

# The Role of Government Delegates in Macau Casino Gaming Concessionaires— Evolution and Prospective\*

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## Introduction

Macau Government announced in the consultation document for the amendment of Law No. 16/2001 (Macau Gaming Law)—whose public discussion ended on October 29, 2021—that it intends to introduce Government Delegates into the casino gaming concessionaires.

According to the consultation document, the appointment of government delegates will extend the Government direct supervisory powers over the casino gaming concessionaires and ensure that public interest is given precedence, as well as will be a form of proper guaranteeing compliance and fulfillment of the duties and obligations of the casino gaming concessionaires.

Such a system has existed in Macau since at least 1956, with the extension to Macau of the applicability of the Decree-Law No. 40 833, of October 29, 1956, enacted by the Presidency of Council of Ministers of Portugal, in which the duties of the delegates and directors appointed by the government are defined in an extensive and comprehensive manner.

The referred Decree-Law established the general principles in force in the current regime—under Decree-Law No. 13/92/M, of March 2, 1992<sup>1</sup>—for the government delegates and directors appointed by the government. That regime will serve as the basis for the amendments to be introduced to the Macau Gaming Law.

\*The outlined proposal for the introduction of Government Delegates was excluded from the actual bill of law, made public only after the conclusion of this article. The author, nevertheless, believes that the discussion herein remains valid within the intended scope.

<sup>1</sup>Decree-Law No. 40 833 was subsequently amended by the Law No. 2105, of June 6, 1960, and by the Decree-Law No. 139/70, of April 7, 1970. The principles stated therein were upheld by the Law No. 12/77/M, of October 22, 1977—the Organic Law of the Inspection of Games Contracts—and, subsequently, by the Decree-Law No. 13/92/M, which is currently in force and revoked *in totum* the referred Decree-Law No. 40 833.

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This article intends to provide a historical view of the concept and how it applies to the concessions of public services and other exclusive rights companies, such as the concessions for casino games in Macau, and to resort the regime that may be expected when the amendments to the Macau Gaming Law are introduced.

We will provide an overview of the concession system and its roots, the rules applicable to government delegates and their role throughout history, the reasons for the proposal to introduce the government delegates in the Macau casino gaming concessionaires, the results of the consultation process recently published, and what can be expected in the amended Macau Gaming Law.

### Concession roots and legal nature

The concept of concession started to flourish after the French Revolution with the rise of the liberal state and its doctrine of separation of powers introduced by Montesquieu.<sup>2</sup> The model of concession was a tool for the states, in exercising their executive power to provide public services.<sup>3</sup> This function could be exercised directly by the state, through “public legal persons”,<sup>4</sup> decentralized entities<sup>5</sup>—municipalities or other public entities—with the consequent enlargement of the size of the administrative structure, or through private entities, which, in principle, have “more economic standards, productivity, and efficiency.”<sup>6</sup>

Concessionaires of public services started to take a significant part of the economic pillars (water supply, electricity, gas, transportation).<sup>7</sup> This is made directly through an administrative act of concession (*e.g.*, government order) or through a concession contract that follows the administrative act of adjudication (direct or pursuant to a public tender or an invitational tender).

In Macau, since the 19th century, the government decided to grant exclusives to specific activities to obtain revenues. In those exclusives were first included the trade in, respectively, pork meat and beef; opium; and cheap Chinese labor.<sup>8</sup> Subsequently, came rights to operate the Chinese lottery (*Pacapio*)<sup>9</sup> in 1847 and the legalization of fantan houses in 1849.<sup>10</sup>

The system of operating rights of gaming through an exclusive license was maintained until 1961, when the first Macau gaming law was enacted,<sup>11</sup> and when Sociedade de Turismo e Diversões de Macau (STDM) was successful in the public tender and got the concession rights.<sup>12</sup>

<sup>2</sup>Robert G. Hazo, *Montesquieu and the Separation of Powers*, *American Bar Association Journal*, vol. 54, no. 7, at 665–68, (American Bar Association, 1968) <http://www.jstor.org/stable/25724465>.

<sup>3</sup>Ana Carolina Gonçalves Valença, *Concessão de Serviços Públicos: Encapação pelo Descumprimento da Função Social da Empresa Concessionária*, *ETIC-Encontro de iniciação científica*-ISSN 21-76-8498 3, no. 3 (2007). Anthony Cabot, António Lobo Vilela, and Pedro Cortés, *Comparing Gaming Regulatory Systems in Civil and Common Law Countries: How Different Approaches Can achieve the Same Policy Goals* (2022) [Manuscript submitted for publication]

<sup>4</sup>Diogo Freitas do Amaral, *Curso de Direito Administrativo*, 2nd edition, Vol. I, at 619 (Almedina, Lisboa, 2000).

<sup>5</sup>Some scholars Diogo Freitas do Amaral, mention the concept of “indirect public administration”.

<sup>6</sup>Marcello Caetano, *Manual de Direito Administrativo*, Vol. II, 8th Edition, at 1015 (Coimbra Editora, Lisboa, 1969). See also Cabot et al, *Comparing Gaming Regulatory Systems in Civil and Common Law Countries*.

<sup>7</sup>Marcelo Caetano, *Manual de Direito Administrativo*, Vol. I, 8th Edition, at 240–41. See also Anthony Cabot et al.

<sup>8</sup>See Pedro Cortés, *Macau Gaming Industry 8.0—Public Policy Beyond 2022*, *Gaming Law Review*, Mary Ann Liebert, Inc., at 53 (2021).

<sup>9</sup>Still in operation in Macau. There is a building in Macau at Avenida Infante D. Henrique which is known by that name and where lottery tickets and other types of non-casino games can be acquired.

<sup>10</sup>Godinho, Jorge, *Os Casinos de Macau—História do Maior Mercado de Jogos de Fortuna ou Azar do Mundo*, at 27 (Almedina, Coimbra, 2019). See Pedro Cortés, at 52. (“*The year of 1849 is debated among authors with some stating 1847 and others 1850. We consider 1849 more accurate in line with the views and sources mentioned by Professor Godinho*”).

<sup>11</sup>Legislative Diploma No. 1496, July 4, 1961.

<sup>12</sup>See Pedro Cortés, at 54. (“*The first concession was signed with Stanley Ho Hung Sun, and subsequently assigned to STDM. STDM not only dominated the local economy, but also exercised an undeniable influence over*

Professor Diogo Freitas do Amaral and Lino Torgal delineate casino gaming concession contracts as administrative contracts—contracts executed between a public entity and a private entity—with the following characteristics:<sup>13</sup>

- *nomen iuris* (to the extent the law refers specifically to this type of contract), formal (executed through a public deed before a Notary),
- reciprocal (create obligations to both the State<sup>14</sup> and the concessionaire),
- onerous (it implies sacrifices and economic advantages to both parties),
- of continuous performance (obligations are fulfilled during a prescribed time—up to 20 years in the case of the Macau gaming concession contracts), and
- with multiple effects (creates diversified juridical conditions covering several areas of law: real estate, administrative, tax and contractual).

Under the Macau Administrative Procedure Code, an administrative contract is defined as “a mutual assent through which it is created, modified or ended an administrative, juridical relation.”<sup>15</sup> The concession for the operation of casino games of fortune and chance is typified as one of the administrative contracts, among other contracts: public works contracts, concession of public works, concession of public services, continuous provision of services and provision of services for immediate public utility.<sup>16</sup>

Under the referred Code, the Administration has general powers, such as:<sup>17</sup>

- (1) to modify the content of the obligations unilaterally, provided it respects the object and the financial balance of the contract,
- (2) control the way that the obligations are performed,
- (3) terminate the contracts invoking the public interest, without prejudice of fair compensation,
- (4) supervise the execution of the contract, and
- (5) apply sanctions stated for the breach of obligations.

One of the means that the government has for supervision of the fulfillment of the duties and obligations and the execution of the concession contract is to appoint delegates and members of the board to the concessionaires of public services and to companies with exclusive rights granted by the government which is the case of the gaming concessionaires.

#### **Government Delegates—the regime established by the Decree-Law No. 40 833, of October 29, 1956**

The Decree-Law No. 40 833, of October 29, 1956, gives some essential structural norms of the current regime in force in Macau (Decree-Law No. 13/92/M, of March 2, 1992).

Under the 1956 diploma, the State was able to appoint delegates to the concessionaires of public services or other companies that used public domain assets, to those who

*the whole of Macau civil society* (it was not uncommon during the STDM monopoly era to find written references suggesting STDM “owned Macau”). See Luís Pessanha, *Jogo de Fortuna e Azar e a Promoção do Investimento em Macau*, in *Revista de Administração*, no. 77, Vol. XX, at 847–888 (2007).

<sup>13</sup>Diogo Freitas do Amaral and Lino Torgal, *Estudos sobre Concessões e Outros Actos da Administração (Legal Opinions)*, at 532 (Almedina, Coimbra, 2002).

<sup>14</sup>In the case of Macau, the Special Administrative Region.

<sup>15</sup>Article 165.1 of the Macau Administrative Procedure Code, approved by the Decree-Law 57/99/M, of October 11, 1999.

<sup>16</sup>Article 165.2 of the Macau Administrative Procedure Code.

<sup>17</sup>Article 167 of the Macau Administrative Procedure Code.

benefited from the from state financing or guarantees, shipping companies with the status of national interest, and to the companies that exploited activities under the exclusivity regime or with advantage or privilege.<sup>18</sup>

The supervision by the delegates was extended to the sub-concessionaires or subsidiaries without any need for a special appointment.<sup>19</sup>

In the version of 1956, the appointment was made for five years,<sup>20</sup> without the possibility of renewal in the same company to which the delegate was appointed. With the amendments of 1970, the term of office was reduced to 3 years.<sup>21</sup> The delegates could not be appointed if they had reached 70 years old.<sup>22</sup>

It was possible for the government to appoint a delegate for several companies, but that would not mean that the delegate could accumulate remunerations for each of them.<sup>23</sup>

In terms of incompatibilities, the delegates of the government were not able to exercise their functions when they held shares of the company or performed other duties in the referred companies;<sup>24</sup> they were also prevented from representing any party against the State or public companies.<sup>25</sup>

The delegates were prevented from being appointed to any social body of the company or to providing any services for a period of 3 years after the term of office.<sup>26</sup> The rationale of these restrictions seems to be the need to prevent the delegates from acting in collusion with the company in exchange for a future office.

Delegates were bestowed with powers to supervise the accomplishment of the obligations derived from the legislative diplomas or contracts applicable to the companies to which they were appointed, as well as to safeguard the public interest of patrimonial, administrative, or economic nature in the activities pursued by the companies.<sup>27</sup> For that purpose, it was established the duty of monitoring all companies' activity and to oppose the resolutions or acts deemed contrary to the law, the articles of association, the contracts, or the public interest.<sup>28</sup>

The opposition to the resolutions or acts would suspend their execution and should be communicated to the government within 48 hours on the knowledge of the acts.

The government delegates were, under the Decree-Law, entitled to attend the general meetings, board of directors' meetings, or any other meetings of the corporate bodies of the companies to which they were appointed, and could have access to all information on the accounting and any other documents, as well as to request any elements deemed convenient to the supervision of the activity.<sup>29</sup> A special duty to inform the government existed whenever any fact could be of interest to the State and propose measures to prevent or remediate damages to the State or the public interest.<sup>30</sup>

Moreover, government delegates could be civilly liable for the damages caused to the State in case of non-deduction of opposition determined by the government.

The aforesaid regime established the government delegates, who were (and are) the representatives of the Government with supervision duties.<sup>31</sup>

<sup>18</sup> Article 2 of the Decree-Law No. 40 833.

<sup>19</sup> *Idem*, Article 2, §1.

<sup>20</sup> *Idem*, Article 5.

<sup>21</sup> Decree-Law 139/70. The term of 3 years after the first ordinary general meeting after the appointment and until the last general meeting of the triennium.

<sup>22</sup> Article 5, §2, of the Decree-Law No. 40 833.

<sup>23</sup> *Idem*, Article 4, and 4 §2.

<sup>24</sup> *Idem*, Article 8.

<sup>25</sup> *Idem*, Article 8, §single.

<sup>26</sup> *Idem*, Article 9.

<sup>27</sup> *Idem*, Article 13.

<sup>28</sup> *Idem*, Article 13, §single.

<sup>29</sup> *Idem*, Article 16.

<sup>30</sup> *Idem*, Article 18.

<sup>31</sup> Diogo Freitas do Amaral, *Curso de Direito Administrativo*, 3rd Edition, Vol II, at 729 (Almedina, Coimbra, 2010).

**Government Delegates—the regime established by the Legislative Diploma 1496, of July 4, 1961<sup>32</sup>**

In this diploma, the entity responsible for the supervision of the gaming activities was the Council of Inspection of Games. This was the most important legislative act that opened the path to the concession of STDM, which lasted—with several extensions in the contract—until March 31, 2002.<sup>33</sup>

The initial contract had a term of 8 years—starting from January 1, 1962—being the first three years mentioned as “experimental and provisional,”<sup>34</sup> after which the state could revise the terms and conditions. The revision to the STDM concession contract took place along with the revision of the Legislative Diploma 1496, introduced by the Legislative Diploma 1649, of December 5, 1964.

It was for the first time mentioned that the government delegate will be the competent entity for the supervision of the casino games,<sup>35</sup> with the powers and competencies attributed by the Decree-Law 40 833.

The government delegate would be assisted by three sub-inspectors and twelve controllers, all chosen by the Governor.<sup>36</sup> The inspectors and controllers were empowered to:<sup>37</sup>

- a) Collect the elements necessary for the assessment by the state of the conditions of the operation;
- b) Verify the fulfillment of the entry restrictions to the casino and the admission of the officials to the casino area;
- c) Give notice, in writing, of any incident that may constitute an infringement;
- d) Communicate to the government delegate all matters to be decided and solved;
- e) Exercise any other powers granted by the government.

It was also mentioned that the salary of the government delegate would be fixed by an act of the Governor, with the agreement of the concessionaire.<sup>38</sup>

From a Council of Inspection of Games, the supervision model was embodied in the government delegate. Such model was kept, with changes and amendments, until at least 1988, when Gaming Inspection and Coordination Bureau (DICJ) was created, despite the government delegate existence in the casino gaming concessions until 2002, and in other gaming activities concessions (lotteries, horse-racing), as well as public utility concessions until today.

**The organic law of Inspection of Games Contract—Law No. 12/77/M**

Under the rule of the Decree-Law No. 40 833 and of the Legislative Diploma 1496, with the amendments introduced by the Legislative Diploma 1649, the 1977 organic law of the Inspection of Games Contract—the predecessor of DICJ—was enacted.

In article 1, it is clearly stated that the competent entity to exercise the functions of inspection and supervision of all activities relating to the concession contract for the casino games<sup>39</sup> is the government delegate appointed to the concessionaire of casino games.<sup>40</sup> The powers and duties are those defined in the organic law and in Decree-Law No. 40 833.

<sup>32</sup>First Macau Gaming Law.

<sup>33</sup>When the STDM monopoly concession ended.

<sup>34</sup>Article 8 of the Legislative Diploma 1496.

<sup>35</sup>Article 37 of the Legislative Diploma 1496, amended by the Legislative Diploma 1649.

<sup>36</sup>*Idem*, Article 37 §1°.

<sup>37</sup>*Idem*, Article 40.

<sup>38</sup>*Idem*, Article 43.

<sup>39</sup>The second concession contract of STDM dated December 5, 1964, which had a term of 25 years, from 1 January 1962. See Godinho, at 333.

<sup>40</sup>Article 1 of the Law No. 12/77/M, of October 22, 1977.

What were the powers and duties of the government delegate, statutorily referred to as “Chief of Services”?

To “superiorly direct”<sup>41</sup> the Inspection of Games Contract, being empowered in general to:

- a) Guide, coordinate, and direct the inspection and supervision services and the administrative section;
- b) Superintend all aspects of the study and execution of the concession contracts for casino games, as well as the repression of illicit gambling and regulation of lawful games;
- c) Monitor the revenue of the state stemming from the concession;
- d) Present an annual report on the conditions under which the concessionaire’s obligations were met and on the performance of the inspection and supervision services;
- e) Propose to the Government amendments to the terms of the concession contract;
- f) Inform monthly about how the respective Services take place and anything else that concerns the good execution of the terms of the concession contract;
- g) Pass instructions deemed appropriate for the good order and efficiency of the services;
- h) Fix the models of books and model documents required for the activities of the inspection and supervision services and the concessionaire.

It was further added that, whenever other departments intervened, the government delegate was also competent to:

- a) Send to the relevant services the necessary assessment elements;
- b) Promote meetings with a view to jointly assessing outstanding issues, appointing their representatives to the working groups to be set up;
- c) Request, whenever necessary, that the entities and services concerned give their statement in writing.

The law also established that the supporting body of the government delegate was the Inspection of Games Contract, a department created by the Provincial Decree No. 49/75, of December 20, 1975, which was also the support of the government delegates in the lotteries, *pari-mutuel*, and other types of games concessionaires.

It was evident in 1977 that the primary entity with powers of inspection and supervision of the casino games was the government delegate who was the Chief of Services of the Inspection of Games Contract.

According to Diogo Freitas do Amaral, the government delegate is not a social body of the concessionaires but, otherwise, a body of the state who supervises on behalf of the state the activity developed by the concessionaire.<sup>42</sup>

The difference is also made with the directors appointed by the government to companies where the state is a shareholder. In this case, the directors are governing bodies of the concessionaires and act on behalf of the state.<sup>43</sup>

The government delegates are essentially persons authorized and appointed by the government to supervise the fulfillment of the concession contract obligations and to safeguard the public interest involved in the operation of the casino games.<sup>44</sup>

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<sup>41</sup> *Idem*.

<sup>42</sup> See Diogo Freitas do Amaral, *Curso de Direito Administrativo*, at 729.

<sup>43</sup> *Idem*.

<sup>44</sup> José Pedro Fernandes, *Dicionário Jurídico da Administração Pública*, Vol. III, at 449 (Lisboa, 1990).

**Commission of Coordination of Games—Decree-Law No. 45/83/M, November 26, 1983**

The importance of the industry has grown since the STDM concession contract was signed in 1962. Especially after the revision of 1975/1976,<sup>45</sup> the concessionaire of casino games started to pay a higher amount to the territory, which would be adjusted in accordance with the evolution of the gaming revenues. It is also at this time that the assessment of the gaming revenues would be made daily.<sup>46</sup>

After 1976, the so-called “baccarat revolution” or the “change to baccarat”<sup>47</sup> permits STDM to increase stratospherically the revenues and, consequently, the gains of the Macau Territory.

From 1962 until 2002, Macau had a monopoly system run by STDM. Throughout the years, STDM was involved in all main infrastructure projects, as well as in the share capital of the electricity company, the airport, the flag air carrier, the jetfoil carrier, and helicopter services, being that part of the obligations under the concession contract, related to investment and development. The concept of ‘capture’<sup>48</sup> of the local government by a concession operator can be mentioned. The government in Macau arguably became a tool for the operator in the latter’s activities.<sup>49</sup>

It was more important than ever for the government to supervise and inspect the casino games concessionaire properly.

After the enactment of the organic law of the Inspection of Games Contract, the government, recognizing the importance that the gaming industry had in Macau, and with the expansion of the betting activities (*e.g.*, lotteries, horse racing, greyhound) all operated through the concession model, created the Commission of Coordination of Games. This Commission was composed of all government delegates in the casino games, lotteries, *pari-mutuel*, and other forms of games concessionaires, as well as all directors appointed by the Government and the special representatives.

The Commission was endowed with functions and duties of assistance of the Governor on gaming matters and coordinate the execution of the public policy in relation to the industry.<sup>50</sup>

Special duties included:<sup>51</sup>

- a) Ensure the provision of overall information on the monitoring of the performance of gaming concession contracts to the Governor;
- b) Study and propose the standardization of procedures relating to the way of monitoring the activity of the various concessionaires in the sector;
- c) Systematically and permanently analyze the appropriateness of existing procedures for inspection and supervision of the activities of concessionaires and proposing changes when appropriate;
- d) Regularly review the appropriateness of legislation concerning the gaming sector, proposing any change where necessary;
- e) Convey among its members the knowledge of elements of mutual interest and to contribute to the resolution of common problems;
- f) Promote adequate support for the activity of the government delegates;

<sup>45</sup> See Godinho, at 366.

<sup>46</sup> See Godinho, at 364.

<sup>47</sup> See Godinho, at 366 *et seq.*

<sup>48</sup> Richard Schuetz, *The Economics of Gambling Regulation*, in *Regulating Land-Based Casinos*, Chapter 6, at 257 (stating the Public Interest Versus Capture).

<sup>49</sup> See Pessanha.

<sup>50</sup> Decree-Law No. 45/83/M, of November 26, 1983.

<sup>51</sup> Article 3.2 of the Decree-Law No. 45/83/M, of November 26, 1983.

- g) Speak on all matters and make any suggestions and proposals it deems appropriate about the gaming sector.

**Role of the Government Delegates in the gaming concessionaires—Decree-Law No. 55/85/M, of June 29, 1985**

After the creation of the Commission of Coordination and the amendment made to the Inspection of Games Contract introduced by the Decree-Law No. 3/85/M, of January 19, 1985—which replaced the Law 12/77/M already mentioned herein—there was the need to dispose of the competencies of the government delegates in the gaming concessionaires.

In the preamble of this Decree-Law, it is stated that the primary activities of the government delegates include taking part in the Commission of Coordination and the exercise of the function of representatives of the government and coordinating the execution of the public policy for the sector.

The government delegates to the concessionaires for the operation of casino games, *pari-mutuel*, and lotteries were bestowed with the following duties:<sup>52</sup>

- a) Monitor the management and, in general, the operation of concessionaires;
- b) Assess and give an opinion on the proposals for amendment or revision of the concession contracts submitted by the concessionaire, introducing them to the governor's decision;
- c) Ensure the connection between the Government and concessionaires in all matters not directly committed by Decree-Law No. 3/85/M, of January 19, 1985, to the Inspection of Games Contracts;
- d) Participate in the meetings of the governing bodies of the concessionaires whenever the interest of the matters to be addressed justifies it;
- e) Take part, in terms to be defined by order of the Governor, in the negotiation or renegotiation processes of concession contracts, or part of the respective clause;
- f) Propose for a higher decision, duly informed, all aspects that comply with the non-pecuniary provisions included in the concession contracts;
- g) Participate in the meetings of the Commission of Coordination of Games, proposing to hold extraordinary meetings whenever the nature of the matters to be addressed justifies it.

The Decree-Law also mentions that the rules applicable to the government delegates would apply to the special representatives of the Government.

In addition, it is stated that all correspondence between the concessionaires and the government delegates would need to be addressed to the Inspection of Games Contract, which, in turn, would forward it to the adequate entities.

The regime created by this Decree-Law is the same as the original regime of the government delegates of the Decree-Law No. 40 833 and the Law No. 12/77/M already described herein.

**Role of the Government Delegates with the establishment of the Gaming Inspection and Coordination Bureau—Decree-Law No. 28/88/M, of April 5, 1988**

The duration of the regime of the government delegates to the gaming concessionaires established by the Decree-Law No. 55/85/M only applied for three years. The creation of the Gaming Inspection and Coordination Bureau (DICJ) was part of the reform introduced in the public administration of Macau by the Decree-Law 85/84/M of August 11,

<sup>52</sup>Article 1 of the Decree-Law No. 55/85/M, of June 29, 1985.

1984, which established the legal framework of the organic structure of the Public Administration of Macau. This had direct consequences to the inspection of games with DICJ being created with the introduction of the Decree-Law No. 28/88/M, of April 5, 1988.

Under this Decree-Law, the government delegates to the concessionaires for the operation of casino games, *pari-mutuel*, and lotteries had the following responsibilities,<sup>53</sup> which were similar to the previous regime:

- a) Monitor the management and, in general, the operation of the concessionaires;
- b) Assess and give an opinion on proposals to amend or revise concession contracts submitted by concessionaires;
- c) Participate in the meetings of the governing bodies of the concessionaires whenever the interest of the matters to be addressed justifies it;
- d) Participate in the negotiation or renegotiation of concession contracts or amendment of their closure;
- e) Submit proposals, duly substantiated, to amend clauses included concession contracts for consideration of the Games Advisory Board;<sup>54</sup>
- f) Participate in the Games Advisory Board meetings, proposing to the Chairman to hold extraordinary meetings whenever the nature of the matters to be addressed justifies it.

DICJ, with the enactment of this Decree-Law, comprised, on the one hand, the duties and responsibilities of the Inspection of Games Contract and, on the other hand, the Commission for Coordination of Games. One of the duties was still to support the government delegates in the performance of their duties.

Among the duties established for the government delegates was the duty of professional secrecy—common to the DICJ officers. Such assignment stated in article 16 of the Decree-Law, mandated the government delegates to maintain the professional secrecy, being prevented from providing information on matters of a confidential nature relating to the activities, in particular those relating to the execution of concession contracts, under penalty of removal and other criminal sanctions.

This regime was in force until the enactment of the Administrative Regulation 44/2003, which was recently revoked by the Administrative Regulation 19/2021, of June 21, 2021—the current regulation of the organization and functioning of the DICJ.

Arrived here, and before we enter into the regime of the government delegates that replaced the Decree-Law No. 40 833, it is worth establishing the primary duties of the government delegates to the gaming concessionaires in force until 1992.

Government delegates were (and are) representatives of the state (Territory of Macau until 1999 or Macau Special Administrative Region after 1999) entitled to monitor the management and operation of the concessionaires. They could also give opinions on the amendment or revision of the concession terms that the concessionaires can submit to the government and participate in the meetings of the corporate bodies of the concessionaires. During the negotiation and renegotiation of the concession contracts, government delegates had an important role. Throughout the concession contracts' execution, they would be the messenger of the government and the concessionaires. In a way, the government delegates were the ears and the mouth of the government and the mailbox that the concessionaires could use to convey to the government officials the messages for better performance.

It is called to this point the lessons of Professor Marcello Caetano: concession comprehend “the transfer of powers of the administrative entity to a private entity for them to exercise them at their own risk but in the public interest.”<sup>55</sup> The Professor adds to this

<sup>53</sup>Article 12 of the Decree-Law No. 28/88/M, of April 5, 1988.

<sup>54</sup>Games Advisory Board was created by this Decree-Law and replaced the Commission for Coordination of Games. It was then extinguished by the Decree-Law No. 29/93/M, of June 21, 1993.

<sup>55</sup>Marcello Caetano, *Estudos de Direito Administrativo*, at 92 (Atica, Lisboa, 1974).

concession definition that the concession's grantor keeps at least part of the powers on the activity granted, being the concessionaire not in the full fruition of the granted rights but, otherwise, always with an imperfect or shorter right. The administration reserves the rights of supervision and safeguard of the public interest,<sup>56</sup> being the government delegates one of the essential tools for exercising such rights.

The referred Decree-Law was revoked by Administrative Regulation No. 34/2003, of November 3, 2003. In this diploma, which defined the organization and functioning of DICJ, no reference to government delegates or to the supporting role of DICJ in their duties is made. Likewise, in the most recent Administrative Regulation No. 19/2021, of June 6, 2021.

The reason for that seems to lie in the introduction of the Decree-Law No. 13/92/M, of March 2, 1992, which covers the directors appointed by the government and the government delegates for public services concessionaires or entities that use public domain assets, among other companies.

### **Role of the Government Delegates—the regime established by Decree-Law No. 13/92/M, of March 2, 1992**

With the previous definition in mind, the enactment of the Decree-Law No. 13/92/M defined the role of the government delegates and replaced what was established by Decree-Law No. 40 833.

Government delegates are individuals appointed by the Chief Executive for the exercise of supervisory and monitoring functions of public service concessionaires or the use of public domain assets, those receiving financing made by or guaranteed by the Region and the companies that exploit activities on an exclusive regime or with benefit or privilege not provided for by general law.<sup>57</sup>

Government delegates are appointed by the Chief Executive, being the appointment made for the period stated in the dispatch.

The regime establishes the incompatibilities and impediments for the exercise of the functions of government delegates.

Before accepting the office, government delegates shall inform in writing all equity interests or other interests that they hold, directly or indirectly, in any companies based in or outside Macau. Government delegates cannot be shareholders and cannot exercise functions of another nature, permanent or occasional, in the same company or in other sub-concessionaires or subsidiaries.

In addition, when the office is performed on a full-time basis, the government delegates cannot exercise any other paid professional or civil service activities unless a miscellaneous regime, justified by reasons of public interest, has been expressly authorized by the Chief Executive. It is possible for the government delegate to perform the same functions in relation to other related or associated companies of the concessionaire.<sup>58</sup>

As to impediments, government delegates cannot accept any mandate against the Administration or any public entity while performing their duties or within one year after the end of the office, in a regime quite similar to the one established by the Decree-Law No. 40 833.

Furthermore, government delegates are not eligible, for three years from the dismissal, for any position in the management bodies of the concessionaire, its sub-concessionaires or subsidiaries, and may not, during that period, provide them with services of any kind.

The same applies to the Chief Executive or the Secretaries: during the three years following the discharge of office, they are prevented from exercising any administrative, executive, directive, advisory, or supervision functions in the concessionaires.<sup>59</sup>

<sup>56</sup> *Idem*, at 93.

<sup>57</sup> Article 1 of the Decree-Law No. 13/92/M, of March 2, 1992.

<sup>58</sup> *Idem*, Article 3.

<sup>59</sup> *Idem*, Article 4.

Among the duties of the government delegates are the monitoring of the compliance of the obligations arising from concession contracts and the defense of the public interest involved in the activities.

For this purpose, government delegates have the following general responsibilities:

- a) Participate in meetings of the governing bodies, for which they must be convened in advance;
- b) Take direct knowledge of accounting and other documents;
- c) Request the elements they consider necessary for the supervision of the corporate social activity, which shall be provided as soon as possible;
- d) Take part in the negotiation processes of concession contracts or amendment of their closure.

The specific obligations of the government delegates include:<sup>60</sup>

- a) Communicate to the government all the facts of the company's life, which they consider harmful to the public interest, and propose in due course the measures deemed appropriate and necessary.
- b) Draw up and refer in duplicate to the government, within one month of the end of the quarter, quarterly reports with the following information:
  - i. Number of meetings of the governing bodies, with the express indication of those to which the government delegate attended, of the issues dealt with and opinion on the main problems in progress;
  - ii. Indications on quality of service, cost, equipment condition, technical efficiency, and compliance with especially applicable legal or contractual provisions.
- c) Monitor the accounts for the financial year, up to ten days before the general meeting, annual information containing the following elements:
  - i. Aspects of the concessionaire's activity in the previous year and its framework in the economy Macau;
  - ii. Analysis of the action of the management bodies and the management staff of the concessionaire;
  - iii. Analysis of the balance sheet, operating account, and opinion on the company's economic, financial and patrimonial situation;
  - iv. Problems resolved and pending.

Government delegates shall also communicate to the government the resolutions and acts of the general meeting, the board of directors, the supervisory board or the other governing bodies contrary to the law, the articles of association and the terms of the concession contracts, being the Chief Executive entitled to request the court to suspend or declare the nullity of such resolutions.

The remuneration of the government delegates is charged to the concessionaires.

Law No. 14/96/M, of August 12, 1996 (mandatory publications of the concessionaires), establishes what elements of the concessionaires (including the gaming concessionaires) must be published annually:

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<sup>60</sup>*Idem*, Article 16.

- i. Balance sheet;
  - ii. Administration or management report;
  - iii. The advice of the supervisory board or the sole auditor.
- a) It is a specific obligation of the government delegates to oversee the fulfillment of such publication obligation including:
- i. Use best endeavors to obtain the referred elements for publication and inform the Chief Executive of the result of such diligence;
  - ii. Carry out, on its own initiative and at the expense of the concessionaire, the publication of those elements, once obtained, whenever there is non-compliance by the concessionaire;
  - iii. Inform the Public Prosecutor Office of the situations of non-compliance to initiate criminal proceedings;
- b) The infringement of the aforesaid duties by the government delegates may result in loss of office and disqualification for a period of 5 years for an office of the same nature.

The aforesaid responsibilities are a sound basis for what can be expected by the gaming concessionaires in the future.

**Law No. 16/2001, of September 24, 2001—reasons for the non-inclusion or appointment of the government delegates to the gaming concessionaires**

Law No. 16/2001 (Macau Gaming Law) revoked the previous regime established by Law No. 6/82/M, of May 29, 1982. Under the previous regime, it was established as one of the conditions of the concession the subordination of the concessionaires, as concessionaires and companies, to the continuous monitoring by the state through government delegates. It is also stated that the remuneration would be borne by the concessionaires and the competencies and duties of the government delegates would be those established and defined in the Decree-Law No. 40 833 of October 29, 1956, and also those that the Governor might impose, in the spirit of the same decree or other legislation that may be enacted.

Law No. 16/2001 had not included as a condition of the concession or made any reference to the government delegates, despite the extensive rights of supervision of the administration over the gaming concessionaires.

The interpretation made could have been that the regime established by Decree-Law No. 13/92/M of March 2, 1992, only included the exclusive concessionaires, i.e., those operating under monopoly, and that the opening of the activity to more operators would not make feasible the continuation of the government delegates.

**Duty of information—reasons for the introduction of the Government Delegates and what can be expected**

The consultation document for the amendments of the Macau Gaming Law<sup>61</sup> includes the discussion of the government delegates as one of the main points. It states that there is a dichotomy between the protection of the public interest and the welfare of the people, which is bestowed to the government, and the maximization of the profits, which is the primary goal of the gaming concessionaires.

It is added that the right to operate games is not a fundamental right, but a privilege granted by the Macau Government.

<sup>61</sup>Document is available in Portuguese at: [http://doc.dicj.gov.mo/ebook/ebook\\_final.pdf](http://doc.dicj.gov.mo/ebook/ebook_final.pdf).

In this sense, the introduction of the government delegates in the gaming concessionaires intends to give priority to the public interest and the adequate supervision of the fulfillment of the duties and obligations of the concessionaires. That would, in the words of the consultation document, safeguard the sustainable, ordered, and healthy development of the gaming industry. There will be direct supervision in line with what is established in the Decree-Law No. 13/92/M. The delegates will be a tool to prevent any incidents that may undermine the development of the industry.<sup>62</sup>

The Final Report on the Amendment to the Law 16/2001 was published on December 23<sup>rd</sup>, 2021.<sup>63</sup> It states that the consultation received 134 opinions on the proposal to introduce government delegates with the results of 42.5 per cent in favour and 28.4 per cent against.<sup>64</sup>

The analysis and opinion of the Government states that it will consider the opinions and take as reference the supervision systems adopted in other jurisdictions or countries where casino games are operated, without mentioning which.

It is inferred in the Report that, despite the proposal to introduce delegates from the MSAR Government, allowing direct access to the most comprehensive information on the management or operation of the concessionaires, such a decision may interfere with the functioning of its activities and its independence.<sup>65</sup>

The Government concludes that it will make an assessment and balance various interests and factors to strengthen oversight of the gaming operators without affecting the aim of amending the law, i.e., increasing the competitiveness of the gaming sector.<sup>66</sup>

Given what is stated in the Report, our view is that there might be additional mechanisms to strengthen the supervision that may or may not include the government delegates.<sup>67</sup>

With or without the introduction of the government delegates, gaming concessionaires already have under the current regime a general duty of information to the government, which includes, among others, the obligation to give notice of:

- a) Any circumstances that may affect the normal functioning of the concession, liquidity or solvency, legal proceedings against the concessionaire, its directors and qualified shareholders (5% or more of the share capital), any act or fact that takes place in the casinos and other gaming areas that may be considered a crime or administrative infraction that may come to its notice and any negative attitude directed at the concessionaire or members of its governing bodies, by a responsible member of an entity or a worker of the Public Administration of the Macau Special Administrative Region, including agents of the Security Forces and Services.
- b) All events that harm, hinder, or substantially increase the financial burden or the difficulty in fully complying with the obligations resulting from the concession contract or that may cause its termination.
- c) Regular or incidental, periodical, or extraordinary remuneration of its directors, financiers, and central employees with positions of relevance in the casino, whether these are received as salaries, wages, remunerations, or other, and well as any mechanism for their participation in profits.

<sup>62</sup>Point 6 of the Consultation Document for the Amendment of the Gaming Law (Law No. 16/2001).

<sup>63</sup>Final Report on the Amendment to the Law 16/2001, dated December 23, 2021, available in Portuguese at: <https://www.gov.mo/pt/wp-content/uploads/sites/3/2021/09/%E4%BF%AE%E6%94%B9%E5%8D%9A%E5%BD%A9%E6%B3%95%E5%85%AC%E9%96%8B%E8%AB%AE%E8%A9%A2%E7%B8%BD%E7%B5%90%E5%A0%B1%E5%91%8A-%E8%91%A1%E6%96%87%E7%89%88%E6%9C%AC.pdf>.

<sup>64</sup>The remaining opinions were not clear or neutral.

<sup>65</sup>See Final Report, at 41–42.

<sup>66</sup>*Idem*.

<sup>67</sup>Pedro Cortés, *Macau Gaming Law*—Same same, but different ... *at least for some years*, in IAGA Expert Insight, December 2021, available at: <https://www.theiaga.org/macau-gaming-law---same-same--but-different--at-least-for-some-years>.

- d) Existing benefits or benefits to be created, including a share in the profits.
- e) Contracts for management and services, existing or to be proposed.

This duty of information also includes the obligation to submit all documents, contracts, or instruments.

Furthermore, under the Macau gaming law and concession contracts, the government shall also be informed of any imminent or severe foreseeable change to the economic and financial situation of the concessionaires, as well as its dominant shareholders, entities closely associated with the concessionaire, qualified shareholders, or any other entities that assumed the commitment or pledged a guarantee for the financing of the investments and obligations that the concessionaire must carry out or accept by reasons of contract.

In this sense, if the option is to introduce government delegates, such introduction shall be seen as a tool for the government to exercise direct oversight. Concessionaires shall expect those representatives to be part of the concessionaires' daily life, participate in meetings of the governing bodies, get all information on accounting, all documents, and elements for the good performance of the concessionaires, and the fulfillment of the concession obligations.<sup>68</sup>

We know that Macau gaming operators can tackle the introduction of government delegates in an advanced and proper fashion. The appropriate tools for the exercise of the roles will not constitute an obstacle to entrepreneurial success, given the fact that the gaming operators have been compliant and went well beyond what is legally required throughout the term of the existing concession contracts.

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<sup>68</sup>In a way, the role of government delegates and their duties established in the Decree-Law No. 13/92/M and which is purported to be introduced in the Macau Gaming Law, is not unfamiliar to the role specified in the Companies Act of the People's Republic of China, where an organization can be created in the companies to develop what is established in the Charter of the Communist Party, being the companies responsible for providing all conditions required for that purpose, *i.e.*, "to implement the principles and policies, guides and oversee the observance of the state laws and regulations, promoting unity among workers and office staff, safeguarding the legitimate rights and interests of all parties, and promote the healthy development of the companies." See article 19 of the PRC Companies Act and Charter of the Communist Party.