

CASE ALERT:

Concessionaires for operating games of chance in casinos in Macau are not “companies that operate activities on an exclusive basis” for the purposes of the Criminal Code

Uniform Judicial Interpretation

In Case No. 69/2022, the Court of Final Appeal (“CFA”) issued a uniform judicial interpretation and ruled that casino companies are not under “exclusive operations”, and their employees are not equivalent to civil servants. The judgement was made in response to the diverging interpretations and opposite solutions on the same legal issue: whether casino operation companies should be deemed as “exclusive operators” and their employees as “civil servants”. This issue is relevant, as crimes committed in the exercise of public functions are subject to a specific regulation in the Macau Criminal Code.

UNIFORM JUDICIAL INTERPRETATION

Uniform Judicial Interpretation (*Uniformização de Jurisprudência* in Portuguese) issued by the CFA is necessary when there are opposing decisions of the Second Instance Court judgments on the same legal issue. Both the parties to the case and the Public Prosecutions Office may appeal against the decision and request for a uniform judicial interpretation from the CFA. The decision on such appeal constitutes a mandatory judicial interpretation on the courts of Macau since its publication in the Official Gazette.

The regime of uniform judicial interpretation varies in civil procedure and criminal procedure:

- In civil procedure, it is an ordinary appeal called the Extended Judgment of the Appeal (*Julgamento ampliado do recurso*).
- In criminal procedure, it is an extraordinary appeal known as Determination of Judicial Interpretation (*Fixação de jurisprudência*), meaning that only decisions with res judicata effects can be used as the basis for such extraordinary appeal.

The decision issued by the CFA in Case No. 69/2022 discussed in this article is a uniform judicial interpretation in criminal procedure.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The crime of Public Sector Embezzlement (provided in Article 340 of the Criminal Code) can only be charged against “civil servants”. The concept of “civil servants” stipulated in Article 336 of the Criminal Code is specially formulated for the purposes of the criminal law. In fact, it is different from the ordinary concept of civil servants in public administration. The concept of “civil servants” in the Criminal Code covers a wider scope of individuals than the latter, including employees of companies with “exclusive operations” and other persons specified by law.

In two separate cases, two croupiers were charged with Public Sector Embezzlement for conducting gambling fraud and theft of casino chips, respectively. The first croupier was convicted of the crime, while the second had the charges changed by the First Instance Court to Abuse of Trust.

Both criminal defendants filed an appeal against the First Instance Court’s decisions, resulting in opposing decisions from the Second Instance Court:

Criminal Appeal Case No. 580/2013

The Second Instance Court held that the Appellant may be equivalent to civil servant, and, thus, continued to press the charge of Public Sector Embezzlement.

In the Appellate Court’s view, the number of licenses granted for gaming operations is not a decisive factor in determining whether a licensed operator is an exclusive operator. Issuing more than one license does not mean that the gaming industry has entered a real liberalization phase. Since the gaming sector is not liberalized, the operators still retain an exclusive nature.

Criminal Appeal Case No. 248/2021

The Second Instance Court held that the casino licenses had been granted to three companies, and so the company the croupier worked for was not the sole operator of casinos in Macau.

For the Appellate Court, “exclusive operations” means “single operation”, that is, exclusively operated by one company.

As the situation at issue did not meet such requirement, the Appellate Court determined that the employees of the gaming concessionaire should not be considered civil servants.

Since there are diverging interpretations of law and opposing solutions on the same legal problem, the Public Prosecutions Office sought a uniform judicial interpretation from the CFA.

LEGAL ANALYSIS

The CFA considered that, under the previous legal regime (Law No. 6/82/M, which was amended by Law No. 10/86/M), there were two types of gaming concessions, namely (i) those of an exclusive regime or (ii) those under a special license. Unlike the previous regime, the current legal regime (Law No. 16/2001) does not expressly provide for several different concession regimes, nor does it refer to the exclusive or special license regime, establishing only that the concession of operating games of chance in casinos is made through an administrative contract, and that the maximum number of concessions is six.

Having pondered the legal interpretations made by the Second Instance Court and legal scholars, the CFA concluded that the “exclusive operations” in the gaming industry goes in the direction of exclusive operation by a single company provided by Law No. 6/82/M, rather than multiple companies operating with special government licenses.

According to the CFA, if the concept of “exclusive operations” is expanded to activities reserved for the Government and dependent on a concession, there would be no substantial difference for criminal purposes between a concession under an

exclusive regime and a concession under a non-exclusive concession. Such legal interpretation would undermine the principle of consistency or uniformity of the legal system.

Moreover, taking into account the Statement of Reasons for the draft of Law No. 16/2001, the statement of the then Secretary for Economy and Finance when presenting the proposed law in the Legislative Assembly, and the opinion issued by the committee that reviewed this proposed law, the CFA concluded that, through Law No. 16/2001, the legislator intended to introduce changes to the regime of games of chance in casinos in Macau, being one of the most significant changes the end of the traditional model of “exclusive operation”. Hence, since the entry into force of Law No. 16/2001, the right to operate casinos is no longer granted on an exclusive basis, and the concessionaires ceased to operate casinos exclusively.

RULING

The CFA held that the gaming concessionaires cannot be deemed as “companies that operate activities on an exclusive basis” provided for in Article 336(2)(c) of the Criminal Code, and the employees of such concessionaires do not have the status equivalent to civil servants. As such, the decision in Appeal Case No. 248/2021 is upheld: the criminal defendant should be punished with the crime of Abuse of Trust and not Public Sector Embezzlement.

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