

# What future for Macau's sub-concessions?

In memoriam (Rui Afonso, 1947-2017)

Macao gaming systems are the result of historical evolution from the 19<sup>th</sup> century onwards, which were legally established and made available for commercial purposes through administrative concessions granted by the Macao SAR Government (Godinho, 2016: 239)<sup>1</sup>.



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## 1. Historical view

Formally, the legal gaming industry dates from 1810, when the Holy House of Mercy of Macao began to operate lotteries. For more than two centuries gambling has contributed to the economic development of Macao. It is therefore natural that its importance is recognized by the very attention given by its administrators to gaming affairs. There has been news of the existence of concession rights related to lotteries and the so-called games of fortune and chance since the days of Governor Ferreira do Amaral (1846-1849) (Godinho, 2016: 149).

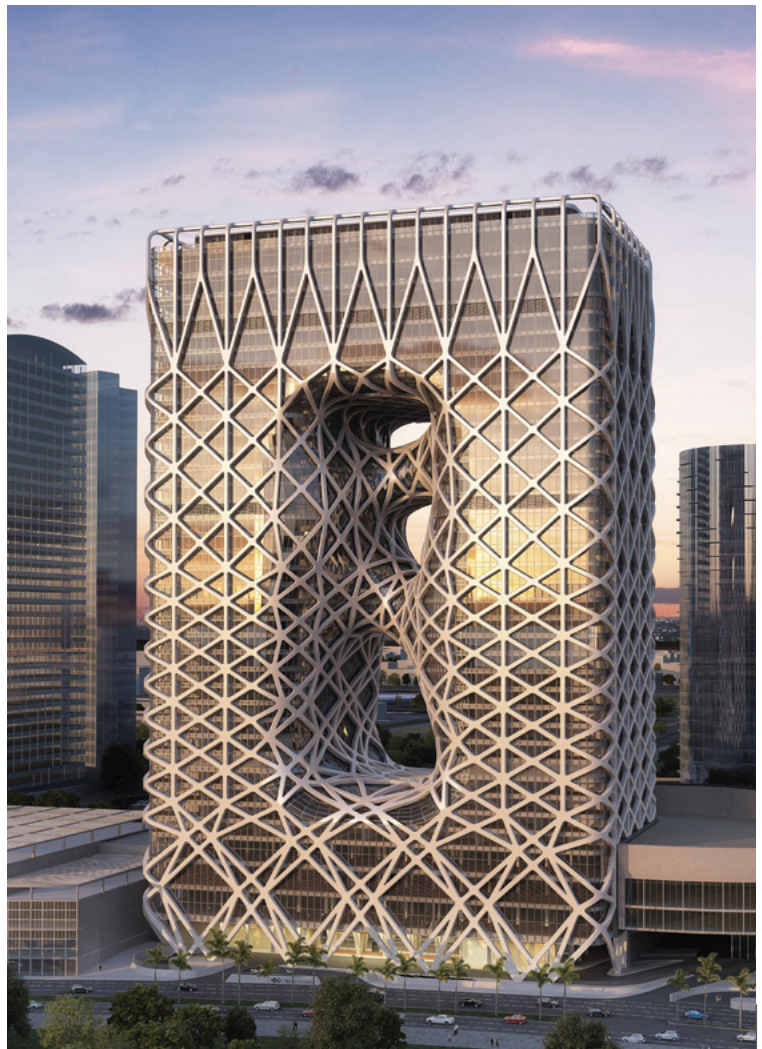
The current legal framework finds its roots in the law n<sup>o</sup> 1496, of June 1961, and from 1962 onwards it has been based on a concession system that, apart from the traditional more inward-looking models, sought to establish its gravitas and potential in the tourism industry. This model comes with greater specialization and more exhaustive regulation, taking into account the diversity of the gaming sector applications. Also, this development is associated with a growing professionalization of the sector evolving into a large-scale business aspiring to have international elements, as well as the establishment of entities specialized in this trade with competencies exclusively related to matters of gaming.

With the introduction of this new regime, Stanley Ho's STDM was granted a market monopoly to operate gambling, which continued uninterrupted until the beginning of this century following the handover of the Macao Administration from Portugal to the PR China (PRC) with the consequent establishment of the MSAR. It was then decided to liberalize the gaming industry.

The liberalization of the sector was already advocated by the Legislative Assembly (LA), for it was expressly included in article 5 of Law no. 6/82/M, of May 29, when a special license regime of up to four concessions was envisaged<sup>2</sup>. However, the lack of strategic vision of the Portuguese Administration - personified in the last governor of Macao<sup>3</sup> postponed the liberalization of the gaming industry to the 21<sup>st</sup> century. For this reason, the liberalization would only come

about in the early 2000's, under Chinese administration, through the approval of Law n<sup>o</sup> 16/2001. The current public tendering system for the casino gaming licenses was established containing the requirements to which the concessionaires were to comply.

These days, the MSAR enjoys legislative autonomy in defining casino gaming policy. This is included under the heading of "tourism and entertainment industry", which is



1. Godinho, Jorge A. F. (2016), *Direito do Jogo*, Vol. I, Macau.

2. Subsequently, Law No. 10/86/M, of Sept. 22, would limit the maximum number of concessions to three.

3. In December 1985, an official publication of the Government of Macao stated that "competition in the field of gambling should prevail over exclusive competition and this rule should only be disregarded in order to maintain the socially harmful effects of gambling (mainly those related to criminality) within reasonable limits (...) or when the size of the market does not justify the existence of more than one operator"- cf. The Game in Macau, Gaming Bureau, December, 1985.

dealt with in Article 118 of the Basic Law, and should accord with local interests and also integrated with the interests of the PRC itself.

## 2. The concession legal tool

In accordance with customary practice, activities related to the casino gaming industry post-1999 Macau were bound by the legal-administrative institution of the concession. The concession is a juridical entity deeply rooted in Portuguese administrative law, which inspired the Macau law. The administrative concession contract for the operation of games of fortune and chance is defined as “the administrative contract by which the administration allows a private person to operate, or maintain and operate, a casino gaming premise by remunerating himself from gaming revenues and providing financial compensation to the grantor” (Sousa and Matos, 2009: 78)<sup>4</sup>.

Pursuant to article 165 of the Macao Administrative Procedure Code (CPAM), the concession of the casino gaming operations is made under an administrative contract negotiated between the grantor, the Macau SAR, and the concessionaire. Law 16/2001 is the instrument that contains the fundamental collection of rules applicable to casinos in the MSAR. Paragraph 2 of article 1 stipulates that the legal regime aims, in particular, to ensure: (i)

proper exploitation and operation; (ii) the suitability of those involved in oversight, management and operation; (iii) operation under conditions of justice and honesty, and free from criminal influence; (iv) protection of the MSAR’s tax interests and, at the same time, (v) promoting tourism, social stability and economic development.

However, unique to the Macau system is the fact that by law there are only three maximum allowable concessions (see article 7, Law 16/2001). Despite this, the direct operation of casino gaming is undertaken by six distinct entities. Three of these are without concession agreements with the MSAR, operating under sub-concessions but behaving as if they were true license holders.

The legal regime for the concessions derives from the general law - Law 3/90/M, of May 14 – which defines the general basis of concessions for public works and public services by virtue of article 26. It applies to concessions that are not regulated by specific legislation. Sub-concessions are meant for public works and services. So, in view of the provisions of article 165 of the CPAM, there would be no legal basis for sub-concessions in games of chance, i.e. casino gaming.

The reason of delving here into the issue of gambling concessions derives from the above-mentioned restriction of the law as well as from the fact that the current concessions will end between 2020 and 2022. In the case of SJM, the current contract expires on March 31, 2020. The other two concessionaires, Galaxy Casino and Wynn Resorts (Macau) both have their contracts expiring on June 26, 2022. Consequently, the sub-concessions will expire on March 31, 2020 (MGM) and on June 26, 2022 (Melco Crown (Macau) and Venetian).

4. Sousa, Marcelo Rebelo and Matos, André Salgado (2009), *Contratos Públicos, Direito Administrativo Geral*, Tomo III, D. Quixote, 2.<sup>a</sup> edição.





### 3. Problems to be solved

Sub-concessions raise three fundamental problems. One derives from the particular contractual instrument used that allows for the extension of certain obligations beyond the date of termination of the concession contracts on which they depend. This is contrary to what is common practice and is not a result of the classic administrative legal framework applicable to sub-concessions. To clarify, clause 94 of the sub-concession contracts states that the termination of the concessions does not imply the termination of the sub-concessions.

This is a genuine legal aberration, which is understandable given the circumstances at the time (2002-2006). The continuity clauses for sub-concessions beyond the final deadlines set in the gaming concession regime is no longer acceptable. It should be corrected as soon as possible so that this situation does not recur. Essentially, it is a technical-legal problem that, if corrected, would not expose any major risk to the interests of the MSAR.

A different and much more acute problem arises from the answer to the question of whether the current regime of sub-concessions is in the interests of the MSAR.

On this subject, it seems that the answer is unequivocally negative. The current regime of sub-concessions is clearly detrimental to Macao's interests because the proceeds from the agreement to establish the sub-concession, which should go directly into the MSAR treasury strongboxes, will eventually end up in the pockets of brokers and intermediaries who use the licenses granted by MSAR to negotiate the terms of the sub-concessions. In other words, the grantor,

who is the MSAR Government, is marginalized from these negotiations and takes no advantage from the income generated by an agreement prior to the commencement of casino operations of the sub-concession; and which terms it does not control<sup>5</sup>.

The existing system seriously penalizes the interests of the MSAR, and by the same token the PRC's. It lacks transparency and therefore is also contrary to the financial interests of Macao and of the requirements of greater transparency and accountability in public affairs.

The third question to which the MSAR Government will have to determine a response is whether or not the continuation of the existing concessionaires and sub-concessionaires should be maintained, and whether or not their numbers should increase. To this point it should be remembered that gaming is a "public service" in Macao (Godinho, 2014: 3)<sup>6</sup> and any change implies a revision of Law 16/2001<sup>7</sup>. This issue will have to be defined with these guidelines in mind some time in advance because the future will depend on it. For now, what can be said is that there is no advantage from sub-concessions to the MSAR. And it is not justifiable to have sub-concessionaires, as well as junkets, behaving as if they were the license holders into the future.

### 4. Conclusion

In conclusion, it will be said that it is important to realign the bizarre de facto reality of the present day sub-concessions with the legal logic of the Macau law and in the interests of the MSAR, by not allowing the continuation of sub-concessions beyond the current deadlines. It is therefore appropriate to plan for the future and to review the existing legal regime, if necessary by extending the number of concessions to allow direct allocation. It is important to put an end to the present sub-concession system, which creates conflicts of interest and other corrupt practices. This solution is balanced, it respects the interests of the present sub-concessionaires and is in line with the actions of the PRC and President Xi Jinping to fight undesirable situations that undermine the power of the State and the ethical and moral authority of those that govern vis-à-vis the governed.

#### \*About the author

Sérgio de Almeida Correia studied law at the University of Lisbon (1980/1985), before becoming a full-time lawyer in the 90's. He was a legal adviser of the Macao Marine Department and of the Cabinet of Justice Affairs from the Government of Macao during the Portuguese Administration (1986/1989). In 1993 he joined Rui Afonso Lawyers in Macao. In the last twenty years, he has focused his attention on citizenship rights, as well as in Civil, Corporate and Administrative law. He holds a Master in Political Science (2003) and is currently a PhD candidate at the ISCTE-Lisbon University Institute.

5. According to what is publicly known, Pansy Ho paid USD 200 million and Lawrence Ho USD \$ 900 million (Chidley, Joe (2016), *The Rich 100: The Prince of Macau*, Canadian Business, Dec. 4; Cohen Muhammad (2016), *US scrutiny of Macau junkets dead as dodo; MGM Atlantic city buyout brings Pansi Ho tale full circle*, Forbes Asia, June 7).

6. Godinho, Jorge (2014), *Casino Gaming in Macau: Evolution, Regulation and Challenges*, *UNLV Gaming Law Journal*, Vol. 5:1, Spring.

7. In the same vein, Melo, Luís (2014), *Macau gaming concessions renewal risk*, *World Gaming Magazine*, April 19.

