2003, 65 ff.



4. Administrative Law

The historical roots of the administrative law of Macau goes back to Portuguese and continental European public law, which offers a special body of law to regulate the relations between the State and private citizens, as well as applying specific rules to ensure the fairness and lawfulness of the conduct of public authorities. Its main origins can be found in classic Roman Law and French administrative law. Administrative law can be understood as the set of laws, regulations and legal principles applied exclusively to the Public Administration and other public entities as such and not to private parties or the private law contracts concluded by public entities. It is the legislation designed to deal specifically with the special relations of authority between the Public Administration and private parties that is mainly based in unilateral decisions of public authorities, with impact on the interests of private parties, under an established administrative procedure, as well as to the contractual relations conducted under public law. This implies, namely, that the government has to obey a number of demanding legal principles and regulations, which are specific designed to contain public powers.¹⁵ For public authorities the law is both limit and source of their action.

5. Administrative contracts

Administrative law contracts are ruled by a special public law regime, which allows for a number of special powers of the public entities within the contractual relationship, and are established, in general, under articles 165 to 176 of the Administrative Procedure Code.¹⁶

An administrative contract is an agreement ruled by administrative law, not a private law agreement, and is signed between a public authority, as such, and a private party in order to create, modify or extinguish an “*administrative legal relation*”.¹⁷ Administrative contracts allow for contractual arrangement that aim at obtaining the collaboration of private parties, permitting that resources and know-how that exist in the private sector are employed by public authorities in the pursue of public interest. The assumption is that the government does not

15 JOSÉ ANTÓNIO PINHEIRO TORRES, “Fundamental Principles of Administrative Law of Macau”, in *Report on Macau Law*, Manuel Trigo (Editor), University of Macau/LexisNexis, 2014, 109-119.

16 Administrative Procedure Code of the Macau SAR, enacted by Decree-Law 57/99/M, of 11 October 1999, as amended by Decree-Law 110/99/M, of 13 December 1999.

17 See article 165/1 of the Administrative Procedure Code.



need to provide all necessary public goods and services directly to the general public and may be best served to contract the performance of certain activities to the private sector, under terms and conditions to be agreed by both sides. This may allow for a higher degree of market efficiency and a reduction of governmental expenditures, and that the degree of public intervention in the economy is limited to a mere function of control and supervision of the public concessionaires that act in place of the government.

It is to be understood that administrative contracts are not quite like other ordinary private law agreements. We are not merely dealing with two private parties, with equal rights under the law, freely agreeing on how to dispose of their own business interests. Administrative contracts have a private party, assumed to have a mere financial interest at stake, and a public authority, which needs to protect the public interest in the timely fulfilment of the public services or goods to be provided to the population. This implies that the contractual interests of the public authority are seen as predominant, which might even justify limiting or setting aside the conflicting private interest, in the name of public interest, if such is strictly required.

For this purpose, a number of special powers are established by law, with the intent to fortify the position of the public entity in the contractual relation, often described as the *public regime* of the administrative contract.¹⁸ Thereunder, under certain conditions established by law the government might unilaterally amend the terms and conditions of any given administrative contract,¹⁹ without the prior consent of the concessionaires, if such is warranted to protect public interest. This is part of the special public powers of the government in such administrative contracts and implies that proper financial compensation must be offered to the private parties for such unilateral amendments (indemnity for losses or additional costs of the concessionaire arising from such unilateral contractual changes²⁰). It is also possible for the competent authorities to

18 JOSÉ EDUARDO FIGUEIREDO DIAS, *Administrative Law of Macau*, University of Macau/ LexisNexis Butterworths, 2012, 233-274 (243-249).

19 See article 167/a) of the Administrative Procedure Code.

20 As a rule, the competent authorities might “*modify unilaterally the content of the performances [of the contract previously agreed to], as long as the object of the contract and the [prior existing] financial equilibrium is respected*” (article 167/a) of the Administrative Procedure Code) (our translation). Therefore, the public administration cannot change the “*object of the contract*” (e.g.: one rental contract cannot be unilaterally amended into a purchase and sale contract, since that would imply not only a change of the content of the contract, but a change from one type of contract to another) and the original “*financial equilibrium*” must be respected. That implies that the margin of profit reasonably expected by the concessionaire, under the original agreement, cannot suffer from the changes unilaterally imposed by the competent authorities (financially the concessionaire must be put in the same situation he was before such unilateral amendments).



rescind or terminate an administrative contract exclusively on the grounds of public interest, if the administrative contract no longer serves public interest, even without any default of contractual duties by the concessionaire that might justify such a rescission, as long as a fair and adequate financial compensation is paid for any damages or losses arising from such a unilateral termination of the concession without proper cause.²¹ Other special powers of the public entities within an administrative contract include the prerogative to manage the execution of the contract, directing the private party on how exactly the contractual obligations are to be performed,²² to supervise and control the proper execution of the contract by the private party²³ and to apply any penalties that have been agreed by the parties for the non-performance of the contract.²⁴

Administrative contracts are, as a rule, concluded under public

21 The competent authorities might “*rescind unilaterally the [administrative] contracts because of imperatives of public interest, properly justified, without prejudice of the payment of a fair compensation*” (article 167/c) of the Administrative Procedure Code) (our translation).

22 See article 167/b) of the Administrative Procedure Code.

This can be described as a legally enforceable *management power* over the execution of the contract, allowing that the public authority issues orders, directives or binding instructions to the private party, with regards to how exactly to execute the contractual duties. It should be noted that this power will include not only the contractual obligations that the private party originally assumed, but will also include new obligations, arising out of the exercise of the unilateral modification of the contract, even without the agreement of the private party.

23 See article 167/d) of the Administrative Procedure Code.

The legal doctrine often distinguishes between *technical*, *financial* and *legal* supervision. The public entities will be legally entitled to follow up on the proper execution of the administrative contract, supervising or controlling how the private party is performing its obligations, so that potential deficiencies are detected. The private party cannot object to any exams, audits, inspections or similar checks that take place hereunder.

24 See article 167/e) of the Administrative Procedure Code.

This requires that the contract includes penalties (*sanctions*) that can be applied in case of non-performance, namely for cases of delay in performance, defective performance and definitive non-performance. The most common contractual penalties are *fines*, but they may also include the *seizure* of the concession (to reestablish regular operations) or even the *rescission* of the contract (for more serious breaches of contract).



procurement rules, and generally awarded by means of open²⁵ public tenders,²⁶ to ensure that the best possible market prices and conditions are reached by means of a transparent and recognized procedure.²⁷ Since many public concessions are highly lucrative, the law wants to ensure the fairness and transparency of the selection procedure, achieve best market prices, and to limit the potential for corruption of public officials in the awarding of public contracts.

Within judicial review, there are special procedure rules, entitled *proceeding on administrative contracts*, to allow for the judicial review of administrative contracts, to decide on claims arising out of the *interpretation*, *execution* or *validity* of administrative contracts, but also for the purpose of ascertaining *contractual civil liability* arising out of these public law contracts.²⁸ The legal basis of this special procedure rules is to be found under articles 113 to 115 of the Administrative Judicial Procedure Code.²⁹ The competence for such judicial actions is of the Administrative Court,³⁰ but they may also be subjected to voluntary arbitration.³¹ Only the judicial disputes related with

25 As a rule, the public authorities shall award their contracts through a transparent tender procedure to ensure that the best possible proposal is selected and that all interested parties have a fair chance of submitting bids for tender (see article 170/1 of the Administrative Procedure Code). Furthermore, the tender procedure should, in principle, be an “*open*” public tender, which implies that all interested parties might take part in the tender and submit a bid for the awarding of the relevant contract under competition (see article 170/2-3 of the Administrative Procedure Code). However, it is sometimes possible to conduct an “*closed*” public tender, which implies a pre-selection of the parties to whom the contract might be awarded and should be used if the performance of the contract is highly technical or particularly complex and it is evident that only certain parties would be able to fulfill the relevant obligation (see article 169/3 of the Administrative Procedure Code). Only exceptionally the contracts with public authorities shall be awarded through a process of direct award (by which the contract is directly awarded to a certain private party, without the need of a tender competition), which might be used in cases of especial urgency or when only one private party has the specific knowledge or is able to perform the relevant contractual obligations (see articles 169/4 and 170/3 of the Administrative Procedure Code).

26 See articles 169 and 170 of the Administrative Procedure Code.

27 JOSÉ EDUARDO FIGUEIREDO DIAS, *Administrative Law of Macau*, University of Macau/LexisNexis Butterworths, 2012, 233-274 (263-268).

28 JOSÉ EDUARDO FIGUEIREDO DIAS, *Administrative Law of Macau*, University of Macau/LexisNexis Butterworths, 2012, 233-274 (269-274).

29 Administrative Judicial Procedure Code of the Macau SAR, enacted by Decree-Law no. 110/99/M, of 13 December 1999.

30 Article 30/2/3)/(3) of the Framework Law of the Judicial Organization, enacted by Law 9/1999, of 20 December 1999, as amended by Law 9/2004, of 16 August 2004, and Law 9/2009, of 25 May 2009.

31 Articles 30-A, 30-B and 30-C of the Arbitration Regime, enacted by Decree-Law 26/96/M, of

administrative contracts fall within this special administrative jurisdiction, since the litigation with regards to the private contracts of the Public Administration is of the competence of the common courts.

6. Administrative concessions

Concessions are a type of administrative contracts. It is usually understood that the administrative law of Macau reserves certain activities, as is the case of gaming, to the government, establishing a public exclusivity or monopoly, which implies that, in principle, only public entities can provide such goods or services to the general public. These goods and services are offered to the community in the name of public interest. The activities subject to public concessions should be essential to the community, are usually public services, need to be provided in the name of public interest and to have been excluded from the market or reserved to public authorities. However, in such cases, by means of an administrative concession, the government can award such activities to a private party, granting the right to carry on with these economic activities, in principle reserved for the government, which shall be managed and operated at the risk and expense of the public concessionaire.³²

Traditional examples of early public concessions are the construction of public roads, bridges, railroads or other major infrastructures, for the use of the general public, for which the necessary public financial resources were lacking. The same can be said about utilities, since the building of telephone, gas or electric networks can be too expensive and complex for the government to handle directly. Hereunder, private parties built the required infrastructures, provided these public goods and services, in the name of public interest, in exchange for a reasonable return of investment (capital plus fair profit), paid by the government directly or generated by the management of the assets built and the collection of user fees from the general public during the term of the concession.

11 June 1996, amended by Decree-Law 19/98/M, of 11 May 1998, and Decree-Law 110/99/M, of 13 December 1999.

32 The administrative contracts of concession aim to allow for the transfer, temporary and partially, to a private party of powers to exercise a certain activity that is by law reserved as an exclusive to a public authority. So that the private party, under the terms and conditions of the concession, can legally conduct such an activity at his own expenses and risk, but in the overall public interest. See DIOGO FREITAS DO AMARAL/LINO TORGAL, *Estudos sobre Concessões e Outros Actos da Administração (Pareceres)*, Almedina, 2002, 532-534.



7. Gaming concessions

Gaming concession contracts³³ are currently included in the set³⁴ of administrative contracts. The public law framework applicable, in general, to administrative contracts will also apply namely to gaming concession contracts. In addition to this public law framework, some administrative law contracts may also benefit from detailed specific legislation. Even if only some of the administrative contracts listed in article 165 of the Administrative Procedure Code enjoy a specific legal regime, as is the case with the casino gaming concession contracts, which enjoys a specific legal regime under Law 16/2001³⁵ and further secondary legislation, but not with other gaming concession contracts,³⁶ as it would be preferable.

Gaming concessions are considered by the legal doctrine to be *contracts of*

33 Or in the legal terminology of article 165/2/d) of the Administrative Procedure Code: the “*concession contracts for the exploitation of games of chance*”.

This contract was already included in the enumeration of *nominative administrative contracts* under the old Administrative Procedure Code (article 157/2/d) of the Administrative Procedure Code of 1994, enacted by Decree-Law 35/94/M, of 18 July 1994).

Historical, the fact that the Administrative Procedure Code did not always include the gaming concession contract raise doubts about its nature, namely if it was an independent administrative contract or should be considered as a variant of another administrative contract, the public service concession contract. There was also a discussion about if there could be other administrative contracts, not included in the Code. See MARCELLO CAETANO, *Manual de Direito Administrativo*, Vol. I, 10th Edition (reviewed and updated by Diogo Freitas do Amaral), Almedina, 1997, 580-583.

For a proposal for the reform of the legal concept of gaming concession currently employed in article 165/2/d) of the Administrative Procedure Code, to explicitly include casino games, sports betting and lotteries, see JORGE GODINHO, *Direito do Jogo*, Vol. I, CRED-DM, 2016, 322-323.

34 See article 165/2 of the Administrative Procedure Code.

35 Law 16/2001, of 24 September 2001, Legal Regime for the Exploitation of Casino Games of Chance.

36 There is another possible exception, since there is also special legislation that deals with the instant lotteries concession, which is regulated under Law 12/87/M, of 17 August 1987. The remaining non-casino gaming concessions are mostly regulated by each of the relevant concession contracts. Legislation for the horse racing concession is incipient and mainly regulates the taxes obligations of the concessionaire, under Decree-Law 28/77/M, of 6 August 1977. There is detailed secondary legislation on the types of bets that may be placed and an overall regulation, under Order (*Portaria*) 163/90/M, of 27 August 1990. The same could be said about the former greyhound racing concession.

The Sports Betting concession is regulated by secondary legislation, namely Executive Order 20/2005 (Regulations for Sports Betting on Basketball) and Executive Order 67/2018 (Regulations for Sports Betting on Football). It appears not to exist any relevant legislation for the Chinese Lottery concession.

collaboration,³⁷ by which a private party agrees to provide temporary assistance to the government, for the conduct of a public function, in exchange of the payment of a price (*contracting out*).³⁸ Usually the performance in question is to offer a public service to the general public, which in turn would imply that public interest is served by means of the concession. This is the reason why it is considered that the contractual interests of the public party need to prevail.

Gaming concessions, however, do not fit neatly into the picture of standard administrative concessions, in the sense that gaming is not an activity that needs to be provided to the community (the contrary might even be argued, and in the last few years there is a growing concern with *harm prevention*, *harm minimization* and *responsible gambling*³⁹), and it is not a public service.⁴⁰ Moreover, the interest of the government and the private party are mainly of financial nature⁴¹ and symmetrical, since the main aim of a gaming concession is to generate revenues (profits for the concessionaire and taxes for the government). In this sense, gaming concessions serve a public interest in offering regulated gaming to the public, promoting tourism and other public

37 JOSÉ MANUEL SÉRVULO CORREIA, *Legalidade e Autonomia Contratual nos Contratos Administrativos*, Almedina, 1987, 420-421; PEDRO GONÇALVES, *O Contrato Administrativo (A instituição contratual como forma de actuação da Administração Pública)*, Cadernos de Direito Administrativo de Macau, Direcção dos Serviços de Administração e Função Pública, 1997, 18-20; PEDRO GONÇALVES, *O Contrato Administrativo (uma instituição do direito administrativo do nosso tempo)*, Almedina, 2004, 74-75; JOSÉ EDUARDO FIGUEIREDO DIAS, *Administrative Law of Macau*, University of Macau/LexisNexis Butterworths, 2012, 251.

38 Administrative contracts of collaboration are the ones by which public authorities obtain the cooperation of private parties to pursue activities that the law entrusts to such public authorities. Or in the terminology of the Code, they are the “*contracts that aim to associate a private party to the regular performance of administrative functions*” (our translation) (article 169/1 of the Administrative Procedure Code).

39 There is currently a law proposal pending at the Legislative Assembly that aims at amending Law 10/2012, of 27 August 2012, which regulates the restrictions of access to casino venues, to ban gaming access to the floor employers of the local casinos, to address problem gambling concerns, since these professionals are considered to be particular exposed and frequent victims of gambling addictions.

The law proposal can be viewed at <http://www.al.gov.mo/pt/law/lawcase/344>.

40 JORGE GODINHO, *Direito do Jogo*, Vol. I, CRED-DM, 2016, 318-323.

41 There are other public interests served by the gaming concessions, but the fiscal impact of the gaming revenues is, at least in the case of Macau, paramount, as most public expenditure of the government of the Macau SAR are financed by special taxes on gaming. The economic important of the gaming concessions cannot be overstated, and all other goals pursuit by legalizing gaming are accessory to the tax revenues.



policy goals,⁴² and generating public revenues. It should be noted that gaming concessions are currently taxed on gross gaming revenues, which implies that they may need to pay taxes even if they are not profitable.⁴³ This is part of the business risk of the gaming concessions, and another unusual feature in public concessions.

In the past, gaming concessions were awarded as an exclusive, to a single private party, ensuring that they were likely to remain profitable due to the lack of competition. Such allowed for the payment of significant premiums to the government of Macau at the time of the awarding of these concessions,⁴⁴ which would happen in regular intervals, as the concessions were valid only for a limited period of time. In Macau, casino gaming concessions currently are no longer monopolies, but need to compete and operate jointly, which implies that the traditional characteristic of *exclusivity*, which still exists in non-casino gaming concessions, was lost. This is a breach with the customary concept of administrative concessions, and a recent trend, as up until Law 16/2001, casino gaming concessions were still intended as exclusives, even if possibly only within territorial areas of Macau.⁴⁵

Legal doctrine often considers that gaming concession contracts are similar to another type of administrative contract, the public service concession contract.⁴⁶ Both these administrative contracts allow for a private party to *exercise a restricted activity*, in principle reserved for the government, not

42 Authorized gaming might promote tourism and suppress unlawful gaming, which is often operated by and might be a significant source of revenues for organized crime. Other objectives may exist, for example, the concessionaire may be required to promote Macau as a tourism destination or offer certain cultural events. Lately, the government of the Macau SAR is also pursuing the full employment of local workers as a goal.

43 JANUÁRIO PINHEIRO, *Lei do Jogo, Anotada e Comentada*, Almedina, 2006, 115-121.

44 In the past the main criteria to the awarding of a gaming concession would be the highest price offered. See JORGE GODINHO, *Direito do Jogo*, Vol. I, CRED-DM, 2016, 264-293.

45 Article 5 of Law 6/82/M, of 29 May 1982, which regulated the games of chance, established that the right to offer games of chance to the public in Macau could be awarded by the government by means of an exclusive concession or a special gaming license. In case of the issuing of gaming licenses, each special license should have its own territorial area, allowing for a territorial exclusive for each of the four gaming licenses.

Law 10/86/M, of 22 September 1986, amended Law 6/82/M, of 29 May 1982, and amended namely article 5 to reduce the maximum number of gaming licenses from four to three special licenses. It also added that one of the exclusive territorial zones should be in the Macau peninsula (in the “*City of Macau*”).

The legislation applicable to the instant lottery concession, set under Law 12/87/M, of 17 August 1987, also suggests that this gaming concession could be awarded as an exclusive or not (article 3/2).

46 See article 165/2/c) of the Administrative Procedure Code.



permitted to private parties, and usually benefiting from a regime of exclusivity (*legal monopoly*). With the main distinction been made in the fact that gaming is not considered to be a public service that needs to be provided.⁴⁷ It can be said that there is public interest in the gaming concession, understood to exist in all administrative concessions, but that there is no proper public service been provided by offering gaming.

There are also obvious similitudes between the gaming concession and another type of administrative contracts: the concession for public works. In both cases, the private party will undertake certain investments and works, at his own expenses and risk, in exchange to the right to a public exclusive, awarded by the government, which permits that the concessionaire can gain income by collecting fees from the general public for the use of the assets built over a certain period of time. It is, however, clear that while gaming concessions may imply the need to commit to an investment plan and to build certain properties (hotel or casino venues⁴⁸), these are accessory obligations, and that the core of the gaming concession resides in the awarding of a right to offer gaming to the public, which is only permitted to the concessionaire, usually as an exclusive.⁴⁹ This would allow for the development of gaming as a commercial business by a private party, under an administrative concession.

The general legal framework for the concession of public works and public services, approved under Law 3/90/M, of 14 May 1990, may be applied subsidiary to the gaming concessions, if there is no special law applicable and such is required by the nature of the issues requiring legal regulation, as it is the case with the non-casino gaming concessions, where as a rule there is no

47 JOSÉ EDUARDO FIGUEIREDO DIAS, *Administrative Law of Macau*, University of Macau/LexisNexis Butterworths, 2012, 233-274 (258-261).

48 In the past, the sole gaming concessionaire committed to offer other services to the local government (namely, river clearing and dragging) and was responsible for building projects unrelated with gaming activities, as part of the contractual obligations negotiated with public authorities at the time.

For example, the concession contract signed in 30 December 1982 with STDM (the former sole casino gaming concessionaire) included a duty by the concessionaire to maintain maritime transportation services (*ferries*) from Macau to Hong Kong (clause 8), to lease offices to the government at the port of arrival (clause 9), to take care of river clearing and dragging (clause 9), to finance the urban development of the ZAPE area, in the Macau peninsula (clause 11), to build residential housing at Bairro Tamagnini Barbosa, in the Macau peninsula (clause 12) and to promote Macau as a tourism destination (clause 13). See *Contrato de Concessão [Jogos de Fortuna e Azar]*, Imprensa Nacional de Macau, 1983.

49 DIOGO FREITAS DO AMARAL/LINO TORGAL, *Estudos sobre Concessões e Outros Actos da Administração (Pareceres)*, Almedina, 2002, 534-539.



specific legislation, but not with casino gaming concessions.⁵⁰

8. Casino Gaming Law

The casino gaming regulation of Macau is broadly established under Law 16/2001, which offers the specific legal framework under which private entities are allowed to lawfully operate casino gaming activities in Macau. Casino gaming is to be offered to the public in compliance with Law 16/2001 and under the supervision of public entities, namely the Gaming Inspection and Coordination Bureau. The Macau casino gaming law states as its explicit goals to ensure that gaming operations are proper, which implies namely that casino games are fair and free from organized crime, that the public interest in generating tax revenues is protected, and supports the economic and broader social development of the Macau SAR as a whole.⁵¹ No unauthorized gaming activities can be permitted and criminal penalties shall apply to such cases.⁵² The government of the Macau SAR controls, reserves and awards casino gaming concessions, ensuring legal compliance, in accordance with public interest and with the aim to promote the welfare of the wider community.

Broadly speaking, Law 16/2001 establishes what are the games of chance allowed to be offered by local casinos, including table games and slot games,⁵³ but excluding pari-mutuels and sports betting, and also lotteries, at

50 Article 26 of Law 3/90/M, of 14 May 1990, which approved the general regime for the concession of public works and public services, states: “*The present law applies to concessions that by their nature justify the same discipline and are not regulated by a special law*”. Law 16/2001 is such a special law. Law 12/87/M, with regards to instant lotteries, could also be understood to be a special law for this purpose.

In our view, it remains possible that one may need to integrate possible *lacunae* in law by resorting to the legal regulation in Law 3/90/M. See JORGE GODINHO, *Direito do Jogo*, Vol. I, CRED-DM, 2016, 324-325.

51 A reading translation of article 1/2 of Law 16/2001 might provide that:

“*The legal regulation of casino games of chance has the objective of ensuring: 1. That casino games of chance are properly run and operated; 2. That those involved in supervising, managing and operating casino games of chance are persons suitable for the exercise of such functions and responsibilities; 3. That the management and operation of casino games of chance is conducted in a manner which is honest, fair and free from criminal influence; 4. That the interest of the Macau SAR in collecting the taxes arising from the operation of casinos is duly protected; 5. That the tourism, social stability and the economic development of the Macau SAR is promoted*” (our translation).

52 See article 1/3 of Law 16/2001 and Law 8/96/M, of 22 July 1996, which criminalizes illegal gambling.

53 Rules of the games are approved by secondary legislation. Article 3/5 of Law 16/2001.

least as a rule,⁵⁴ and indicating that online gaming cannot be offered, as they are understood not to be included in the current scope of the casino gaming concessions.⁵⁵ Further, Law 16/2001 determines certain rules on the operation of casino venues, namely a general duty of continuous business operation, requiring that casinos are always open for business, and have to stay open to the public 24 hours a day, every day of the year. It permits that operators can have multiple casino properties, operating under the same gaming concession, as there is no single concession per casino.

Law 16/2001 also sets a number of legal requirements on the corporations,⁵⁶ which are selected to be casino gaming concessionaires, that need to hold certain minimum capital⁵⁷ and maintain the necessary financial capacity throughout the duration of the casino gaming concession,⁵⁸ comply with rules on good administration and fair competition, under open market conditions,⁵⁹ as well as on the fitness, probity or suitability of individuals holding corporate office, or who are the main shareholders of casino companies.⁶⁰

The selection of the casino gaming concessionaires needs to happen by means of a public tender procedure.⁶¹ The duration of the casino gaming concessions is to be set in each single casino gaming concession contract, and is of up to twenty years.⁶² If considered necessary for reasons of public interest, a casino gaming concession can be extended by the government up to an additional five years.⁶³ After this period of time the casino gaming concessions will expire, and a new public tender needs to take place,⁶⁴ which can result in the retaining of the current gaming operators or the selection of new contractual parties, in accordance with what are considered to be the best proposals put forward to public tender at the time.

54 See article 3/6-7 of Law 16/2001.

55 See article 4 of Law 16/2001.

56 SALVATORE MANCUSO, Chapter 4 (*Regulation of Gaming Companies in Macau*), in "Studies on Macau Gaming Law", Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 149-152.

57 See article 17 of Law 16/2001.

58 See article 15/1 and 5 of Law 16/2001.

59 See article 21 of Law 16/2001.

60 See article 14 of Law 16/2001.

61 See article 8 of Law 16/2001.

62 See article 13/1 of Law 16/2001.

63 See article 13/3 of Law 16/2001.

64 See article 8/1 of Law 16/2001.



Casino gaming concessionaires must uphold and safeguard the public interest in the collection of all taxes due,⁶⁵ and are under a general duty to provide the necessary cooperation with the relevant governmental authorities,⁶⁶ which might include the submission of documents, information, data or evidence and granting any consents or other permissions deemed necessary by the government,⁶⁷ namely in connection with the review of the personal suitability of all relevant parties. Casino gaming concessionaires are subject to strict rules of bookkeeping and accountancy, to ensure good public supervision and control of the gaming revenues and gross income generated.⁶⁸ Public oversight over the gross gaming revenues by the government implies that great care is employed in ascertaining the exact amounts due under the special gaming tax.⁶⁹ All financial reports submitted by the concessionaires need to be accurate. If needed, the government will conduct an external financial audit.⁷⁰

For the purpose of the development of gaming operations, the Macau SAR leases to the casino gaming concessionaires the public land and other assets needed for the proper operation of each gaming concession,⁷¹ which shall be kept in good working conditions all throughout the duration of the concession.⁷² The public assets leased to the concessionaires shall revert to the Macau SAR upon the termination of the gaming concession, as well as the casino venues and all their equipment, which shall also revert to the Macau SAR at the end of the relevant concession period, without compensation.⁷³ Until such a moment in time, the casino gaming concessionaires must keep all casino property in good working conditions and free from any encumbrances, and the government shall inspect the condition of such property prior to the termination of the concession. If a concessionaire fails to deliver such property voluntarily in a timely manner the government shall take possession of all such assets. For the concessionaires such implies that they must be able to recover the capital invested, and a reasonable return on investment, from the income generated throughout the period of duration of the casino gaming concession.

65 See article 1/2 of Law 16/2001.

66 See article 36 of Law 16/2001.

67 See article 32 of Law 16/2001.

68 See article 30 of Law 16/2001.

69 See article 27 of Law 16/2001.

70 See article 33 of Law 16/2001.

71 See article 37/1-2 of Law 16/2001.

72 See article 37/3 of Law 16/2001.

73 See article 40 of Law 16/2001.



9. Casino gaming concession contracts

Once a casino gaming concession is awarded, it is necessary for the public authorities and the newly appointed concessionaires to negotiate and sign a public concession contract.⁷⁴

The casino gaming concessions contracts are administrative contracts, negotiated and signed between the Macau SAR and each single casino gaming concessionaire, in accordance with the terms and conditions that were achieved in the public tender procedure. The casino gaming concessions contracts detail the rights and obligations of the casino gaming operators and the government of the Macau SAR, in accordance with the legal framework applicable (mainly, Law 16/2001), and follow a broadly identical contractual draft (albeit minor discrepancies can be found between each of the casino gaming concession contracts).⁷⁵ An analysis of the terms and conditions of each of the casino gaming concession contracts cannot be undertaken here. Still, it should be noted that these public law agreements must apply faithfully the relevant legal framework,⁷⁶ need to respect the result of the public tender, and that they might introduce additional features, namely when the law allows for discretion.

The government of the Macau SAR has also negotiated and signed administrative contracts with the three casino gaming sub-concessionaires,⁷⁷ which follow the same model, albeit with some specific clauses, to address the particulars of the awarding of a sub-concession.⁷⁸ Each sub-concession draws

74 See article 7/1 of Law 16/2001.

75 The three casino gaming concessions contracts are available at the official website of the Official Printing House of the Macau SAR at <http://pt.io.gov.mo/Legis/record/121600.aspx> or at the official website of the Gaming Inspection and Coordination Bureau at <http://www.dicj.gov.mo/web/pt/contract/index.html>.

76 The vast majority of the contractual clauses merely *transcribe* into the casino gaming contract the legal regime already set under Law 16/2001. In some cases, the contract may offer greater detail and clarification.

77 The three casino gaming sub-concession contracts are also available to be consulted at the official website of the Gaming Inspection and Coordination Bureau at <http://www.dicj.gov.mo/web/pt/contract/index.html>.

In our view, these administrative contracts should also be published in the Official Printing House, as it is legally required under article 11/6 of Law 16/2001, which should be applied, with the necessary adaptations, also to the sub-concessions contracts. The lack of publication is, hence, a breach of law. See LUÍS PESSANHA, Chapter 3 (*Gaming Concessions in Macau*), in “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 79 (footnote 142).

78 See, namely, clauses 1, 6, 72/2, 73/2, 75, 77, 82/2 and 94 of the Casino Gaming Sub-Concession Contracts (MGM Grand, Melco PBL and Venetian).



upon the rights of the relevant concession, and is limited by it, namely in terms of its duration.⁷⁹ The casino gaming sub-concessions are triparty agreements, which are negotiated and signed also by the holder of the concession. Such implies that both the relevant concessionaire and the government of the Macau SAR have agreed to the terms and conditions set in each sub-concession.

10. Casino gaming sub-concession

It is sometimes said that Macau stumbled into having six casino operators. By law, and under the public tender rules, there should only be three casino gaming concessions.⁸⁰ Hence, it could be expected that no more than three casino gaming operators would be allowed to compete in the local casino gaming market until the current casino concessions expire in 2020/2022.⁸¹ Further, arguably the government of the Macau SAR was legally and contractually⁸² obliged to limit

Some of these clauses may not be fully legally enforceable, as it does not seem possible, for example, that a sub-concession could remain in force even in case of the termination of the relevant concession, the *master agreement*, as it is stated under clause 94/1 of the Casino Gaming Sub-Concession Contracts.

- 79 The legal doctrine describes a sub-concession as the transfer by the concessionaire, authorized by the awarding public authority, to another private party, of a portion of the duties to perform the public services that are included in the concession, and also of the necessary powers, under terms and conditions set between the concessionaire and the sub-concessionaire. Hence, the concessionaire can only sub-concession what he owns, the sub-concession must confined itself to the limits of the concessions, and needs to be submitted to the terms and conditions of the concession. The concessionaire is to be held responsible before the public authorities for the performance of all contractual duties, namely the ones he has transferred to the sub-concessionaire and, as a rule, the sub-concession is agreed solely between the concessionaire and the sub-concessionaire. If the concession is terminated by any reason, or if suffers any changes, the sub-concession shall also be terminated, or suffer the necessary alterations accordingly. See MARCELLO CAETANO, *Manual de Direito Administrativo*, Vol. II, 10th Edition (Reviewed and Updated by FREITAS DO AMARAL), Almedina, 1994, pages 1127-1129.
- 80 Article 7/2 of Law 16/2001 states that the “*maximum number of concessions for the exploitation of casino games of chance*” is of three.
- 81 It can be expected that the duration of the casino gaming concession of SJM and the connected casino gaming sub-concession of MGM will be extended until 2022, to allow for a unified approach by the government, by means of a new public tender procedure, or that any amendments made to Law 16/2001 to prepare for the awarding of the new casino gaming concessions, will apply to all the casino gaming operators simultaneously.
- 82 There is contractual duty of the grantor to limit the maximum number of casino gaming concessions to only three at least until 01 April 2009 as stated in the casino gaming concession contracts (clause 106/1 of the Galaxy Gaming Concession Contract; article 110 of the SJM Gaming Concession Contract; and article 104/1 of the Wynn Gaming Concession Contract).



the access to the Macau gaming market to just three casino gaming operators, which would represent an oligopoly division and not a full liberalization of the Macau gaming market, as is sometimes suggested. However, as a matter of fact, as it is well known, the local casino gaming market has currently six competing casino operators: three casino gaming concessionaires and three casino gaming sub-concessionaires.⁸³

Both the casino gaming concessionaires and the casino gaming sub-concessionaires participate, under broadly equal conditions, in the local gaming market, and there are few distinguishing features between casino gaming concessionaires and casino gaming sub-concessionaires.⁸⁴ It appears that the casino gaming sub-concessions were an mere expedient used to expand the number of casino operators, from three to four and then to six casino gaming operators, without the recourse to a public tender, as legally required, and without any amendments made to Law 16/2001, which still does not contain any explicit reference to the casino gaming sub-concessions to this date.⁸⁵ This is a somewhat puzzling outcome, if one considers the great care that was put into the international public tender procedure that took place in 2001/2002. Little progress has been made since on the issue, as we arrive at the end of the current casino gaming sub/concessions in 2020/2022.

While an argument can be made that the letter of the law has not been

This suggest not only that the issue was considered, discussed and agreed upon by the parties at the time of the signature of these agreements, but also that the operators were able to obtain a commitment by the government of the Macau SAR not to allow other parties to enter the market until this date. It is understood that after 01 April 2009 the government would be free from this contractual obligation.

83 There are also a number of satellite casinos, owned by third parties, which are operated under license from concessionaires. An argument can be made that there are more than six operators in the local casino market.

84 If one reads the sub-concession contracts, it becomes quickly obvious that they are structured to place the sub-concessionaires in an equal footing, as much as possible, with the concessionaires. It is clear that most clauses are similar, or even identical, to the ones used in the concession contracts, and that the concession and sub-concession are isolated by a number of specific clauses, to ensure that both operators are independent from each other, and each does not need to assume liability for the conduct of the other. We are not really dealing with proper sub-concessions, but with a legal construct that should be considered to be equivalent in nature to the concessions, and should be treated as such by the legal system, namely in terms of its legal regime.

See LUÍS PESSANHA, Chapter 3 (*Gaming Concessions in Macau*), in “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 83-88.

85 We do recognize that article 17/9-11 of Law 16/2001 makes allowance for the transfer or cession of a casino gaming concession to a third party and allows for a management company to operate the casino business of a concessionaire, both subjected to prior authorization by the government of the Macau SAR.



breached, by the awarding of casino gaming sub-concessions by the government, as Law 16/2001 does not make any explicit reference to casino gaming sub-concessions, and hence does not prohibit the government from authorizing casino gaming sub-concessions, it appears evident that the spirit of the law has not been followed and that the legal basis for the awarding of three casino gaming sub-concessions is to this date lacking and deficient. It could even be said that if the government wished to increase the number of casino operators, due to reasons of public interest, it should have amended article 7/2 of Law 16/2001 accordingly. And it should have gone through a public tender procedure to select the best possible candidates.

This is not a minor issue, under Law 16/2001 any new casino gaming concessions need to be awarded by means of a public tender procedure,⁸⁶ which would also apply to the awarding of any casino gaming sub-concessions, in our view.⁸⁷ This is not what has happened, as allowance was made to the casino gaming concessionaires to each selected and negotiate a casino gaming sub-concession. With the exception of the Venetian,⁸⁸ which was granted a casino gaming sub-concession from the very onset,⁸⁹ the two other sub-concessions were authorized by the Macau government, after the relevant casino gaming concessionaires had selected which company was to be awarded each casino gaming sub-concession. This implies that the rules of public tender, which are set under Law 16/2001, were not applied to the awarding of the casino gaming sub-concessions, and that the government only ensured that certain basic legal requirements were complied with – namely, suitability and financial capacity. Such has permitted the capture and monetization of the process of awarding the two remaining casino gaming sub-concessionaire by the relevant casino gaming concessionaires.

Again, the legal framework applicable to the casino gaming sub-concessions is, to this day, still missing from Law 16/2001. Usually one hears the argument that nevertheless Law 16/2001 needs to be applied both to the

86 As set under Administrative Regulation 26/2001, of 29 October 2001, and amended by Administrative Regulation 34/2001, of 31 December 2001, and by Administrative Regulation 4/2002, of 25 March 2002.

87 At least in the case where the sub-concession in question is a *de facto* concession.

88 LUÍS PESSANHA, Chapter 3 (*Gaming Concessions in Macau*), in “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 78-81.

89 The first sub-concession was created in December 2002, as a last minute stop-gap solution to avoid that the joint bid between Galaxy and Las Vegas Sands, who were unable to agree on partnership terms, which was the leading bid of the tender procedure, would have to be eliminated from competition. This could mean that the tender procedure would need to be reopened or that there would have been only two casino concessions.



casino gaming concessions and sub-concessions, since both need to comply with the legal framework for the operation of casino gaming set thereunder, as well as with the relevant secondary gaming legislation. We share this view of the matter, as otherwise we would be facing a lack of sufficient regulations for the operation of casino games of chance by the three casino gaming sub-concessions, which would also force us to apply the relevant casino gaming legislation, if only with the necessary adaptation, under general rules of law (as set under article 9 of the Civil Code⁹⁰).

It is true that more recently the Macau lawmakers, when approving subsequent casino gaming legislation, explicitly recognized the existence of casino gaming sub-concessions, as was the case with the Law 5/2004,⁹¹ which makes reference to both casino gaming concessions and casino gaming sub-concessions.⁹² Almost the same can be said about Administrative Regulation 27/2009,⁹³ Law 10/2012⁹⁴ and Administrative Regulation 26/2012,⁹⁵ which all make express reference to the casino gaming concessionaires throughout their legal regimes and include a final provision stating that the regulation for the casino gaming concessionaires is also applicable, with the necessary adaptations, to the casino gaming sub-concessionaires.⁹⁶

This approach by the lawmaker implies the recognition of the holders of casino gaming sub-concessions as legitimate sub-concessionaires and lawful casino gaming operators, and clarifies that the legislation applicable to casino gaming also needs to be applied to them. However, it also implies that the sub-concessions require being distinguished, as a matter of their own legal nature, from the casino gaming concessions. Casino gaming sub-concessions are overall subjected to the same rules, and the same legal framework, but only with the

90 Civil Code of the Macau SAR, enacted by Decree-Law 39/99/M, of 3 August 1999, as amended by Decree-Law 48/99/M, of 27 September 1999, and Law 13/2017, of 21 August 2017. Under article 9 of the Civil Code, in case of *lacunae* in law, one shall apply the statutes that exist for similar cases by means of *analogy*.

91 Law 5/2004, of 12 July 2004, approved the legal framework of credit for casino gaming.

92 See articles 1/2/10), 3, 7 and 8 of Law 5/2004.

93 Administrative Regulation 27/2009, of 10 August 2009, amended Administrative Regulation 6/2002, which regulates the commissions and other payments to be made to gaming promoters.

94 Law 10/2012, of 27 August 2012, regulates the restrictions of access to casino venues.

95 Administrative Regulation 26/2012, of 26 November 2012, approved the requirements for slot-machines and other gaming devices and equipment.

96 Article 30-A of Administrative Regulation 6/2002 (new article added by Administrative Regulation 27/2009), article 18 of Law 10/2012 and article 47 of Administrative Regulation 26/2012.



necessary adaptations, which implies that there is a substantive difference between concessionaires and sub-concessionaires, that requires that the legal framework needs to be adjusted and shall not be applied directly to the three casino gaming sub-concessionaires.

One issue still deserves our attention, which is the often asked and seldom answered question of the validity of the casino gaming sub-concessions. In our view, the answer was clear at the time in which the sub-concessions were issued, and it is that we were facing an apparent breach of article 7/2 of Law 16/2001, which has the legal purpose to set a maximum number of operators, to no more than three, for the local casino gaming market. The legislative intent was clear and while the use of sub-concessions is not unheard of in the administrative law of Macau,⁹⁷ since they were often used namely in public works concessions.⁹⁸ Nevertheless, the fact remains that sub-concessions here were used to elude the legal limits of Law 16/2001.

The same can be said about a number of mandatory legal provisions of Law 16/2001 that required that the casino gaming operators need to be selected by public tender, namely article 8/1 of Law 16/2001. They were also not complied with. And all points to the fact that such was done deliberately, to avoid that the full compliance with the rules of public tender could lead to a displeasing result.⁹⁹ This implies that the decision of the government of the Macau SAR, to grant sub-concessions in 2002-2006, were illegal at the time, in breach of Law 16/2001, and that the sub-concessions could be considered invalid.¹⁰⁰ Further, the fact that a number of subsequent gaming legislation explicitly recognized the existence of casino gaming sub-concessions, as was the case with the Law 5/2004, Administrative Regulation 27/2009, Law 10/2012

97 See, for example, article 2/2 of Decree-Law 2/78/M, of 21 January 1978, article 4 of Decree-Law 9/87/M (and article 6 of the Statute approved by Decree-Law 9/87/M), of 23 February 1987, article 1 of Decree-Law 51/83/M, of 26 December 1983, article 4 of Decree-Law 23/98/M, of 1 June 1998, article 6/1/a) and 2 of Decree-Law 36/95/M, of 7 August 1995, article 14 of Law 3/90/M, of 14 May 1990, and articles 42/1-2, 43/3-5, 50/1, 2 and 4, 51/1/1)-2) and 2 of Law 10/2013, of 2 September 2013.

98 In a public works concession it often happens that certain phases of a multifaceted construction project (namely, bridges, tunnels, etc.) requires a high degree of specialization that the concessionaire does not have. In such cases, it is not uncommon for a sub-concessionaire (as a sub-contractor) to be selected, and authorized by the government, to offer such specialty and execute the portion of the construction work under his purview.

99 The exclusion of the favorite bid from the public tender, which was perceived as having an advantage in terms of a new integrated resort casino gaming model, against the preferences of the public authorities.

100 The potential legal consequences, and the legal issues that might possibly be raised in a court of law, require a more comprehensive review of the law than is here possible.



and Administrative Regulation 26/2012, does not appear sufficient to alter this conclusion. That is so, namely, because Law 16/2001 was never amended, and the governmental authorities do not appear to have a sufficient legal basis to act in this fashion.

Overall, this question has become the proverbial *elephant in the room*, as the validity of the casino gaming sub-concessions has never been seriously examined and has become somewhat of an awkward question. Nevertheless, it is necessary that Law 16/2001 is revised to recognize the sub-concessions, or, as appears to be preferable at this point, to upgrade all sub-concessions into full-fledged concessions, so that the apparent distinction between the six operators is not retained as a permanent feature of the local casino gaming market.

11. Competition Law issues

The need to apply the legal framework for casino gaming to both the casino gaming concessionaires and sub-concessionaires is made obvious, for instance, with regards to competition law issues.¹⁰¹ Law 16/2001 limits market concentration, and such needs to imply that both casino gaming concessionaires and sub-concessionaires, and their main shareholders holding at least 5% of the corporate capital, are not allowed to hold, directly or indirectly, 5% or more of the capital of other casino gaming concessionaires or sub-concessionaires.¹⁰² Moreover, the holders of key corporate offices (namely, members of the board of directors) cannot accumulate positions in more than one casino operator or management company.¹⁰³

This is designed to avoid the exchange of corporate shares and cross-participations of capital between the various casino operators, and to prevent that the casino gaming concessionaires or sub-concessionaires might be owned by the same shareholders or managed by the same corporate officials (namely, the same members of the board of directors), which could limit or reduce fair competition conditions in the local casino gaming market.¹⁰⁴

101 Such is established in the administrative contracts signed with the three casino gaming sub-concessionaires, under clause 87 of the Casino Gaming Sub-Concession Contracts (MGM Grand, Melco PBL and Venetian).

However, that the sub-concessionaires must be required to compete fairly in the market is another clear indication that the sub-concessionaires are nothing else than *de facto* independent casino operators and that therefore we are facing a potential breach of the restriction of the number of operators that Law 16/2001 imposes.

102 See article 17/10 of Law 16/2001.

103 See article 18/1 of Law 16/2001.

104 See article 21/1 of Law 16/2001.



There is also a general prohibition of abuse of dominant position¹⁰⁵ and of any agreements that might restrict competition between the casino gaming concessionaires and sub-concessionaires¹⁰⁶ (any such agreement is null and void, and administrative and civil liability might arise¹⁰⁷). All casino operators must respect the rules of a free market economy and are not allowed to distort normal competition conditions.¹⁰⁸ Hence, casino gaming concessionaires and sub-concessionaires, without any relevant difference, must not engage in any actions which might endanger or limit fair competition in the Macau casino gaming industry.

Furthermore, the government must be fair and impartial in all dealings with the casino gaming concessionaires and sub-concessionaires, and protect fair competition in the local casino gaming market, ensuring that all casino operators comply with these market rules.¹⁰⁹

However, there is an issue of tax competition that deserves greater attention, since as a result of the tender proposals submitted at the public tender of 2001/2002, there is a discrepancy in the tax rates applicable to one of the casino gaming concessionaires that may be considered to be a breach of fair competition conditions. Under the casino gaming concession and sub-concession agreements, with regard to the amount due to the Macau SAR as a contribution for the promotion of tourism, social and urban development, there is a difference to be found among the tax duties applicable to the various casino gaming operators.¹¹⁰ With regard to this contribution the amount due is: (i) a tax rate of 2.4% of the gaming gross revenues for Wynn, Galaxy, Venetian, MGM Grand and Melco PBL;¹¹¹ and (ii) a tax rate of only 1.4% for SJM.¹¹²

This is a substantial discrepancy in the effective tax burden of the casino gaming operators and a potential breach of the duty to ensure fair competition conditions by the government of the Macau SAR. This discrepancy is usually

105 See article 21/4 of Law 16/2001.

106 See article 21/3 of Law 16/2001.

107 See article 21/6 of Law 16/2001.

108 See article 21/4 of Law 16/2001.

109 See article 21/2 of Law 16/2001.

110 LUÍS PESSANHA, Chapter 7 (*Taxation of Gaming in Macau*), in “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 249-251.

111 Clause 49 of the Casino Gaming Concession Contracts (Wynn and Galaxy) and clause 49 of the Casino Gaming Sub-Concession Contracts (MGM Grand, Melco PBL and Venetian).

112 Clause 49 of the Casino Gaming Concession Contract (SJM).



justified as a compensation for the expenses paid by SJM with certain unique additional contractual obligations, which imply a duty to perform certain contributions in kind.¹¹³ It is, however, increasingly less convincing that the costs with such special contractual obligations are equal in economic value to the tax differential.¹¹⁴

12. Non-casino gaming

As was previously mentioned, under Law 16/2001 the casino gaming concessions and sub-concessions cannot offer pari-mutuels and sports betting, or lotteries,¹¹⁵ and online gaming is also not permitted, since it is not included in the scope of the land-based casino gaming concessions. As the current cycle of casino gaming concessions is ending, it may be time to reconsider the legal divide between casino and non-casino gaming.¹¹⁶

It should be considered that 2018 saw two major *adverse events* with regards to pari-mutuels, which may deserve further reflection in terms of public policy. The first and more obvious one is the closure of the greyhound racing pari-mutuel, and the end of a dog racing concession that existed since 1963,¹¹⁷ but which is believed to have been unprofitable for the last decade.¹¹⁸ The second

113 See clause 100 of the Casino Gaming Concession Contract (SJM).

This clause of the Casino Gaming Concession Contract of SJM has been amended in 2013 and 2017 to reflect the growing scope of the river clearing and dragging obligations that need to be performed.

114 At the very least, the economic costs of these obligations in kind should be assessed each year in order to see how much they are worth in real terms and to determine the amount of tax reduction to be awarded. Better yet would be for the government to award such works directly, in the market, and establish equal tax rates for all sub/concessionaires, ensuring that there is a level playing field with regards to casino gaming taxes.

115 It is possible that lotteries can be offered by the casino gaming sub/concessionaires, if authorized by the government and after an amendment to the sub/concession contract is made – Article 3/7 of Law 16/2001.

There has been at least one such authorization granted to SJM to offer a raffle (*tombola*) to the public, under Dispatch of the Secretary of Economy and Finances 42/2002, of 22 April 2002.

116 LUÍS PESSANHA, Chapter 3 (*Gaming Concessions in Macau*), in “Studies on Macau Gaming Law”, Salvatore Mancuso (Editor), University of Macau/LexisNexis Butterworths, 2012, 117-125.

117 The last renewal of the concession contract was of 1 year only, until 20 July 2018.

118 The probable causes for the end of the concession are the following:

(1) poor economic performance of the concession, which made investments by the concessionaire into new facilities unpalatable, allowing for the noticeable aging of the dog racing racetrack, and reduced the tax base for the government, which in turn made the prorogation of the concession



episode that deserves reflection was somehow more nuanced, but follows the same pattern, which was the extension of existent horse racing pari-mutuel, in place since 1978, up until 2042, but with a number of unusual conditions: that outstanding gaming taxes are paid until 2021, in monthly payments, in a total amount that exceeds 150 million Patacas,¹¹⁹ and that additional capital is made available by shareholders to the horse racing concessionaire, in a total amount of no less than 570 million Patacas in 2018, of no less than 400 million Patacas until 2020, and of no less than 500 million Patacas until 2023.¹²⁰ This was required because the corporate capital of the horse racing concessionaire had fallen below the minimum legally required of half of the initial capital due to accumulated losses.¹²¹ It might be worth noting that the horse racing pari-mutuel concessionaire appears to have been making operational losses in the last years to a point in which it has become extensively decapitalized and has not been able to pay gaming taxes.¹²²

The potential loss of financial capacity of the horse racing pari-mutuel concessionaire, due to accumulated operational losses, is a serious event, which may trigger governmental action, and additional corrective measures, to ensure the continued operation of the concession. The non-payment of gaming taxes, is a potential ground for termination of the horse racing pari-mutuel concession¹²³

less appealing, (2) location of the greyhound racing stadium (*Canidrome*) in a high density urban area of the peninsula of Macau, creating sustained grassroots pressure to repurpose public land upon which the concession was operating for housing and urban renewal (namely, to build schools, elderly care facilities, etc.), (3) increased levels of concern with animal welfare and difficulties in complying with new domestic and international standards, leading to an international boycott on the sale of greyhounds to Macau (namely, by Australia, the main source of greyhound imports to Macau), which lead to significant complications in replacing aging greyhounds with new dogs fit to race, and the need to improve existent facilities to comply fully with the new domestic legislation on animal welfare, namely Law 4/2016, of 25 July 2016, which approved the animal protection act.

119 See clause 2 of the Horse Racing Concession Contract, as amended in 28 March 2018.

120 See clause 9/4-6 of the Horse Racing Concession Contract, as amended in 28 March 2018.

121 There was a breach of a general rule of company law, which requires that additional capital is invested in the company by the shareholders, so that at least half of the company initial capital is made available, in no more than 60 days, or that the company needs to be dissolved, in case more than half of the original capital of a company is lost, under article 206 (*Loss of half of capital*) of the Commercial Code of Macau.

Commercial Code of the Macau SAR, enacted by Decree-Law 40/99/M, of 3 August 1999, as amended by Law 6/2000, of 27 April 2000, Law 16/2009, of 10 August 2009, and Law 4/2015, of 1 June 2015.

122 We do not know since which year exactly the special gaming taxes were no longer duly paid.

123 See clause 29/c) of the Horse Racing Concession Contract, as amended in 28 March 2018.



and a serious breaches of the duties of the concessionaire.

This *state of affairs* was not known and was made public only upon the renewal of the Horse Racing Concession, for nearly another 25 years, which took place in March 2018.¹²⁴

The latest official numbers published by the Gaming Inspection and Coordination Bureau suggest that the shortfall in gaming income started in 2013:¹²⁵

* 1 HKD = 1.03MOP (Unit:MOP million*)

(1) Gross revenue from different gaming activities in 2013-2018										
Items	2013	2014	2015	2016	2017	2018				
						1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Total
Games of Fortune	360,749	351,521	230,840	223,210	265,743	76,510	73,707	73,838	-	224,055
Greyhound Racing	178	145	125	71	46	11	12	-	-	23
Horse Racing	365	306	166	141	104	30	26	19	-	75
Chinese Lottery	5	6	7	7	10	4	3	3	-	10
Instant Lottery	0.0024	0.0014	0.0021	0.0004	0.0001	0.0007	0.0003	0.0002	-	0.0012
Sports Lottery - Football	419	598	503	541	519	126	244	178	-	549
Sports Lottery - Basketball	150	138	170	158	185	69	44	45	-	157
Total	361,866	352,714	231,811	224,128	266,607	76,750	74,036	74,083	-	224,869

* 1 HKD = 1.03MOP (Unit:MOP million*)

(2) Betting amount from pari-mutuels and lotteries in 2013-2018										
Items	2013	2014	2015	2016	2017	2018				
						1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Total
Greyhound Racing	855	690	592	335	218	52	58	-	-	110
Horse Racing	1,881	1,567	837	709	517	149	129	97	-	375
Chinese Lottery	20	25	27	29	39	14	12	11	-	36
Instant Lottery	0.0042	0.0018	0.0026	0.0005	0.0007	0.0008	0.0003	0.0002	-	0.0013
Sports Lottery - Football	4,962	6,040	5,887	6,093	5,500	1,324	2,013	1,793	-	5,130
Sports Lottery - Basketball	1,810	2,078	2,310	2,390	2,643	908	545	403	-	1,856
Total	9,528	10,400	9,653	9,557	8,917	2,447	2,757	2,304	-	7,508

124 The concession was extended for another 24 years and six months, until 31 August 2042. See clause 2/1 of the Horse Racing Concession Contract, as amended in 28 March 2018.

125 Gaming statistics available at the official website of the Gaming Inspection and Coordination Bureau at <http://www.dicj.gov.mo/web/en/information/DadosEstat/2018/content.html#n1>.

The situation with regards to local Chinese Lottery is arguably even worst, as there is very little income been generated in the last decades, and it is obvious that the main lottery been sold in Macau to the general public is the one offered by the Hong Kong Jockey Club (*Hong Kong's Mark Six Lotto*), which is sold openly by local vendors and at newspaper stands, even if such is not legally permitted, as it is a breach of the exclusive enjoyed by the local lottery concessions. The instant lottery does not deserve to even be mentioned, since its gaming revenue is practically non-existent, as it has been so for the past decades. The sports betting concessionaire appears to be doing better, and remains the only non-casino gaming concession that is both profitable and financially viable, even if one cannot help to wonder if it could not benefit from been offered at the casino properties.

It can be questioned if the current non-casino gaming concession model, at least with regards to pari-mutuels and lotteries, is sustainable or if changes are needed, to permit that the casino gaming operators are allowed to offer non-casino gaming products to the general public. It is obvious that, at least as far as sports betting is concerned, the casino operators could be interested. It may be time to rethink the existing divide between casino gaming, where there is competition and six operators, and non-casino gaming, where there is a group of sole monopolistic gaming concessionaires, since the current model appears to be near exhausted.

It may even be time to reconsider the *status quo* with regards to online casino gaming¹²⁶ in Macau, which is something Law 16/2001 opted not to include in the scope of the existent casino gaming concessions.¹²⁷ It was implied that, at a later stage, there may be separate concessions for online casino gaming, but since then the government never revisited the matter. Meanwhile, the Macau Jockey Club (*sole horse racing concessionaire*), formerly the Macau Yat Yuen (*sole greyhound racing concessionaire*) and Macau SLOT (*sole sports betting concessionaire*) do accept online bets through their websites, and are authorized to do so by secondary legislation.¹²⁸ There is still no general legislation that deals with this issue, which may offer a comprehensive framework for the regulation of online games.

We have grown sceptical of the potential benefits of online casino gaming

126 Or “*interactive games*” in the terminology of Law 16/2001 (see article 2/1/3) of Law 16/2001).

127 See article 4 of Law 16/2001.

128 See articles 6 and 7 of the Sports Betting Regulation approved by Executive Order 67/2018, of 30 April 2018, the Regulation for the Placing of Bets in Horse Racing in the Internet, approved by Dispatch of the Secretary of Economy and Finances 63/2003, of 25 March 2003, and the Regulation for the Placing of Bets in Greyhound Racing in the Internet, approved by Dispatch of the Secretary of Economy and Finances 64/2003, of 25 March 2003.



for the local gaming industry, namely taking into account international tax competition, but we would advocate that the time is right to conduct a serious and credible study of the matter, with the help of leading experts in the field, to inform public policy on the matter.

One final issue should be raised here, which is that the legal system of the Macau SAR still does not include a specific legal regime with regards to non-casino gaming concessions, which are mostly regulated by the various administrative concession contracts and disperse, often outdated, legislation. The need to approve a broad legal framework similar to Law 16/2001 for non-casino gaming is obvious, since there are a number of issues that require to be regulated by law, in a systematic approach, and should not, or cannot, be settled only in the relevant concession contracts. One of these issues requiring a law are the gaming tax duties, or exemption of taxes, that currently are regulated in the concession contracts,¹²⁹ but in our legal system need to be approved by the Legislative Assembly, by means of a parliamentary act. Here we are facing a potential breach of the matters that, under article 71(3) of the Basic Law, are in the exclusive power and competence of the Legislative Assembly, and cannot be approved directly by the government.¹³⁰ This is an issue that should attract greater attention, and needs to be addressed by the lawmakers with some urgency.

13. Final remarks

As we approach the end of the current cycle of casino gaming concessions, it may be time to reflect upon the many virtues of the existent model, but also to consider some of its short-comings. It would be advisable to consider not only what needs to be done with regards to casino gaming, the natural focus of attention in terms of public policy-making, since it is the main source of tax revenues by far, but also to consider non-casino gaming, ending the long neglect

129 The issue was raised by the recent amendment of the horse racing concession contract, in 28 March 2018, which included a delayed payment schedule for taxes due by the concessionaire, which is a temporary exemption of payment of taxes, without a legal basis. Prior, the special tax regime applicable to the horse racing concession was set under Decree-Law 28/77/M, of 6 August 1977, which also included tax exemptions.

130 A reading translation of article 71(3) of Basic Law might provide that:

“The Legislative Assembly of the Macau Special Administrative Region shall exercise the following powers and functions: (...)

3) To define, according to law proposals submitted by the government, the essential elements of the tax regime, as well as to authorize the government to issue debt; (...).” (our translation)

It is understood that this implies an exclusive law-making power of the Legislative Assembly to regulate tax law (*fiscal legality*), in broad terms, including any tax exemptions or benefits that may be granted to taxpayers.



that has seen pari-mutuels, sports betting and lotteries been almost forgotten by the lawmaker.¹³¹ And it may also be time to consider some changes, within what needs to be improved, and to avoid blind continuity. Public interest so dictates.

It remains a fact that Law 16/2001 is in need of been updated, namely to take into account the new figure of the casino gaming sub-concessions, since at least 2002. One wonders how it can be that for over 15 years, and in all likelihood until the end of the current concessions, we had a legal framework that fails to address half the reality that matters, regulating the casino gaming concessions, but not acknowledging the sub-concessions. Not to mention that there is also no specific regulation to deal with the numerous satellite casinos, owned by third parties, that are operate under license from concessionaires, and one assumes are authorized by the government of the Macau SAR. One assumes, since the legal basis is not known to us, nor have the appropriate governmental authorizations been made public. The law has not been able to offer proper rules for all these things. It may be time it does, and that a broad revision of the current gaming legislation is undertaken. The end of the current casino gaming concessions offers a *golden opportunity* for reform and to recalibrate for the future.

We expect, as does almost everybody else, that the two casino gaming sub/concessions that will expire in 2020¹³² will be extended to have the same term as the remaining sub/concessions, which will end in 2022. Such is made palatable by the fact that, as the law stands now, the government needs to open a public tender for the selection of the new casino gaming concessionaires. There is no appetite to open a public tender in 2020 and another one in 2022. The path of less resistance points to a single public tender taking place in 2022.

It would, however, be wise to learn from past experience, and consider that the 2001/2002 tender procedure was a *near miss*, with the favourite tender proposal almost been excluded, in part because there was an additional element of complexity and risk in allowing joint bids, namely that the private parties submitting a combined application may not be able to reach detail agreements on a later stage. It should also be noted that the public tender in 2001/2002 took longer than originally expected,¹³³ since the review of the documentation supporting the various bids under competition was considerably more challenging than anticipated.

131 We have raised this issue before. See LUÍS PESSANHA, “O Jogo de Fortuna e Azar e a Promoção do Investimento em Macau”, in *Administração*, 77, Vol. XX, 2007, 847-888 (862).

132 Both the concession of SJM and the linked sub-concessions of MGM Grand end 31 March 2020.

133 And because of that the concession of STDM (the former sole casino gaming concessionaire) required a last minute extension. See Dispatch of the Chief Executive 259/2001, of 21 December 2001.



One can expect that things will not be much easier in 2022. On the contrary, the same level of difficulty can be expected. And the government needs to be finished by 2025, at the latest. Or Law 16/2001 will have to be amended, to allow for the prorogation of the existing sub/concessions for more than the current maximum of five years, if such is strictly required to allow for extra time to conclude the ongoing public tender. Which is something that a number of observers expect to happen anyhow, since there is a widespread believe that the existent sub/concessionaires will be allowed to continue to operate after 2022, which could make necessary that Law 16/2001 is amended to increase the total number of concessionaires, to convert the three sub-concessions into full-fledged concessions, and perhaps even to dispense with a public tender and move to allow for the direct award of the new casino gaming concessions. An international public tender may be a less than useful exercise, if the number of concessions under competition equals the existent sub/concessionaires, as they would benefit from their established presence and long experience in the local casino gaming market. A public tender would, however, be necessary if it would be designed to help select additional operators, if there is an increase in the total number of concessionaires that are allowed in the Macau casino gaming market in the future, perhaps from six to eight casino concessions, to allow for fresh applicants. All this needs to be considered.

