Historically, the gaming industry has long been a central part of Macau’s economy and increasingly so since its handover to the People’s Republic of China in 1999 and subsequent transition from a monopoly based system to a liberalized gaming industry. But few predicted, back in the early noughties, the heights that the gaming industry would reach. For those who managed to take part in this formidable boom, life has been good. However, there are those who have been sitting on the sidelines waiting patiently for a piece of the pie. The term of the Macau gaming concessions may be their way-in.

Macau’s gaming industry is almost exclusively dominated by the operation of games of fortune or chance, or other casino games whose legal framework is regulated by Law 16/2001 (the “Gaming Law” or “GL”). The Gaming Law stipulates that the operation of games of fortune or chance is restricted to public limited liability companies incorporated in Macau which have been granted a concession by way of an administrative contract by the MSAR (“Concession”) (Cf. article 7.1 of the Gaming Law). The maximum number of Concessions is limited to three and are subject to a public tender before being granted (Cf. articles 7.2 and 8.1 GL).

Further to a public tender whose results were made public by Order of the Chief Executive no. 26/2002, dated February 8, 2002, three Concessions were provisionally awarded to “Sociedade de Jogos de Macau, S.A.” (“SJM”), “Galaxy Casino, S.A.” (“Galaxy”) and “Wynn Resorts (Macau), S.A.” (“Wynn”). SJM signed its contract on March 28, whilst Wynn and Galaxy executed their contracts on June 24 and 26, 2002, respectively.

On December 19, 2002, Galaxy signed a revised Concession contract with the MSAR Government (“Government”), as well as a sub-concession agreement (“Sub-Concession”) with “Venetian Macau, S.A.” (“Venetian”) which enabled the latter to operate games of fortune or chance or other casino games in the MSAR. Two additional Sub-Concessions with the same scope ensued between (1) SJM and “MGM Grand Paradise, S.A.” (“MGM”), signed on April 20, 2005, and (2) Wynn and “Melco PBL Jogos (Macau), S.A.” (“Melco PBL”), signed on September 8, 2006.

In accordance with article 13.1 of the Gaming Law, Concessions are subject to a term set in each agreement which cannot exceed 20 years. Gaming Concessions which have reached the 20-years term can only be exceptionally extended, once or more, by way of a reasoned order issued by the Chief Executive, to a maximum period of five years (Cf. article 13.3 GL). Once the said five years’ extension has elapsed, the Concession is terminated. Unless the Gaming Law is amended, future Concessions will be subject to a public tender procedure.

The SJM Concession stipulates a term of 18 years, ending on March 31, 2020, whilst the Galaxy and Wynn Concessions have a 20-year term, terminating on June 26, 2022.

The Sub-Concessions end on the same day from which
each formally derive. Thus, the term of the MGM, Venetian and Melco PBL Sub-Concessions is March 31, 2020 for the first, and June 26, 2022 for the last two.

The legal nature of the Sub-Concessions has caused much debate and controversy. Some say that these agreements are illegal in light of the current Gaming Law, although their legality has not yet been challenged in the MSAR jurisdiction.

A Portuguese Administrative Law academic defines sub-concessions as "[…] the transfer that the concessionaire, with the conceding party’s consent, does to another company of part of the obligations conceded and of the powers necessary to fulfill such obligations, in accordance with the terms agreed between the concessionaire and the sub-concessionaire." (Cf. Marcelo Caetano, Administrative Law, vol. II, Lisbon, p. 1127-1128). These agreements, such as any concession contracts granted by the Government, are deemed administrative agreements, therefore regulated by Administrative Law.

As mentioned above, the first Sub-Concession was entered between Galaxy and Venetian on December 19, 2002. When Galaxy’s initial Concession was signed by public deed, on June 26, 2002, Clause 24 of the said agreement stipulated that the concessionaire would undertake to transfer to a Venetian group company, designated “Venetian Macau – Management Company, S.A.” the management of the Concessionaire, regarding the operation of casinos games of chance.

However, a subsequent fall-out between Galaxy and Venetian, allegedly due to the joint-venture not satisfying the Nevada gaming regulator’s standards, led the Government to authorize a Sub-Concession agreement to satisfy both parties’ interests.

According to the second paragraph of its recitals, the Venetian’s Sub-Concession stems from Clause 75.1 of Galaxy’s Concession. In accordance with said clause, sub-concessions are forbidden unless approved otherwise by the Government. The formal approval, if any, was never disclosed by the Government.

As the first ever Sub-Concession, Venetian’s terms will be briefly analysed in order to determine how different it is compared to the Concession it derives from:

a) The Venetian Sub-Concession has the exact same scope as the Galaxy Concession, i.e., the operation of games of fortune or chance or other casino games in the MSAR (Clause 1.1);

b) In Clause 6.2, Venetian committed before the Government to the fulfilment of legal obligations identical to those of the concessionaires;

c) Venetian is authorized to operate all kinds of games that the concessionaire has been authorized to operate, as well as any electrical or mechanical gaming machines (Clause 10.1);

d) The Sub-Concession is governed by the same legal framework applicable to the Galaxy Concession and Venetian assumes before the Government the fulfilment of legal obligations identical to the ones assumed by Galaxy (Clause 6.1 and 6.2);

e) The concessionaire does not assume nor share any liability before the MSAR for any damages caused by the non-performance of part, or all of the sub-concessionaire’s legal or contractual obligations caused by the latter (Clause 74.1);

f) The termination of Galaxy’s Concession before June 26, 2022 does not imply the termination of Venetian’s Sub-Concession (Clause 94.1);

g) In case of termination of the Concession, the Government will do its best in order to transfer Galaxy’s contractual position as concessionaire in the Sub-Concession to be assumed by another concessionaire for the operation of games of fortune or chance and other casino games (Clause 94.2);

h) The Government will extend to Venetian any more favourable conditions granted in future Concessions (Clause 106).

It should also be noted that some of the obligations assumed by Venetian could not have been imposed by Galaxy, but only by the Government, e.g., those related to the payment of taxes, contributions and other commitments made and mentioned in Clauses 6.2, 47.1, 48, 49 and 74.1 which bind the sub-concessionaire directly to the Government, evidently making it a (silent) party of the Sub-Concession.

As a result of the above-mentioned, there seems to be no substantial difference between the Galaxy Concession and the Venetian Sub-Concession other than its formal designation. The same could be said of the other Sub-Concessions.

Considering that the current Gaming Law forbids more
than three Concessions, how is the Government going to address the continuity of the existing Concessions and Sub-Concessions at the term of each agreement?

One option on the table is to amend the Gaming Law in order to reflect the current status quo in the MSAR gaming industry. This amendment entails specifically admitting the admissibility of Sub-Concessions, along with the respective terms and conditions.

Since the current Sub-Concessions are in substance Concessions, all new Sub-Concessions granted should abide by the legal nature of such contracts. This would avoid the Government having to issue letters to third parties declaring the independence of these Sub-Concessions in relation to their respective Concessions.

Considering that the current MSAR gaming industry has come a long way since the Gaming Law was first enacted, the Government may also address the possibility of setting shorter terms for new Concessions and allowing the renewal of current Concessions by direct award instead of public tender. However, any amendment to the gaming regulatory framework will have to pass through the Legislative Assembly, which may not be an easy hurdle to overcome.

On the other hand, no one can guarantee that the Government will allow new Sub-Concessions once these terminate, nor should the number of six gaming operators be taken for granted.

In any case, the Government will most certainly ensure that the renegotiation of the current Concessions and/or Sub-Concessions is done simultaneously, i.e., by extending SJM’s Concession, and MGM’s Sub-Concession, in order for both to end at the same time as the remaining Concessions and Sub-Concessions, i.e., in 2022.

There is also the possibility of the Government extending the Concessions (and Sub-Concessions) with an additional term of up to 5 years, i.e., until 2027.

The renegotiation of these contracts will likely fall upon the next Chief Executive whose term will start on December 20, 2019.

One thing is certain: the future Government’s handling of the negotiation regarding the award of future Concessions will abide to the directives set by the Central Government and will reflect the political zeitgeist of this decade’s end and early twenties.

*About the author*

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