POSSIBLE LEGAL COURSE OF ACTION UPON THE TERM EXPIRATION OF THE MACAU SAR CASINO CONCESSIONS AND CASINO SUB-CONCESSION CONTRACTS VIS-À-VIS THE MACAU GAMING LAW

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I. INTRODUCTION

Macau utilizes a concession system¹ and not a licensing system² for authorizing the exploitation of casino games of chance (hereinafter “casino gaming”).

Although both systems are legal entitlements to exploit a commercial activity, there are significant differences between them. In fact, in a licensing system—the one that applies to economic activities in general—the applicant *has the right* to exploit the economic activity he is applying for provided he meet all legal requirements, being, if that is the case, the license issued automatically.

However, the exploitation of casino gaming is, by law,³ an *activity reserved to the Macau Special Administrative Region (SAR)*,⁴ which means it is an activity outside the private sector’s sphere and, as a consequence, private entities *do not hold any right* to exploit casino gaming. Nevertheless, such “reserve” is not absolute as the Macau SAR may concede such a privilege to private entities by means of a casino concession,⁵ followed by a public tender open to that effect.⁶ Such casino concession implies the exploitation of an activity—by law reserved to the Macau SAR—by a private entity at its own risk but in the general interest of the Macau SAR. In short, a casino concession may be described as a transfer to private entities of the Macau SAR’s powers in relation to an activity that is legally excluded from the private sector’s domain, to be exploited in the general interest of the Macau SAR, although at the risk of the casino concessionaire.

The Macau Gaming Law prescribes the *casino concession finitude principle*⁷ by setting a maximum initial term of 20 years for the granting of casino concessions,⁸ i.e., a maximum duration of 20 years for a casino concession grant. This maximum initial term of 20 years is not, however, absolute as an exception exists: the possibility for a (casino concession) *term extension*⁹ to be granted by means of a substantiated dispatch of the Macau SAR chief executive (hereinafter “the chief executive”).

Keywords: Macau, Macau Gaming Law, renewal, concession, sub-concession

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¹See Law 16/2001, of September 24, 2001 (hereinafter Macau Gaming Law), Article 7/1.

²Commonly used in many other gaming jurisdictions such as, just to mention one, Nevada, USA.

³See Macau Gaming Law, Article 7/1.

⁴Such a reservation can be explained by the interest of the Macau Special Administrative Region (SAR) in the economic results of the exploitation of casino

gaming for public interest purposes and to minimize the effects associated with gaming.

⁵By means of an administrative contract—see Macau Gaming Law, Article 7/1 *fine*.

⁶See Macau Gaming Law, Articles 7/1 and 8/1.

⁷The *concession finitude principle* applies to all other types of permissible gaming activities—see our (in coauthorship with Pedro Cortés) Macau chapter in GAMING, GAMBLING & LICENSING (Nicholas Casiello Jr. ed., Chambers Global Practice Guides, 2018).

⁸See Macau Gaming Law, Article 13/1.

⁹See Macau Gaming Law, Article 13/3.

On the other hand, casino concessions granted an initial term less than the maximum term of 20 years can be authorized via a *term prorogation*¹⁰ by the Macau SAR government (hereinafter “the Macau government”), up to the period of time necessary to fulfill the maximum term of 20 years.

Finally, pursuant to the Macau Gaming Law¹¹ and the concession contracts,¹² the Macau government authorized three casino sub-concessions (Venetian, MGM, and Melco), one to each casino concession granted (Galaxy, SJM, and Wynn, respectively).

II. ANALYSIS OF THE POSSIBLE LEGAL COURSE OF ACTION

A. Termination by lapse

The initial term granted to the current casino concessions was:¹³

- 18 years for SJM (until March 31, 2020)
- 20 years for Wynn and Galaxy (until June 26, 2022)

The casino sub-concessions in existence were authorized with the following final contractual term,¹⁴ which coincides with the initial term granted to the casino concessions in their base:

- March 31, 2020 for MGM
- June 26, 2022 for Venetian and Melco

The first possible legal course of action would be letting the casino concessions and casino sub-concession contracts *lapse*¹⁵ by expiration of their respective term.¹⁶ The lapse—which constitutes a cause of casino concessions/sub-concessions

extinction¹⁷—severs all ties (contractual or otherwise) with the Macau SAR, with the casino concessionaires/sub-concessionaires entirely responsible for the termination of any effects on the contracts they are a party to, and the Macau SAR not assuming any responsibility in this regard.¹⁸

With the lapse, the *public tender principle*¹⁹ applies and a public tender to award (up to three²⁰) casino concessions would have to be opened²¹ to that effect.

B. Term prorogation

The second possible legal course of action is to authorize, pursuant to the Macau Gaming Law,²² a term prorogation to the casino concessions and to the casino sub-concessions contracts. We use *term prorogation* to mean the increase in the length of time of a casino concession or a casino sub-concession contract *within* the maximum term allowed by law (20 years), by opposition to *term extension* used to mean the increase in the length of time of a casino concession or a casino sub-concession contract *beyond* the maximum term allowed by law (20 years).

It should be stressed that none of the casino concessionaires/sub-concessionaires hold any right to a term prorogation²³ (or an option right on, or a preference right to, a term prorogation), being a decision entirely of the Macau government. Moreover, a term prorogation is limited to the respective casino concessionaire/sub-concessionaire providing the Macau government with:

- a bond²⁴ (to guarantee, inter alia, the prompt and exact fulfillment of the legal and contractual obligations assumed by the casino

¹⁰See Macau Gaming Law, Article 13/2.

¹¹See Article 17/9.

¹²See Clause 75/1.

¹³See casino concession contracts, Clause 8/1.

¹⁴See casino sub-concession contracts, Clause 8/1.

¹⁵A cause of termination of a contract by the expiration of the time during which it is to remain operative.

¹⁶The term is set forth in Clause 8/1 of the casino concession/sub-concession contracts.

¹⁷See Macau Gaming Law, Article 45/1, applicable to the casino sub-concessions *ex vi* Clause 6 of the casino sub-concession contracts. See also casino concession/sub-concession contracts, Article 81/1.

¹⁸See casino concession and sub-concession contracts, Clause 81/2.

¹⁹See Macau Gaming Law, Article 8/1.

²⁰If the Macau Gaming Law is not amended, three is the maximum number of casino concessions that can be in existence—see Macau Gaming Law, Article 7/2.

²¹A public tender is the only lawful means to award casino concessions.

²²See Article 13/2.

²³See, *inter alia*, casino concession/sub-concession contracts, Clause 81.

²⁴See Macau Gaming Law, Article 22/2, Administrative Regulation No. 26/2001, of Oct. 29, 2001 (Public Tender to Award Casino Concessions), Article 84/1 (applicable to casino sub-concessions *ex vi* Clause 6 of the casino sub-concession contracts), and casino concession/sub-concession contracts, Clause 61.

cessionaires/sub-concessionaires) in the amount of MOP\$300 million, by any of the means legally acceptable for its provision;²⁵ or,

- assurance of the good standing of the existing MOP\$300 million²⁶ first demand autonomous bank guarantee currently provided.²⁷

On the other hand, and despite the casino concessionaires/sub-concessionaires contractual obligation to annually submit to the Macau government—until March 31—declarations on “no tax dues”²⁸ (issued by the Macau SAR Financial Services Bureau) and “no contributions dues”²⁹ (issued by the Macau SAR Social Security Fund), it shall be requested for the submission of extraordinary declarations, contemporary to the term prorogation authorization to the casino concessions and the casino sub-concession contracts.

Additionally, it should also be noted that on the expiration year of the casino concessions term and casino sub-concession contracts final term, the annual inventory on the assets (casinos and gaming equipment) to revert to the Macau SAR³⁰ is to be conducted at least 60 days³¹ before the said expiration.³²

Finally, if for any reason a term prorogation is not authorized by the Macau government, the respective casino concession and/or casino sub-concession contract (as the case may be) will lapse at its term³³ and consequently, the contractual relationship between the parties—casino concessionaire and/or casino

sub-concessionaire and the Macau SAR—is severed, being the casino concessionaire and/or casino sub-concessionaire entirely responsible for the termination of any effects on the contracts it is a party to, not assuming the Macau SAR any responsibility in this regard.

1. Casino concessions

i. In general. Casino concessions are legally limited in number (to a maximum of three)³⁴ and in length of time (to a maximum term of 20 years),³⁵ and can only be awarded by means of a public tender open to that effect.³⁶ It is for the dispatch of the chief executive opening a public tender to award casino concessions to state the number of casino concessions to be granted (up to a maximum of three³⁷) and the respective term (up to a maximum of 20 years).³⁸

Although the dispatch of the chief executive³⁹ that opened, back in 2001, the first public tender to award casino concessions set the maximum term at 20 years,⁴⁰ the chief executive decided—namely, in obedience to the equal treatment principle⁴¹—to award casino concessions with a different initial term based on SJM’s possibility to start operations⁴² immediately, in the casinos authorized by its casino concession contract,⁴³ previously operated by STDm.⁴⁴

Therefore, having considered two years sufficient time for Wynn and Galaxy to start operations, the Chief Executive granted the casino concessions⁴⁵ for:

²⁵See Administrative Regulation No. 26/2001, of Oct. 29, 2001, Article 87/1 (applicable to casino sub-concessions *ex vi* Clause 6 of the casino sub-concession contracts).

²⁶The existing MOP\$300 million first demand autonomous bank guarantee provided by all casino concessionaires/sub-concessionaires is valid until 180 days following the extinction of the casino concession/sub-concession (if not by cause other than lapse)—see casino concession/sub-concession contracts, Clause 61/3, *in fine*.

²⁷See casino concession/sub-concession contracts, Clause 61.

²⁸See casino concession/sub-concession contracts, Clause 53.

²⁹See casino concession/sub-concession contracts, Clause 54.

³⁰See Macau Gaming Law, Article 41. About the reversion issue, see our article, *Reversion of Casinos and Gaming Equipment*, ASIAN GAMING LAWYER, Sept.–Oct. 2015, at 14–15.

³¹In SJM and MGM’s case, until February 1, 2020, and for all the remaining casino concessionaires/sub-concessionaires, until April 28, 2022.

³²If not by cause other than lapse—see casino concession/sub-concession contracts, Clause 44/3. See Clause 44/2.

³³Stated in the casino concession/sub-concession contracts, Clause 8/1.

³⁴See Macau Gaming Law, Article 7/2.

³⁵See Macau Gaming Law, Article 13/1.

³⁶See Macau Gaming Law, Article 8/1.

³⁷Notwithstanding the chief executive’s legal faculty to decide not to award any or all of the casino concessions if convenient to the interests of the Macau SAR—see Macau Gaming Law, Article 11/4.

³⁸See Macau Gaming Law, Article 9/4 *fine*.

³⁹Dispatch of the Chief Executive No. 217/2001, of Nov. 1, 2001.

⁴⁰See Dispatch of the Chief Executive No. 217/2001, of Nov. 1, 2001, No. 8.

⁴¹See Macau Gaming Law, Article 21/2.

⁴²*I.e.*, the exploitation of casino gaming.

⁴³See SJM’s casino concession contract, Clause 103/1.

⁴⁴Sociedade de Turismo e Diversões de Macau, S.A., SJM’s dominant shareholder that held a casino gaming monopoly in Macau from 1962 to 2001.

⁴⁵See casino concession contracts, Clause 8/1.

- 18 years to SJM (from April 1, 2002 until March 31, 2020)
- 20 years to Wynn and Galaxy (from June 27, 2002 until June 26, 2022)

Pursuant to the Macau Gaming Law,⁴⁶ if a casino concession is granted for a term less than the maximum term of 20 years, the Macau government⁴⁷ may authorize, up to six months before the expiration of the casino concession term, a term prorogation up to the period of time necessary to fulfill the maximum term of 20 years.

This means a term prorogation is limited in what relates to:⁴⁸

- its *scope*, because it can only be authorized in relation to casino concessions granted for a term less than the maximum term of 20 years;
- the *increase in the length of time*, since the prorogation itself cannot exceed, in conjunction with any other term previously granted, the maximum term of 20 years; and,
- the *timing of the authorization*, as it can only be authorized by the Macau government up to six months before the expiration of the casino concession term.

The Macau government may authorize, if it so decides, more than one term prorogation to the same casino concession, provided that, in conjunction with the initial term previously granted, it does not exceed the maximum term of 20 years. Besides, a term prorogation is not automatic, as it is dependent on a Macau government authorization, nor is an ex officio initiative of the Macau government, belonging to the interested casino concessionaire the procedural impulse towards the authorization (and to the Macau government the [passive] role of deciding on the authorization requested).

Having been granted a term less than the maximum term of 20 years, SJM is the only casino concessionaire with legitimacy to request and be authorized by the Macau government, a term prorogation to its casino concession. Furthermore, and bearing in mind the above-mentioned limitation to the increase in the length of time, the maximum prorogation that can legally, *in casu*, be authorized by the Macau government to SJM's casino concession is two years, i.e., until March 31, 2022.

ii. Applicable formalities. Entailing a contractual amendment,⁴⁹ the authorization for SJM's casino concession term prorogation may trigger either a *revision* or an *addendum* to its casino concession contract.⁵⁰

The option for a revision or an addendum is not, however, aleatory. Although we stand in the presence of a contractual relationship, a casino concession contract *revision* depends on the opening of a negotiation phase⁵¹ to discuss the terms under which the Macau government is prepared to authorize a term prorogation. If unaccompanied by any other contractual amendment or any materially relevant contractual amendment, a casino concession term prorogation suffices, in principle, with a (simple) addendum to the respective casino concession contract.

A revision and an addendum to casino concession contracts shall follow the same rules and format prescribed by law to casino concession contracts, i.e., it shall be executed by public deed (in the *Notes Book* of the Macau SAR Financial Services Bureau and before its Privative Notary), signed by the chief executive in representation of the Macau SAR (or by a member of the Macau government bestowed with [delegated] powers to that effect) and published in the II Series of the Macau SAR Official Gazette.

The respective casino concessionaire is responsible for all costs⁵² and entitled to a certified true copy of the revision or addendum, including all elements

⁴⁶See Macau Gaming Law, Article 13/2.

⁴⁷Within the Macau government, the competence seems to lie solely in the chief executive (as a primary competence), as it is not delegated in the Macau SAR secretary for economy and finance—see Executive Order No. 110/2014, of Dec. 20, 2014, No. 1, read in conjunction with Administrative Regulation No. 6/1999, of Dec. 20, 1999, Article 3, as amended.

⁴⁸See Macau Gaming Law, Article 13/2.

⁴⁹Even if only the clause concerning the term—see casino concession contracts, Clause 8.

⁵⁰See Macau Gaming Law, Article 13/4.

⁵¹See casino concession contracts, Clause 82. In the same line, see intervention of Jorge Costa Oliveira at the Legislative Assembly during the discussion of the Macau Gaming Law draft proposal, on August 30, 2001—in Legislative Assembly Diary, I Series, No. 20/2001, of Aug. 30, 2001.

⁵²Notary fees (as to the public deed), administrative fees (as to the publication in the Macau Official Gazette and (only) MOP\$50.00 as stamp duty levied on the contract (please refer to Article 17 of the Table annexed to the Stamp Duty Regulation, applicable *ex vi* Article 16, *a contrario*).

FIG. 1. SJM's casino concession term prorogation process.

that constitute an integrant part thereof.⁵³ Please refer to Figure 1 for a schematic of SJM's casino concession term prorogation process.

2. Casino sub-concessions

i. In general. Although enjoying a high degree of autonomy, casino sub-concessions do not hold, by definition, *vital autonomy* vis-à-vis the casino conces-

sions in their base⁵⁴ and in relation to several aspects, they are not “anchored” to the casino concessions in their base. It is the case, for instance, of the contractual final term, which it is not (directly) linked to the casino concessions term. In other words, despite the existence of a term correlation, an authorization for a casino concession term prorogation does not oblige the Macau government⁵⁵ to (also) prorogate the respective casino sub-concession contract final term.⁵⁶

⁵³See casino concession contracts, Clause 82/2, and Administrative Regulation No. 26/2001, of Oct. 29, 2001, Article 91.

⁵⁴See, *inter alia*, casino sub-concession contracts, Clauses 1/2 and 94.

⁵⁵Within the Macau government, the competence seems to lie solely in the chief executive (as a primary competence), as it is not delegated in the Macau SAR secretary for economy and finance—see Executive Order No. 110/2014, of Dec. 20,

2014, No. 1, read in conjunction with Administrative Regulation No. 6/1999, of Dec. 20, 1999, Article 3, as amended.

⁵⁶The casino sub-concessions contracts only foresee the maintenance of the sub-concession in case of extinction of the casino concessions in their base by cause other than lapse—see, *inter alia*, casino sub-concession contracts, Clause 94.

Having SJM's casino concession in its base, MGM is the only casino sub-concessionaire with legitimacy to formulate a term prorogation request identical to the one SJM may submit to the Macau government. However, in face of the casino sub-concessions lack of vital autonomy, MGM's request for its casino sub-concession contract term prorogation is always dependent on:

- a prior request being submitted by SJM in relation to its casino concession (as MGM's sub-concession cannot stand alone by itself);
- the terms, if any, under which the Macau government is prepared to grant a term prorogation; and,
- the actual prorogation length, if any, authorized to SJM's casino concession by the Macau government (as MGM's casino sub-concession is anchored in SJM's casino concession).

The limitation to the actual prorogation length cannot—and shall not—be read as an identity of the term: there is no impediment for the Macau government to decide for MGM's casino sub-concession contract prorogation with a term less (never greater) than the one authorized to SJM's casino concession. Casino sub-concession contracts may, without prejudice of prior authorization (from the Macau government), be revised following negotiations by and between the casino concessionaire and the casino sub-concessionaire (as the only parties to a casino sub-concession contract).⁵⁷

It should be underlined that casino sub-concessions (*latu sensu*) are not exhausted with the casino sub-concession contracts. Truthfully, a casino sub-concession is formalized in a set of documents—the most significant one being the casino sub-concession contract—that mirror the bundle of rights, duties, and

obligations that constitute the binding contractual relations by and between the Macau SAR, a casino concessionaire and a casino sub-concessionaire.⁵⁸

Moreover, casino concessionaires have contractually⁵⁹ agreed to any amendment (to the casino sub-concession contract) decided by and between the Macau government and the casino sub-concessionaire, provided it would not increase their responsibilities.

A casino sub-concession contract term prorogation unaccompanied by any other contractual amendment or any materially relevant contractual amendment does not entail, in principle, any increase of the respective casino concessionaire responsibilities. Thus, it is a matter that may be directly and solely agreed by and between the Macau government and the casino sub-concessionaire. This doesn't mean casino concessionaires shall be kept in the dark about the intended amendments as they, at a certain stage, will have to intervene⁶⁰ in the formalities related to the amendment to several of the documents that formalize the casino sub-concession, in particular the casino sub-concession contract.

ii. Applicable formalities. As opposed to what is provided to casino concessions, the revisions and addendums to casino sub-concessions contracts shall follow the formalities determined by the Macau government.⁶¹

In fact, by the time the first casino sub-concession was formalized,⁶² due to the fact the Macau SAR was not a party to the casino sub-concession contract itself, the Macau government felt the need to innovate in relation to the casino concessions contracts⁶³ by stipulating the application of formalities determined ad hoc to its revisions and addendums. Hence, the formalities array adopted by the time each casino sub-concession was formalized shall be taken into

⁵⁷See casino sub-concession contracts, Clause 82/1.

⁵⁸See reply from the Macau government, through the Macau Gaming Commission, dated June 30, 2008, to the written interpellation admitted by Dispatch [of the Legislative Assembly's President] No. 351/III/2008, of June 6, 2008—in Legislative Assembly Diary, II Series, No. III-36, of July 31, 2008, and, with a similar wording, see letter signed by the secretary for economy and finance of the Macau government, addressed to the Bank of Nova Scotia and dated May 25, 2006, No. 2—available at <https://depository.jasontc.net/the-myth-of-sub-concession-busted-92f71923d67c> (last accessed on Sept. 10, 2018), which was object of an oral interpellation to the Macau government—see Legislative Assembly Diary, I Series, No. IV-107, of Aug. 6 and 7, 2013, p. 53.

⁵⁹See casino sub-concession contracts, Clause 82/2.

⁶⁰As a concerned, materially related and signatory party.

⁶¹See casino sub-concession contracts, Clause 82/3.

⁶²With Venetian Macau, on Dec. 19, 2002.

⁶³See casino concession contracts, Clause 82/2, and Administrative Regulation No. 26/2001, of Oct. 29, 2001, Article 91.

consideration and constitute a valuable starting point for the revision or addendum.

Additionally, one should bear in mind that a revision or addendum to a casino sub-concession contract—including to its final term, by amendment of Clause 8—involves the need to revisit the set of documents that formalize the respective casino sub-concession, in order to process the necessary adjustments.

Although not required (by law or otherwise), MGM's casino sub-concession contract revision or addendum shall be disclosed at DICJ's webpage,⁶⁴ where all casino sub-concession contracts executed can currently⁶⁵ be accessed. Please refer to Figure 2 for a schematic of MGM's casino sub-concession term prorogation process.

C. Term extension

The third possible legal course of action is to grant a term extension to the casino concessions and casino sub-concessions contracts. We use *term extension* to mean the increase in the length of time of a casino concession or a casino sub-concession contract beyond the maximum term allowed by law (20 years), by opposition to term prorogation used to mean the increase in the length of time of a casino concession or a casino sub-concession contract within the maximum term allowed by law (20 years). It should be stressed that none of the casino concessionaires/sub-concessionaires hold any right to a term extension⁶⁶ (or an option right on, or a preference right to, a term extension), being a decision entirely of the chief executive.⁶⁷ Moreover, a term extension is not dependent on any request to the effect, being a Macau government *ex officio* initiative, although

prior consent from the casino concessionaires/sub-concessionaires shall be obtained.

Additionally, a term extension is limited to the respective casino concessionaire/sub-concessionaire providing the Macau government with:

- a bond⁶⁸ (to guarantee, *inter alia*, the prompt and exact fulfillment of the legal and contractual obligations assumed by the casino concessionaires/sub-concessionaires) in the amount of MOP\$300 million, by any of the means legally acceptable for its provision;⁶⁹ or,
- assurance of the good standing of the existing MOP\$300 million⁷⁰ first demand autonomous bank guarantee currently provided.⁷¹

On the other hand, and despite the casino concessionaires/sub-concessionaires contractual obligation to annually submit to the Macau government—until March 31—declarations on “no tax dues”⁷² (issued by the Macau SAR Financial Services Bureau) and “no contributions dues”⁷³ (issued by the Macau SAR Social Security Fund), it shall be requested for the submission of extraordinary declarations, contemporary to the granting of the term extension to the casino concessions and the casino sub-concession contracts.

Additionally, it should also be noted that on the expiration year of the casino concessions term and casino sub-concession contracts final term, the annual inventory on the assets (casinos and gaming equipment) to revert to the Macau SAR⁷⁴ is to be conducted at least 60 days⁷⁵ before said expiration.⁷⁶

⁶⁴GAMING INSPECTION AND COORDINATION BUREAU (DICJ), <http://www.dicj.gov.mo/web/en/contract/index.html>.

⁶⁵Since 2013, all casino sub-concession contracts can be accessed at DICJ's website. However, long before, the contracts were disclosed by the dominant shareholders of all casino gaming sub-concessionaires to the stock exchange where their shares are admitted to.

⁶⁶See, *inter alia*, casino concession and sub-concession contracts, Clause 81.

⁶⁷Not of the Macau government, as the case of the term prorogation.

⁶⁸See Macau Gaming Law, Article 22/2, Administrative Regulation No. 26/2001, of Oct. 29, 2001, Article 84/1 (applicable to casino sub-concessions *ex vi* Clause 6 of the casino sub-concession contracts), and casino concession/sub-concession contracts, Clause 61.

⁶⁹See Administrative Regulation No. 26/2001, of Oct. 29, 2001, Article 87/1 (applicable to casino sub-concessions *ex vi* Clause 6 of the casino sub-concession contracts).

⁷⁰As of today, the existing MOP\$300 million first demand autonomous bank guarantee provided by the casino concessionaires/sub-concessionaires is valid until 180 days following the extinction of the casino concessions/sub-concessions (if not by cause other than lapse)—see casino concession/sub-concession contracts, Clause 61/3, *in fine*.

⁷¹See casino concession/sub-concession contracts, Clause 61.

⁷²See casino concession/sub-concession contracts, Clause 53.

⁷³See casino concession/sub-concession contracts, Clause 54.

⁷⁴See Macau Gaming Law, Article 41.

⁷⁵In the case of all casino concessionaires/sub-concessionaires except SJM and MGM, until April 28, 2022.

⁷⁶If not by cause other than lapse—see casino concession/sub-concession contracts, Clause 44/3. See casino concession/sub-concession contracts, Clause 44/2.

FIG. 2. MGM's casino sub-concession contract term prorogation process.

Finally, if by any reason a term extension is not granted by the chief executive, the respective casino concession or casino sub-concession contract (as the case may be) will lapse at its term⁷⁷ and consequently, the contractual relationship between the parties—casino concession-

aire/sub-concessionaire and the Macau SAR—is severed, with the casino concessionaire/sub-concessionaire entirely responsible for the termination of any effects on the contracts it is a party to, and the Macau SAR not assuming any responsibility in this regard.

⁷⁷Stated in the casino concession/sub-concession contracts, Clause 8/1.

1. Casino concessions

i. In general. Pursuant to the Macau Gaming Law,⁷⁸ a casino concession granted for the maximum term of 20 years can *exceptionally* be granted a term extension by means of a substantiated dispatch of the chief executive. The term extension can be granted for one or more times but up to a maximum of five years altogether. This term extension configures the only (legal) exception to the casino concessions maximum term of 20 years, resulting in the maximum legally and unrenovable term enjoyable by a casino concession of 25 years.

Once the term, as extended, is met, the public tender principle⁷⁹ applies and a public tender to award (up to three⁸⁰) casino concessions would have to be opened to that effect.

Assuming SJM's casino concession term prorogation is authorized in full,⁸¹ the casino concessions will meet the maximum term of 20 years⁸² on:

- March 31, 2022 for SJM
- June 26, 2022 for Wynn and Galaxy

Due to its exceptional nature,⁸³ the dispatch of the chief executive granting a term extension must be substantiated on the public interest (at the time) inherent to such a grant vis-à-vis, namely, the public tender principle.⁸⁴

It is worth noting that during the Macau Gaming Law draft proposal discussion, the Legislative Assembly refused to accept an open precept as the one enshrined in the initial version of the Macau Gaming Law draft proposal⁸⁵ submitted to the Legislative Assembly, which foresaw the possibility—also exceptional and by means of a substantiated dispatch of the chief executive—for “successive term extensions of 5 years each.”

Ending almost in the middle of the fifth chief executive mandate,⁸⁶ the rationale behind the “successive term extensions of 5 years each” was, at the time, to allow leeway to all forthcoming chief executives (in office after the expiration of the casino gaming concessions initial term granted back in 2002), as they could—and would—use this extremely convenient mechanism to have a say in the development of the most relevant business activity conducted in the Macau SAR.⁸⁷

ii. Applicable formalities. As to formalities, please refer to Section II(B)(1)(ii), “Applicable formalities,” above, as they apply *mutatis mutandis* here.⁸⁸ Nevertheless, although possible, it is unrealistic to believe the Macau government would consider granting a term extension without a *quid pro quo* from the casino concessionaires. Thus, term extension claims for a revision (not an addendum) to the casino concession contract after the negotiation phase would have to be opened to discuss the minimum and additional requirements and conditions the casino concessionaires would be bound to the Macau SAR as consideration for a term extension.

2. Casino sub-concessions

i. In general. As referred to above, although enjoying a high degree of autonomy, casino sub-concessions do not hold, by definition, *vital autonomy* vis-à-vis the casino concessions in their base.⁸⁹ Moreover, and despite the Macau Gaming Law being (indirectly) applicable, throughout the casino sub-concession contracts,⁹⁰ it is arguable⁹¹ if all “benefits” extended to casino concessions/concessionaires are *qua tale* applicable to casino sub-concessions/sub-concessionaires.

We believe not, and the term extension may be used as example. In fact, the only obligation assumed⁹² by

⁷⁸See Macau Gaming Law, Article 13/3.

⁷⁹See Macau Gaming Law, Article 8/1.

⁸⁰See Macau Gaming Law, Article 7/2.

⁸¹*I.e.*, for the remaining period to reach 20 years (two years, from April 1, 2020 to March 31, 2022).

⁸²The maximum term of 20 years comprises both the initial term and all term prorogations authorized.

⁸³See Macau Gaming Law, Article 13/3.

⁸⁴See Macau Gaming Law, Article 8/1.

⁸⁵In Legislative Assembly Diary, II Series, No. 7/2001, of July 31, 2001.

⁸⁶Elected to office from Dec. 20, 2019 to Dec. 19, 2024.

⁸⁷See our article, *Outlining Renewal Scenarios for the Gaming Concessions*, ASIA GAMING BRIEFINGS—JURISDICTION UPDATES, May 2014.

⁸⁸See Macau Gaming Law, Article 13/4.

⁸⁹See, *inter alia*, casino sub-concession contracts, Clauses 1/2 and 94.

⁹⁰See Clause 6/1.

⁹¹Under the principle “equals should be treated equally and unequals unequally.”

⁹²Due to the investment commitments assumed by the casino concessionaires.

the Macau government on the maintenance of a casino sub-concession in case of premature extinction (for a cause other than lapse) of the casino concession in its base, is to diligently try to find another casino concession to serve as the sub-concession “umbrella.”⁹³ As a consequence, a casino sub-concession contract term extension is dependent upon:

- a term extension being granted to the casino concession in its base;
- the actual extension length, if any, granted by the chief executive to the casino concession in its base; and,
- the acceptance of identical minimum and additional requirements and conditions agreed between the Macau government and the respective casino concessionaire as consideration for such a grant.

The limitation on the actual extension length cannot—and shall not—be read as an identity of the term: existing grounds to, no impediment exists for the chief executive deciding on a casino sub-concession contract extension with a term less (never greater) than the one granted to the respective casino concession.

Assuming MGM’s casino sub-concession contract term prorogation is authorized in full,⁹⁴ the casino sub-concessions will meet the maximum term of 20 years⁹⁵ of the correspondent concessionaires on:

- March 31, 2022 for MGM
- June 26, 2022 for Venetian and Melco

ii. Applicable formalities. As to the formalities, please refer to Section II(B)(2)(ii), “Applicable formalities,” above, as they apply *mutatis mutandis* here.⁹⁶ Yet in this respect and taking into consideration the lack of vital autonomy (*vis-à-vis* the casino concessions in their base), from a straight legal point of view, it is defensible that the Macau government decided to hold a first stage negotiation (solely) with the casino concessionaires and only after with the casino sub-concessionaires.

This would hamper the formation of a casino gaming operators united front and would ease the imposition of a *quid pro quo* (the referred “minimum and additional requirements and conditions”) for the Macau government even consider a term extension and not pursue awarding new casino concessions by opening a public tender to that effect.

⁹³ See casino sub-concession contracts, Clause 94/2.

⁹⁴ *I.e.*, for the remaining period to reach 20 years (two years, from April 1, 2020 to March 31, 2022).

⁹⁵ The maximum term of 20 years comprises both the initial term and all term prorogations authorized.

⁹⁶ See Macau Gaming Law, Article 13/4.