



TIP-POOLING

By Hugo Luz dos Santos

I-Background: The creation of tip-pooling by the casinos of the United States of America and Macau: tipping to ensure fun for all?

The bulk of money emerging from tipping is the exclusive property of the beneficiaries of the tip-pooling. As such, that money belongs to all employees of the casinos (croupiers, casino table dealers, floor managers, pit bosses, floor men, box men, cashiers, and the rest of the employees that are the bulk of the working force of the casino). These employees are a

part of the social structure that strives to achieve a certain goal: the thriving of the gaming leisure industry in general. Tipping is inextricably linked with the intention of the casino patrons or high rollers to reward friendly casino table dealers who closely deal with them and, at a certain point, to reward the above mentioned social structure that ultimately helps ensure the experience for all as fun and dazzling.

Nonetheless, one cannot forsake or disregard that players tip dealers for one specific reason: to receive better treatment while gambling and, sometimes, to ensure that the pit bosses or the casino service team leaders will overlook an assortment of

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illegalities committed by them. Having this consideration very firmly in mind, on the bright side, tipping invariably underlies a specific intention of the casino patrons to reward friendly service provided by all the employees of the casinos (croupiers, casino table dealers, floor managers, “pit bosses,” floor men, box men, cashiers, casino service team lead)¹.

II-Background:

The creation of tip-pooling by the casinos of the United States of America and of Macau: illegitimate taking?

As emphasized by the doctrine, tip-pooling occurs when employees who are regularly tipped put all the tips received within a certain time frame together to be divided up evenly by the employer. Thus, this compilation of tips, or tip-pool, ought to be distributed by the casino employer according to the mutually agreed upon terms of the pooling arrangement. It’s fairly easy to see the reason: the employees rely heavily on the employers to divide the money collected in the tip-pooling between all those employees entitled according to their respective shares.

Conversely, if the casino keeps indefinitely frozen the minimum wage of the beneficiaries of tip-pooling and it complements that wage outdated with the redistribution of the money collected in the tip-pooling (stating, for this purpose, that this redistribution constitutes a wage supplement), the measure of the impoverishment of the beneficiaries of tip-pooling is directly proportional to the measure of unjust enrichment of the casinos.

To this extent, the unjust enrichment of the casinos emerges through the appropriation (thus, illegitimate taking) of the tips originally owned by the tip-pooling beneficiaries

(the employees of the casinos). Oftentimes, the beneficiaries of the tip-pooling do not even realize directly the measure of their patrimonial impoverishment; it is inflicted to them in a purely veiled form.

Although one cannot see directly an immediate patrimonial impoverishment of the beneficiaries of the tip-pooling, this patrimonial movement can be performed steadily in three successive steps: i) the creation of tip-pooling (oftentimes, deeply ingrained by the purposes of transparency listed above); ii) freezing “sine die” of the minimum wage of the employees and finally, iii) the redistribution of the tip-pooling amounts, by its beneficiaries as a wage supplement (provided that the minimum wages remain frozen for indefinite time); in these grounds, one can find the illegitimate taking of the casinos.

This unjust enrichment means that in such cases the casinos unduly benefit from the money collected in the tip pooling², and that is the reason they ought to be obligated to compensate and repay the beneficiaries of tip-pooling the “expropriation value” (the exact amount that has been taken by the casino from the employees).

The unjust enrichment by intervention might be a factor in civil liability according to the general criteria of the Article 477 of the Civil Code of Macau.

The unjust enrichment by intervention constitutes an autonomous category of the unjust enrichment and occurs when someone obtains enrichment through an illegitimate appropriation of others’ goods, through their use, profit, or consumption. Even if the tortfeasor or the wrongdoer had no profit whatsoever, he ought to be obligated to compensate the “expropriation value,” the deemed restitution³. In this light, the beneficiaries of the tip pooling have the exclusive right of enjoyment

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in order to reflect the trust given by the employees, the employers ought to be considered as holding the tips in trust.

Traditionally, the trust has an internal tripartite structure: 1) settlor, 2) trustee; 3) beneficiaries. In general terms the settlor (gambler) is the original owner of the right of ownership of the goods (tips) to constitute in trust; the trustees (casinos) are the present depositary of the constituted goods in trust (the money in the tip-pooling), and the casino table dealers are the last beneficiaries

of the goods and of the rights that are associated to it.

For that reason, the trustees are legally prohibited from taking any benefits from the position of mere depositary, unless duly authorized in the pooling arrangement or duly authorized by the beneficiaries of the tip pooling. Thus, the trustees should maintain the goods (tips) in trust. That obligation is actually a manifestation of the duty of loyalty that is deeply ingrained in the legal status of the trustee.

The no profit rule, which is a fundamental aspect of the common law of trusts, forbids any sort of conflict between the interests of the beneficiary and the interests of the trustee. Furthermore, the no profit rule prevents those trustees from getting profits or income through the fiduciary position that they occupy, unless provided for in pooling arrangement or duly authorized by the beneficiaries. ♣

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and of the fruition of the goods (tips) collected in the tip pooling. That exclusivity implies a legal ordination of goods (tips) that if it is to be disrespected through some illegal intervention, allows the beneficiaries of tip pooling to bring the action of unjust enrichment against the casinos (Article 467, no. 1, of the Civil Code of Macau)¹.

Discussion:

Tip-pooling should be legally qualified as a trust

In order to override or to disentangle the aforementioned legal problems, tip-pooling should be legally qualified as a trust. As outlined above, the employees rely heavily on the employers to divide the money collected in the tip-pooling between all those employers entitled according to their respective shares. Hence,

¹ This does not mean that all positions of the employees of the casinos (for example, floor supervisors and pit managers) can receive tips directly from casino patrons, and that consistently are to be eliminated from the tip-pooling. What is easily understood in the light of prevention of illegal activities and of possible favoritism for some high profile rollers which could thus “buy” to “kindness” of the “pit bosses” so that they “close their eyes” to any illegalities committed by them”. That’s exactly what happened in tip-pooling policy of Wynn Las Vegas LLC, which because of that eliminated those positions (the pit managers and floor supervisors), and introduced the position of a casino service team lead (CSTL). In this regard the US doctrine states that “the traditional of floor supervisor is to watch for cheating or any sign of problems, to handle altercations or disputes with customers, and to generally keep the floor running smoothly. If the floors supervisor’s job is to watch the dealers, then the “pit bosses”, are the heads of the casino floors and are called into action when major disputes or allegations arise. These have institutional, quintessential casino positions and are an integral part of the operation—they are not to be tipped. It is easy to see why tipping the supervisors of the casino floor could become an illegitimate practice because of the possible perception that the tip was a bribe or a payment for turning a blind eye to some less-favorable behavior on the floor. These issues can explain why in the Wynn’s handbook, these are two of the positions barred from receiving tips”; KANDIS MCCLURE, “Tip-Pooling at Nevada Casinos”, in: UNLV Gaming Law Journal, Volume 5, Spring, (2014), p. 88. One should not forsake that Per Nevada Revised Statute (“NRS”) § 608.160, it is illegal for employers to “take” tips from employees. In Wynn Las Vegas, LLC v. Baldonado, 311 P.3d 96 (2013), the Supreme Court of Nevada following the same reasoning level stated in Moen and Alford, considered that the tip-pooling strategy imposed by the casino (Wynn Las Vegas) to their employees did not constitute a violation of the Nevada Revised Statute (“NRS”) § 608.160, as the casino was not taking any tips belonging to the employees.

² About the unjust-enrichment, in this scope, restitution is the principle that underlies the US doctrine of the gain-based damages, i.e., “the wrongdoer is left back where he started”, the US doctrine –ANDREW KULL, “Restitution’s Outlaws”, in: Chicago-Kent Law Review, Volume 87, (2003), p. 19; principle that intrinsically appears connected with the moral hazard, that states that “What moral hazard means is that, if you cushion the consequences of bad behavior, then you encourage that bad behavior”; TOM BAKER, “On the Genealogy of Moral Hazard”, in: Texas Law Review, Volume 75, Number 2, December 1996, (1996), p. 238; for that reason, the authorized US doctrine refers to a “minimum moral virtue in the context of the contracts”; SEANA VALENTINE SHIFFRIN, “The divergence of contract and promise”, in: Harvard Law Review, N.º 3, Volume 120, January 2007, (2007), p. 718.

³ In the US doctrine, ERIC J. KONOPKA, “Hey, That’s Cheating! The Misuse of the Irreparable Injury as a Shortcut to Preclude Unjust Enrichment Claims”, in: Columbia Law Review, Vol. 114, (2014), p. 2049.

⁴ However, the US jurisprudence often dismisses unjust-enrichment claims, mobilizing, for that specific purpose, the requirement of “irreparable injury rule”; in this sense, United States v. Bame, 2012-2 U.S. Tax Cas. (CCH) §50, 528, at 86, 491 (D. Minn. 2012); see Kelley v. Coll. of St. Benedict, 901 F. Supp. 2d 1123, 1132 (D. Minn) (denying unjust-enrichment claim when plaintiff could have obtained relief under fraudulent-transfer statute).