

AMENDMENT TO MACAU GAMING LAW

KEY ISSUES EXPLORED
- A SERIES OF EXPERT
INSIGHTS BY

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PART II: THE GOVERNMENT REPRESENTATIVE

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The consultation document for the amendment of Law 16/20021 released by the Macau SAR Government on September 14th puts a clear emphasis on introducing a higher level of regulatory supervision and government oversight on casino concessionaires, gaming promoters and their respective operations.

One of the proposals the government put forward to achieve this objective is the introduction of a designated government representative to each of the concessionaires. While this level of government participation in private enterprise may seem unconventional to most outsiders, the reality is that the concept of a government representative has long been a part of the Macau concession landscape.

The Government Representative in the Current Legal Framework

A vast majority of the concession contracts (e.g. public utilities) designates one government representative charged with overseeing the contract performance and the activities of the company related to the concession. This was also the case during the *monopolistic era* where the sole casino operator (STDM) had a designated government representative. To date, other types of gaming operators, such as the sports betting concessionaire (“SLOT”) and the horse racing concessionaire (the “Macau Jockey Club”), remain subject to being supervised by a government delegate.

The right of the government to appoint a representative to a concessionaire is determined by Decree-Law 13/92/M. The government representative is defined therein as the individual appointed by the government to supervise and oversee the activities of the following private companies: (i) concessionaires of public services, (ii) concessionaires of public domain assets (iii) concessionaires that benefit from government funding or securities, (iv) corporations that are granted the exclusive operation of certain businesses and (v) corporations that are granted a privilege not provided under general law. The scope of entities which may

be subject to the appointment of a government representative is extensive and could arguably already include casino concessionaires, as these could be considered “*corporations granted [with] a privilege [to operate games of chance in casino] not provided under general law*” (as referred in (v) above).

The fundamental purpose and key duties of the government representative are to supervise the concessionaires’ compliance with its legal and contractual obligations and to protect public interest within the activities pursued by the concessionaire. To exercise such duties, a government representative has the authority to: a) participate in board and shareholders’ meetings; b) inspect the company’s financials; c) request documents and information deemed necessary to exercise its duties; and d) participate in the negotiation of relevant concession contracts and its amendments.

Specifically, the government representative must inform the relevant supervising body of any circumstances that may affect the public interest within their purview and propose measures to address them. It must also regularly report on matters addressed in the board and shareholders’ meetings. The government representative has neither executive nor voting powers within the company it is designated to. As such, it must not be mistaken for a director appointed by the government (which is a separate legal concept, also prescribed by Decree-Law 13/92/M).

Government representatives may be recruited from within the civil service or from the private sector, but their appointment is subject to certain limitations intended to maintain their independence. For instance, they are prohibited from having any economic interests in the entity they are appointed to supervise or in their sub-concessionaires or subsidiaries. They are also prevented from performing other duties which may conflict with their appointment. After their term, they are ineligible to serve, for a period of three years, as officers of the entities they have supervised or to provide such entities with any other services.

The appointment of government representatives to casino concessionaires and its potential implications

The consultation document proposes to extend the appointment of government representatives to casino concessionaires taking (sic) “*as reference*” the provisions of Decree-law 13/92/M. This document justifies the proposal with the need to increase government’s capacity to monitor and control the daily operations of the casinos. Facilitating better promotion and development of the industry, the interests of the community and preventing incidents that could negatively impact the gaming sector.

Ultimately, the proposal intends to reflect the legal nature of operating casinos in Macau which is, per statute, reserved to the government. To that extent, a concession granted to a private entity to operate casino gaming is deemed a privilege and should be carried out not only to the benefit of the operator but also in the general interests of Macau.

In Macau’s long standing legal tradition, this balance of interests is achieved by the representative playing a close observer role, having the authority to collect relevant information directly from the source and reporting its findings as appropriate.

Should the proposed amendments be kept within the boundaries of existing legislation, the introduction of a government representative may be welcomed. For the government, it may provide a valuable insider’s perspective on the operations of concessionaires. For the operators, it may serve as a useful liaison officer, capable of streamlining communications with different government agencies and reducing bureaucracy.

Any suggestion that this role could be broadened by giving it a say over the operations of the company – for instance, exercising voting/vetoing rights in management decisions – would be implausible and contradictory to the framework provided by existing legislation. Such extension of power would overlap with the role typically attributed to a director. This scenario would have overarching implications, not the least of which concerns the liability for decisions taken, or not taken, due to the vote/veto of the government’s representative.

Would the government representative be held liable for such decisions – before the company, its shareholders, and creditors – in terms similar to that of a director? Would the government provide an indemnity to its representative and other directors, for any act or failure to act from its appointee? And who would be available to share the board with someone that is not bound by the same fiduciary duties towards the company?

The consultation document does not provide any indication that a departure from the observant's nature of the government's representative is being considered. To the contrary, the direction provided is that the proposal to designate representatives, if passed into law, should refer to the existing model defined by Decree-law 13/92/M. The same legislation separately defines the role and powers of government designated directors. It also restricts the appointment of such directors to companies in which the government itself is a shareholder.

In our view, there are two ways that the proposal put forward by the consultation document could be harmonized with Macau's legal framework:

a) Utilizing Law 16/2001 to simply determine the possibility of a government representative being appointed to gaming concessionaires and refer to Decree-law 13/92/M for the scope and powers of such appointment.

b) Employing Law 16/2001 to determine special provisions applicable to the government representatives appointed to gaming concessionaires and refer to Decree-law 13/92/M only for those matters which would not be specifically regulated in the gaming law.

Ideally, the framework of Decree Law 13/92/M itself would be revised and updated, so it could be applied consistently to all concessionaires (casino concessionaires included). Regardless of this, we believe the following issues should be given consideration: (i) whether certain qualifications and experience should be required from government appointees, imposing an adequate level of understanding of the industry and of the public and private interests involved; (ii) whether the incompatibility system should be expanded to include family members of the representative and to cover both direct and indirect conflicts of interests; (iii)

whether a strict duty of confidentiality should be introduced and survive the representative's term of office; (iv) whether the reports of the representative should be subject to general provisions allowing access to public records or, to more strict, confidentiality rules (similar to those provided under article 14 of Law 16/2001); (v) whether the powers and duties of the representatives would allow them to play an effective liaison role between the government and concessionaires; (vi) whether representatives should be consulted by a government agency before making decisions relating to concessionaires (vii) whether the 3-year inhibition period provided in Decree-Law 13/92/M is sufficient (viii) whether the representatives should be allowed to receive fringe benefits from the concessionaires and to what extent, (viii) whether the representative needs to be a permanent resident, etc. Resolving these issues would provide a clear understanding of the parameters of this role and of who is best to embody it.



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