

COMPARING GAMING REGULATORY SYSTEMS IN CIVIL AND
COMMON LAW COUNTRIES: HOW DIFFERENT APPROACHES CAN
ACHIEVE THE SAME POLICY GOALS

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I. INTRODUCTION

Public policy reasons for governments to regulate gambling include that the games are honest, persons are secure in their deposits and earnings, and regulation minimizes problem gambling and promotes responsible gambling. However, the type of regulatory process that governments employ to achieve these goals can vary. This article compares the origins, history, and benefits of the two major approaches to gaming regulation—command-and-control and concession models—to more fully understand how each model attempts to meet a government’s public policies behind legalizing gambling.

The failure to understand the fundamental differences can lead to misunderstandings between government regulators across the globe. For example, the U.S.-China Economic and Security Review Commission, a U.S. federal agency, heard from regulatory experts in 2013 that Macau has a “lax

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regulatory system for its casinos.”¹ This allegation infers that Macau’s regulations were not sufficiently strict or severe and prevented the government from achieving its public policy behind permitting casino gaming. One can only assume that the experts compared American regulatory “standards” to those employed in Macau. This comparative analysis of gaming control assumes that standards exist, and all regulatory systems can be directly compared. This results in the often-repeated mantra that a jurisdiction has the “gold standard” for gaming regulation.² This approach has informed lawmakers and regulators across the globe.³

A significant problem with any attempt to critique how different jurisdictions address private casino operations to achieve their public policies is that any such examination is biased based on the observer’s socially constructed views of his or her own existing regulatory system. As an example, the American government and many European governments use systems of command-and-control regulations, which dictate what is and is not allowed in an industry or activity.⁴ Command means that a government authority presents minimum licensing and casino operations standards. The ‘control’ signifies the negative sanctions that may result from noncompliance.

These regulators may look at Macau and other jurisdictions whose primary approach to casino regulation is based on a concession model and believe that a direct comparison is possible. However, the concession model is different in that it reserves gaming to the state⁵ as public activity (*quasi*-public service). The state enters into a temporary contract with private entities to

¹ *Hearing on Macau and Hong Kong Before the U.S.-China Econ. and Sec. Rev. Comm’n*, 113th Cong. 1 (2013) (statement of William A. Reinsch, Chairman of the U.S.-China Economic and Security Review Commission).

² Devin O’Connor, *Japan Casino Regulations Might Resemble Nevada’s, the Gaming Industry Gold Standard*, CASINO.ORG, <https://www.casino.org/news/japan-casino-regulations-might-resemble-nevadas-gaming-gold-standard/> (Dec. 23, 2019, 1:00 AM) (“Nevada’s regulatory environment that oversees the richest casino state in America has long been considered the gold standard of the gaming industry.”); Sue Schneider, *Law Students Help Modernize Nevada Regulation*, 15 GAMING L. REV. & ECON. 755, 755 (2011). See Teresa M. Pimpinelli, *The Positive Impact of Reentry Employment on and in the Atlantic City Casino Industry and Community*, 1 INT’L J. GAMING, HOSP. & TOURISM (2021); Becky Harris & Husna Alikhan, *Part I: Nevada, Over 60 Years Regulating Gambling—A Jurisdictional Overview*, 23 GAMING L. REV. 645, 645 (2019).

³ In the case of Macau, the Macau Special Administrative Region (or Macau SAR).

⁴ See generally C.S. Holling & Gary K. Meffe, *Command and Control and the Pathology of Natural Resource Management*, 10 CONSERVATION BIOLOGY 328 (1996).

⁵ For example, Japanese government officials declared the “Casino Administration Committee will be instituted to address various concerns over casinos and ensure the highest level of casino regulations in the world.” CABINET OFF., GOV’T OF JAPAN, BASIC ECON. AND FISCAL MGMT. AND REFORM 2019: A NEW ERA OF “REIWA”: CHALLENGES TOWARD “SOCIETY 5.0” (2019) (emphasis added).

conduct the gaming on its behalf. The contractual relationship between the state and the contractor is paramount to creating command-and-control regulation. A concession model may appear as a “lax” regulatory system when compared to command-and-control casino operational standards, but this is not necessarily accurate.

II. CIVIL LAW VERSUS COMMON LAW UNDERPINNINGS

Civil Law has its origin in the *Ius Civile*: the law of the citizens of Rome.⁶ Emperor Justinian decided to compile the laws during the Roman Empire, which became known as *Corpus Iuris Civilis*.⁷ In the Middle Ages, laws were based on the principles of Roman law, with some European countries systematizing customary laws to attain the security and certainty that a common system of laws provides.⁸ Centuries later, in the eighteenth century, there was a vast production of comprehensive and systematic legal codes, including the decisive French Civil Code of 1804.⁹

Civil law systems are characterized by a constitution, codified laws (i.e., civil, administrative, criminal, tax codes with basic rights, powers, and duties), and a hierarchical system of laws, regulations, and other legislative enactments, which bind all.¹⁰ Although judges can interpret laws and, in some cases, issue decisions that have binding force on lower courts, the judges must apply the legislative enactments and do not have wide latitude to create them.¹¹ In a civil law system, the opinions of scholars are considered, but not binding.¹² Finally, despite freedom of contract being the general rule, there are mandatory rules in the laws that the parties cannot set aside.

Legal concepts of administrative law¹³ are well defined, studied, and codified most of the time. For instance, the concession model has existed for several centuries and has been transposed into the administrative codes. There

⁶ See generally *The Common Law and Civil Law Traditions*, BERKELEY L., <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> (last visited Mar. 7, 2022).

⁷ Or Justinian Code. See *Code of Justinian*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Code-of-Justinian> (last visited Apr. 16, 2023).

⁸ *Medieval Roman Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Medieval_Roman_law (last visited Apr. 16, 2023).

⁹ Or Napoleonic Code. See *Napoleonic Code*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Napoleonic-Code> (last visited Apr. 16, 2023).

¹⁰ See *The Common Law and Civil Law Traditions*, *supra* note 6.

¹¹ See *id.*; see also Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 426 (1967).

¹² See Dainow, *supra* note 11, at 430.

¹³ Administrative law is an area of public law that enshrines the procedures, rules, and regulations of the public powers (government, governmental agencies, and alike entities).

are general principles enshrined in administrative law, including the fundamental principle of legality, under which the acts of the administration can only take place if authorized by the law. As to the individuals, like the common law, all is permitted unless it is prohibited by the law.¹⁴

By contrast, the common law had its foundations in England in the twelfth and thirteenth centuries when the King's Court (Curia Regis) introduced jury trials with judges' decisions instead of the legislators implementing the rules.¹⁵ In common law jurisdictions, the rules do not need to be written, nor does a constitution—the supreme law in civil law jurisdictions—even need to exist. Court decisions are binding, and only higher courts can overturn judicial opinions. The general principle is that “all is permitted unless it is prohibited.”¹⁶ The laws in common law systems are less prescriptive than those in civil law systems,¹⁷ and scholarly authorities carry less weight.¹⁸

Contract law in common law systems leaves less room for interpretation than it does in civil law systems.¹⁹ Contracts are generally extensive and try to govern all possible outcomes and obligations for parties, who also enjoy extensive freedom of contract.

Economic activities are left to private initiative. For instance, the operation of games of chance is very regulated, predominantly with a system of command and control, stating what “is permitted and what is illegal,” with casino operation and accounting standards and punitive measures, including fines or suspension or revocation of a license when operators breach those standards.

The foundations of the civil law and common law systems, and the differences between them, influence gaming regulation. The civil law system transfers power to conduct gaming from the government to private interests (concessions). The common law system extensively regulates private interests by only allowing them to conduct permitted activities (licensing).

¹⁴ See Alexandre Guimarães Gavião Pinto, *Os Princípios Mais Relevantes do Direito Administrativo*, 11 REVISTA DA EMERJ, no. 42, at 133 (2008).

¹⁵ See *Overview of the Judiciary*, U.K. CTS. AND TRIBUNAL JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary-in-england-and-wales/history-of-the-judiciary/> (last visited Oct. 2, 2022); see also Ralph V. Turner, *The Medieval English Royal Courts: The Problem of Their Origins*, 27 HISTORIAN 471, 471 (1965).

¹⁶ Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 HARV. J. L. & PUB. POL'Y 35, 39 (1988).

¹⁷ See Dainow, *supra* note 11, at 425–26.

¹⁸ *Id.* at 428.

¹⁹ See Shida Galletti, *Contract Interpretation and Relational Contract Theory: A Comparison Between Common Law and Civil Law Approaches*, 47 COMPAR. INT'L L.J. S. AFR. 248, 251–53 (2014).

III. THE MAJOR CHARACTERISTICS OF CONCESSIONS

A. Gaming Concessions Versus Gaming Licenses

Concessions and licenses are legal entitlements to perform or engage in activities or provide services²⁰ that would otherwise be unlawful. While the terms “concession” and “license” are often used interchangeably to represent the idea of governmental permission, they are very different. The fundamental distinction is that a concession always involves activity of a public nature or about an exclusively public domain. By contrast, a license conveys the right to engage in an exclusively private activity.

A concession is used when the legal right to perform or engage in the devolved activity or provide the devolved service is reserved to a public entity (especially the state).²¹ It serves as the appropriate legal arrangement for the devolution, to private entities, of responsibilities or interests that inherently belong to the public sphere of intervention and may not be subject to privatization unless the devolution is permitted by law. Under a concession, a private entity, known as a concessionaire, is responsible for performing or engaging in the devolved activity or providing the devolved service at its own expense and risk, albeit in the general interest. As Freitas do Amaral stated, “[t]here is not, in short, a right of the private individual that is exercised with the State’s authorization [as would be in the case of a license], but rather a right of the State which the private individual exercises through a concession.”²²

In casino gaming, the concessionaire, acting in its interest and at its risk and expense, sets up and operates a casino and is remunerated with the profit derived from gambling revenues.²³ A concession involves the temporary devolution or transfer, to a private entity,²⁴ of the right to perform or engage in a

²⁰ Concessions are also used for the provision of public works.

²¹ The scope of such right encompasses public needs, functions, services, tasks or purposes, and economic domains that fall under the State’s exclusive authority.

²² DIOGO FREITAS DO AMARAL, *O CASO DO TAMARIZ: ESTUDO DE JURISPRUDÊNCIA CRÍTICA* 208 (1964). This doctrine seems to be shared by Nevada Law, which considers “that gaming is a matter of privilege conferred by the State rather than a matter of right.” *State v. Rosenthal*, 93 Nev. 36, 40 (1977). As declared by the legislature, “Any license issued . . . is a revocable privilege, and no holder acquires any vested rights therein or thereunder.” NEV. REV. STAT. § 463.0129 (2021).

²³ Diogo Freitas do Amaral, *Opinion of 01-10-2001 Presented to the Macau SAR Government* 6, cited in the Substantiated Report dated 07-02-2002 [hereinafter Substantiated Report of Feb. 7, 2002], based on which Macau’s chief executive granted the current casino gaming concessions, drawn up by the Tender Commission under Article 44(3), subpar. 8 of Administrative Regulation No. 26/2001, of 29 October, and quoted in ANTÓNIO LOBO VILELA, *MACAU GAMING LAW: ANNOTATED WITH COMMENTS, VOLUME I – ARTICLES 1 TO 10*, 388 (2020) [hereinafter *MACAU GAMING LAW VOL. 1*].

²⁴ Concessions can be granted, exceptionally, to lesser public entities.

public activity or to provide a public service²⁵ which is generally excluded from the private sector domain. Under the principle of the finitude of concessions, concessions always have a specified term. Depending on the applicable laws and regulations, such a term may be prorogated and/or extended²⁶ by the granting authority. Such a term, prorogation, or extension do not preclude a concession renewal if permitted by law.

A license recognizes the lawful nature of an applicant's proposed private activity and its conformity with the regulatory framework governing such licensed activity and binds the licensee to solely comply with the regulatory requirements established for the licensed private activity to ensure legality. A concession goes further by encumbering the concessionaire with the duty to correctly perform an activity deemed to be of public interest. In this pursuit, the concessionaire is required not only to constantly fulfill regulatory requirements and standards, but also to achieve certain goals and objectives.

The term "license" also references the certificate or the document that confers permission to engage in such activity. The government only issues licenses to applicants who qualify by satisfying regulatory requirements established within the legal framework of a licensing process. The licensing entity cannot consider standards outside the legislatively dictated suitability standards. A license is ruled by passivity concerning the furtherance of specific public needs related to a strictly private activity. A concession entails more than mere adherence to legality and is actively conditioned to attaining the satisfaction of a public purpose or aim. For example, casino gaming operators are bound to investment obligations that aim to serve the public interest.

The legal status of assets built and financed by the private operator varies under a concession and a licensing mechanism. Most assets (including those built or financed by the concessionaire) revert to the public entity, which re-emerges as the exclusive titleholder of the legal right to engage in the devolved activity upon a concession's termination.

A license never involves reversing or transferring assets to the public licensing entity. Such assets always remain under the licensee's private ownership. Furthermore, the right to perform the licensed activity does not "return" to the public entity whenever a license expires. Such a right merely ceases to exist for that particular licensee. A licensed activity is private and therefore the state, or any other public entity, has no exclusively public duty, role, task, or interest to perform it.

When a transfer is permissible in publicly reserved economic domains, a public authority entrusts a concessionaire with the total or partial pursuance of economic activity, typically using a concession contract governed by

²⁵ Examples of public utilities include water, electricity and gas supply, and telecommunications.

²⁶ For the difference between extension and prorogation, see António Lobo Vilela, *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*, 23 GAMING L. REV. 2, 3 (2019).

administrative law. A concession is often considered a form of privatization of public duties because it involves a state allowing a private entity to execute a public task. On the other hand, a license is simply permission granted by a public authority (typically never the state per se) to enable the exercise of a specific private activity, which would otherwise be illegal. A license entitles a person, or a private organization or enterprise, to engage in a particular activity that is strictly private in nature. Such activity does not pertain to any public need, role, interest, function, task, or service, nor does it belong to a reserved or public economic domain.

B. The Nature of Gaming Concessions: Collaboration or Autonomous Contracts

Some scholars often refer to concession contracts that grant these powers as “collaboration contracts,”²⁷ which are defined as “those by which one of the parties undertakes to provide the other with temporary collaboration in the performance of administrative duties for remuneration.”²⁸ Without facing difficulties or legal hurdles of any order, the state may operate casinos directly or indirectly through a concession, with the option being “a mere administrative policy issue.”²⁹ As Oliveira Ascensão and Menezes Cordeiro indicated, “there is no doubt that, from the outset, private entities do not have the right to operate games of chance. Yet we do have the State . . . that can grant it to private entities.”³⁰ According to Sérvulo Correia, due to “motives of revenue gain and public morality, these [games of chance] constitute a State monopoly. Its operation by private entities therefore represents a means of collaboration in the performance of the granting entity’s duties.”³¹ Correia notes that:

This central idea of collaboration enables the inclusion of specific aspects from the scheme of administrative contracts. It is due to the fact that the private contractor is obliged to carry out an administrative activity, . . . where the pursuit of public interest always prevails, that the particular subjection of the private individual to the exercise of certain administrative powers, such as the power of unilateral modification, is understood.³²

²⁷ JOSÉ MANUEL SÉRVULO CORREIA, *LEGALIDADE E AUTONOMIA CONTRATUAL NOS CONTRATOS ADMINISTRATIVOS* 421 (1987).

²⁸ *Id.* at 420.

²⁹ FREITAS DO AMARAL, *supra* note 22, at 209.

³⁰ Substantiated Report of Feb. 7, 2002, *supra* note 23, at 14. *See also* José de Oliveira Ascensão & António Menezes Cordeiro, *Das Concessões de Zonas de Jogo*, 2 *REVISTA DE DIREITO PÚBLICO* 65 (1988).

³¹ CORREIA, *supra* note 27, at 419.

³² Substantiated Report of Feb. 7, 2002, *supra* note 23, at 12–13; MACAU GAMING LAW VOL. 1, *supra* note 23, at 388–89.

Since the operation of casino games of chance in casinos is the reserve of the state, concessionaires temporarily—during the validity of the concession—hold the state powers. Therefore, the relationship established between the concessionaire and the private individuals, within the scope of the gaming activity, is administrative.³³ As José de Oliveira Ascensão and António Menezes Cordeiro noted:

For the same reasons, the competent public body, possessing the powers of authority, may intervene in concessionaire companies operating casino games of chance, under the general terms in which it may do so in other private entities, that is, via the specific forms of Public Law (as well as under the terms of special legislation).³⁴

Marcello Caetano references a special “subjection clause” to which the private contractor of the administration is bound, which is associated with the regular performance of an activity in the public interest.³⁵

Other scholars³⁶ consider the casino gaming concession contract as an autonomous category not extendable to public or other service concessions. As in public services concessions, casino gaming concessions do not fulfill an immediate public interest given that the activity performed is not intended to satisfy an individually felt collective need.

According to the Substantiated Report of 07-02-2002:

The public interest pursued with the concession consists not of the activity in itself (which is why it does not constitute an immediate public interest), but of the *quid pro quo* that the conceding public authority derives from the operation of gambling. These *quid pro quos* may consist of tax revenues, bonuses, or other financial contributions, as well as the concessionaire's development of activities in the public interest, be these of an economic, cultural, or other nature, through the execution of works or the provision of public services.³⁷

Casino gaming concessionaires:

³³ See Supremo Tribunal Administrativo [Supreme Administrative Court] Oct. 13, 2004, Case No. 47836 (Port.).

³⁴ Substantiated Report of Feb. 7, 2002, *supra* note 23, at 13; MACAU GAMING LAW VOL. 1, *supra* note 23, at 389. See also Ascensão & Cordeiro, *supra* note 30, at 69.

³⁵ Substantiated Report of Feb. 7, 2002, *supra* note 23, at 13. See also MARCELLO CAETANO, PRINCÍPIOS FUNDAMENTAIS DO DIREITO ADMINISTRATIVO 183 (2003).

³⁶ See Ascensão & Cordeiro, *supra* note 30, at 64.

³⁷ Substantiated Report of Feb. 7, 2002, *supra* note 23, at 17.

[A]re subject to a special fiscal regime, through which the state takes a portion of revenues generated from gambling, being also restricted to activities that are not-for-profit and in the public interest. These activities include the obligation to build casinos, hotels, cultural and sporting venues, etc., which, at the end of the concession, revert to the state.³⁸

Moreover, the “gaming industry does not satisfy an individually felt collective need, not realizing, in itself and of itself, a public interest, but constitutes an instrument for obtaining the means that result in the satisfaction of collective needs, needs that, if individually felt, represent in themselves an immediate public interest.”³⁹ Because the casino industry does not satisfy an individually felt collective need, it does not directly realize any public interest. Instead, it serves as a vehicle for obtaining the means that result in the satisfaction of collective needs, representing an immediate public interest.⁴⁰ Hence, casino gaming concessions are used as a factor for accelerating economic progress.⁴¹ The gaming industry is thus an “activity of indirect public interest.”⁴²

C. Overview of Gaming Concessions in Civil Law Jurisdictions

Concession contracts flourished after the French Revolution, particularly for public services and other utilities.⁴³ This liberal period in Europe was marked by a mostly absent state under the *laissez faire laissez passer* paradigm, which aimed to protect freedom and equality.⁴⁴ However, what actually occurred was the unexpected rise of monopolies that did not protect freedom and equality.⁴⁵ The liberal state gave place to the welfare state that

³⁸ Ascensão & Cordeiro, *supra* note 30, at 54.

³⁹ Substantiated Report of Feb. 7, 2002, *supra* note 23, at 17.

⁴⁰ *Id.*

⁴¹ FREITAS DO AMARAL, *supra* note 22, at 202.

⁴² Substantiated Report of Feb. 7, 2002, *supra* note 23, at 17.

⁴³ Pedro Cortés, *The Role of Government Delegates in Macau Casino Gaming Concessionaires – Evolution and Prospective*, 26 UNLV GAMING RSCH. & REV. J. 1, 2 (2022).

⁴⁴ Under the principles of *Liberté, Égalité, Fraternité* (French for “liberty, equality, fraternity”). *Legacies of the Revolution*, LIBERTÉ, ÉGALITÉ, FRATERNITÉ: EXPLORING THE FRENCH REVOLUTION, <https://revolution.chnm.org/exhibits/show/liberty--equality--fraternity/legacies-of-the-revolution> (last visited Apr. 16, 2023).

⁴⁵ See generally Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL’Y 983 (2012).

centralized public services and public interest activities.⁴⁶ Civil law jurisdiction states started to use contracts to protect activity.⁴⁷ The model of the state evolved, as countries directly executed the provision of public services by increasing the size of the overall public structure.⁴⁸

After a period of bureaucratization of public services, states, in line with liberal state views, devolved public activities to the private sector, which, in principle, had more economic standards, productivity, and efficiency.⁴⁹ Concessionaires of public services started to take a significant part of the economic pillars (water supply, electricity, gas, and public transportation).⁵⁰ This was achieved through an administrative act, such as a government order, or a concession contract in civil law jurisdictions.⁵¹

Macau has been no different since the nineteenth century, when the government granted exclusive rights to specific activities for revenue generation.⁵² As defined by Diogo Freitas do Amaral and Lino Torgal, “gaming concession contracts” are administrative contracts with the following main features: *nomen iuris* (to the extent that the law refers specifically to this type of contract), formal (executed through a public deed before a notary), reciprocal (creates obligations to both the state⁵³ and the concessionaire), onerous (implies sacrifices and economic advantages to both parties), of continuous performance (obligations are fulfilled during a prescribed time—up to twenty years in the case of the current Macau gaming concession contracts), and with multiple effects (creates diversified juridical conditions covering several areas of law: real estate, administrative, tax, and contract).⁵⁴

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.”⁵⁵ A concession for the operation of

⁴⁶ MARCELLO CAETANO, *MANUAL DE DIREITO ADMINISTRATIVO*, Vol. II, 1015 (8th ed. 1969).

⁴⁷ Alice Serpa Braga, *Concessão de Serviços Públicos: Contexto Histórico e Novo Desenho* [Public Services Concession: Historical Context and New Design], *ÂMBITO JURÍDICO* (July 1, 2013), <https://ambitojuridico.com.br/cadernos/direito-administrativo/concessao-de-servicos-publicos-contexto-historico-e-novo-desenho/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See generally Maria João Estorninho, *Concessão de Serviços Públicos - Que Futuro?* [Public Services Concession – What Future?], *DIREITO E JUSTIÇA (ESPECIAL)* 21, 21–36 (2005).

⁵¹ MARCELLO CAETANO, *MANUAL DE DIREITO ADMINISTRATIVO*, Vol. I 240–41 (8th ed. 1969).

⁵² See Pedro Cortés, *Macau Gaming Industry 8.0—Public Policy Beyond 2022*, 25 *GAMING L. REV.* 50, 53 (2021).

⁵³ In the case of Macau, the Macau SAR.

⁵⁴ DIOGO FREITAS DO AMARAL & LINO TORGAL, *ESTUDOS SOBRE CONCESSÕES E OUTROS ACTOS DA ADMINISTRAÇÃO* (Legal Opinions) 532 (2002).

⁵⁵ *CÓDIGO DO PROCEDIMENTO ADMINISTRATIVO DE MACAU* [Macau Administrative Procedure Code], art. 165, § 1.

casino games is considered one of these administrative contracts.⁵⁶ Under the Code, the administration has certain general powers, such as the powers:

aa) to unilaterally modify the content of the obligations, provided it respects the object and the financial balance of the contract, b) [to] control the way that the obligations are performed, c) [to] terminate the contracts invoking the public interest . . . without prejudice of fair compensation, d) [to] supervise the execution of the contract, and e) [to] apply sanctions stated for contractual non-performance.⁵⁷

D. General Overview

Macau had operated under a mixed-jurisdiction system since the Portuguese arrived in the sixteenth century.⁵⁸ “Under that system, the local Portuguese administration had enjoyed some degree of autonomy” concerning its rule over Goa⁵⁹ and Lisbon’s control. The Portuguese administration “pursued a system of coexistence—based on mutual commercial interest—with Chinese political interests.”⁶⁰ The move from a mixed-jurisdiction system to, in effect, a colonial system⁶¹ occurred in the middle of the nineteenth century. This was a decisive moment for the political and administrative structure of the Portuguese Colony of Macau,⁶² the Overseas Province of Macau, the Territory of Macau, and, finally, in 1999, the Macau Special Administrative Region of the People's Republic of China (Macau SAR).

Macau SAR exercises significant autonomy and enjoys executive, legislative, and judicial powers.⁶³ Its legal system is based on the Portuguese legal system—which ruled until 1999—and, essentially, can be included in the civil law system, based on the *Corpus Iuris Civilis*, i.e., influenced by Roman law.

⁵⁶ *Id.* art. 165, § 2.

⁵⁷ *Id.* art. 167.

⁵⁸ Jurisdição mista [mixed jurisdiction], DITEMA, DICIONÁRIO TEMÁTICO DE MACAU (Vol. 3, 2011).

⁵⁹ Goa is a Portuguese colony in India and part of Portuguese India.

⁶⁰ See Cortés, *supra* note 52, at 25.

⁶¹ See José Gabriel Mariano, *A Procuratura dos Negócios Sínicos (1583-1894)*, O DIREITO (1991); see also JORGE GODINHO, OS CASINOS DE MACAU – HISTÓRIA DO MAIOR MERCADO DE JOGOS DE FORTUNA OU AZAR DO MUNDO 29 (2019).

⁶² The concept of “colony” was never accepted by the Chinese authorities and scholars.

⁶³ Lei Básica da Região Administrativa Especial de Macau [Basic Law of the Macau SAR] 1999, art. 2.

Under its sovereign powers, the National People's Congress attributes autonomy to Macau SAR where some advocate that the executive branch prevails over the legislative and judicial branches.⁶⁴

The Macau SAR government, headed by the Chief Executive,⁶⁵ is the executive authority. It exercises powers and functions,⁶⁶ including formulating and implementing policies, conducting administrative and external affairs authorized by the Central People's government under the Basic Law, drawing up and introducing budgets and final accounts, introducing bills and motions, drafting administrative regulations, and designating officials to sit in on the meetings of the Legislative Council to hear opinions or speak for the government.

E. History of the Macau Gaming Concession Model

From the legalization of gaming in 1849 to 1961, Macau viewed gaming as a "necessary evil"⁶⁷ essential to generating and maximizing revenues for the state's⁶⁸ public purse.⁶⁹ Gaming had been tolerated⁷⁰ from the sixteenth century

⁶⁴ *Governo de Macau Diz que Poder Executivo Prevalece Sobre Restantes*, SAPO (Sept. 11, 2020, 9:14 AM), https://www.sapo.pt/noticias/atualidade/governo-de-macau-diz-que-poder-executivo_5f5b599b6c4503705aac4ef (quoting André Cheong, Secretary for Administration and Justice and spokesman of the Executive Council: "in Macau it is always the predominance of the executive . . . each power has their competences . . . but there is no classic separation of powers").

⁶⁵ Under the Chief Executive, there are five Secretaries for different areas: Administration and Justice, Economy and Finance, Security, Social Affairs and Culture, and Public Works. *See* art. 5 of Law No. 2/1999 (1999).

⁶⁶ Basic Law of the Macau SAR [Lei Básica da Região Administrativa Especial de Macau], *supra* note 63, arts. 61, 64.

⁶⁷ *See* Cortés, *supra* note 52, at 50.

⁶⁸ From the arrival of the Portuguese until 1849, the administration of Macau was shared between Portugal and China. From 1849 to December 19, 1999, Macau was solely administered by Portugal. The reference to "the state" as the public authority is, in the context of this paper, abstract. Over the years and depending on the political context, Macau was first a Portuguese settlement, then the colony of Macau, the Overseas Province of Macau, the Territory of Macau, and finally, in 1999, the Macau SAR of the People's Republic of China. *See id.* at 50.

⁶⁹ *See id.*

⁷⁰ *See* Godinho, *supra* note 61, at 32 ("Games of fortune and chance were never prohibited by constitutional provisions"); *see also* VICTOR ZHENG & PO-SAN WAN, GAMBLING DYNAMISM: THE MACAO MIRACLE 28 (2014) ("Although not a few people expressed skepticism of the argument, the irrefutable fact was that licensed brothels, opium divans, and gambling houses of different types and scales flourished in Macao because of the government's blessing.").

onward, with the Portuguese government adopting a permissive approach to such activity.⁷¹

Before legalization in 1849, the Senate implemented repressive measures against illegal gaming,⁷² such as barring the “entry of ‘Chinese rascals’ in private houses to gamble and plan robberies, under penalty of ten taels⁷³ with one third to the whistleblowers.”⁷⁴ The first authorization for the operation of fantan houses was made through a license without a public bid at the request of an unknown person.⁷⁵ After that, licenses were granted pursuant to a public bid.⁷⁶ The first was in 1850 for the operation of fantan, which has since been the most important source of revenue to Macau.⁷⁷ Legal gambling did not have comprehensive regulation; the government merely granted a monopoly, with private entrepreneurs holding exclusive rights to certain activities. Similar concessions were given for the trade-in of pork and beef, opium, and cheap Chinese labor.⁷⁸

⁷¹ See generally Bruno Lopes, *Punição e Controlo Social: Jogo e Inquisição em Lisboa nos Séculos XVI a XVIII*, JOGOS EM PERSPECTIVA: DE LISBOA A MACAU, AS JORNADAS DE HISTÓRIA DOS JOGOS EM PORTUGAL 3 (2014) (“It can be concluded that the Inquisition saw the fact that an individual was a gambler as a deviation from the ‘natural order,’ therefore not a heretic. Nonetheless, and considering the description of Bluteau and the identified cases, this practice was not seen in favorable eyes, due to the losses it conducted.”). The Inquisition would have been equally unlikely to view gaming favorably in jointly administered Macau.

⁷² See Godinho, *supra* note 61, at 32 (stating that the Senate was the local power that started to lose influence since the creation of the Governor’s office in 1623 with military, rather than political, powers). The administrative reform of 1834, with a Decree enacted on December 7, 1836, changed the center of civil powers from the Senate, which became solely a municipal entity, to the Governor, who had powers of colonial administrator, without links to Macau and was only accountable to Goa and Lisbon. *Id.*

⁷³ *Tael* is a weight used in China and East Asia of different amounts, but it is fixed in China at 50 grams (one and three-fourths ounces).

⁷⁴ See Godinho, *supra* note 61, at 40–41; see also *Camara Edital*, BOLETIM OFICIAL DE MACAU [MACAU OFFICIAL GAZETTE], June 4, 1846, at No. 22.

⁷⁵ See Godinho, *supra* note 61, at 53.

⁷⁶ See Cortés, *supra* note 52, at 52.

⁷⁷ *Id.*

⁷⁸ See *id.*, at 52. The depreciative name for these workers is “coolie,” defined as “an unskilled laborer” in India, China, and some other Asian countries. *Coolie*, DICTIONARY.COM, <https://www.dictionary.com/browse/coolie> (last visited Jan. 7, 2022). The United States had the Coolie Trade Prohibition Act. See An Act to Prohibit the “Coolie Trade” by American Citizens in American Vessels, ch. 27, 12 Stat. 340 (1862) (repealed by Act of Oct. 20, 1974).

The Procuratorate of the Chinese Affairs was the initial public authority responsible for awarding the licenses. After 1850, the Board of the Public Treasury,⁷⁹ the tax authority of the colony, assumed that responsibility.

A first approach to the concession model may be deduced from the conditions stated in the contract published in 1858, which included:⁸⁰

- A one-year contract term with exclusive operating rights.
- A limit of twenty gambling houses, with one table in each house.⁸¹
- The concession covered all of Macau.
- Requiring the operator to inform the government of the location of the houses.
- Requiring rent in advance fortnightly which could be increased but not decreased.
- Requiring the operator to provide a suitable personal guarantee, valid for the entire contract period, to guarantee the fulfilment of the obligations and fines or other pecuniary sanctions.⁸²
- Requiring the operator to have internal security, subject to government inspection, and be responsible for the order within the premises.
- Allowing houses to remain open until midnight, with a fine imposed if people were found gambling after that time.
- Allowing the operator to authorize others to operate the activity without any additional government authorization.
- In terms of penalties for illegal operation, imposing fines to be shared equally between the government and the licensed operator.

This operating model did not significantly change until the Macau government adopted the concession model in 1961. There were periods of the monopoly of the activity and others with more than one license granted. The motivation for supervising or reporting illegal gambling depended on whether there was an exclusive license monopoly.⁸³

⁷⁹ In Portuguese, the Board of the Public Treasury is called *Junta da Fazenda Pública*.

⁸⁰ Junta da Fazenda Pública, Aviso, Macau Official Gazette No. 31, May 29, 1858. See Godinho, *supra* note 61, at 56–57.

⁸¹ The operator could request more tables. The price covered twenty houses irrespective of whether they were open or not.

⁸² If the operator opened more than twenty houses without a license, it needed to pay the proportion of the rent in relation to that house, plus a fine.

⁸³ See Godinho, *supra* note 61, at 77.

From 1849 to 1961, several factors affected revenues, including public policy considerations next door in Guangdong Province⁸⁴ regarding either permitting or prohibiting gaming,⁸⁵ and the term of the contracts awarded. In general, longer periods generated more revenue for Macau and, hence, the operators were more motivated to comply with the laws and regulations. As a market-based incentive, the concession model “relies not on fear, but on greed.”⁸⁶ More than the public policies in place, the regulations and instructions that started to emerge in the industry and that currently remain, it was the greed of the Macau operators—under the monopoly or the oligopoly—that spurred the development of the industry and the acceptance of the obligations that the laws and concession contracts imposed.

By the mid-1950s, Macau experienced a recovery in economic confidence. In 1961, the government wanted to overhaul Macau’s infrastructure, create a tourism-based destination for gamblers, promote jobs, and generate taxes.⁸⁷ “The 1961 Gaming Law that heralded [this] new concession brought fresh preconditions for would-be concessionaires.”⁸⁸ This increase in the complexity of concession contracts⁸⁹ and adoption of a concession model were based on the principles of administrative law for the operation of the casino gaming activity.⁹⁰ They included commitments by concession suitors to make either capital investment or conduct general work and improvement in many public projects. Those commitments were mainly responsible for the compliance of the laws and regulations by the gaming concessionaires. The public policy and goals constructed this new era of the industry and permitted a regulatory system based on the concession to start sprouting. The 1961 Gaming Law paved the way to furnish Macau with this gaming regulatory system by creating a Council for Gaming Inspection and defining its powers.

The 1961 Gaming Law—which remains the basis of Macau Gaming Law⁹¹—starts with the definition of games of chance as those “whose result is

⁸⁴ See Cortés, *supra* note 52, at 53 (citing António Pinho, *Gambling in Macau, MACAU: CITY OF COM. AND CULTURE* 157 (Rolf D. Cremer ed., 1987) (“In the era of the Tai Xing Co [Tai Heng], gambling blossomed in Macau, especially after the Chinese Government in 1949 banned all gambling inside China. Tai Xing Co succeeded regularly in securing the monopoly for itself, apparently by a carefully designed policy that excluded other potential bidders.”)).

⁸⁵ *See id.*

⁸⁶ David R. Karp & Clark L. Gaulling, *Motivational Underpinnings of Command-and-Control, Market-Based, and Voluntarist Environmental Policies*, 48 *HUM. RELS.* 439, 443 (1995).

⁸⁷ See Cortés, *supra* note 52, at 54.

⁸⁸ *Id.* (citations omitted).

⁸⁹ *See id.* at 55.

⁹⁰ The other types of permitted gambling (pari-mutuel and operations offered to the public) were granted and continue to operate under a monopoly.

⁹¹ See Law No. 16/2001 (2001), as amended by Law No. 7/2022 (2022) [hereinafter Macau Gaming Law].

contingent, as depend exclusively on the luck.”⁹² It also mandates that these games of chance could only be operated after 1965 in newly constructed casinos.⁹³ For example, the STDM concession contract obligates the concessionaire to construct a state-of-the-art casino and a luxury hotel.⁹⁴ Other obligations of the concessionaire included urbanization and sewage disposal, construction of roads in Macau and establishment of a transportation system between Macau and Hong Kong, development of industry and local commerce, training and education of artisans and hotel industry employees, initiatives to expand tourism in Macau, economic and social development (including salaries and level of employment), an obligation to invest net profits in Macau,⁹⁵ and dredging services in river channels.⁹⁶

The first Macau Gaming Law is comprehensive in several operational aspects in line with the established public policy. Similar to the Portuguese Public Policy of 1958, the Macau Public Policy of 1961 was based on moral aspects encouraging the separation of gaming from daily working life and protecting the nationals and residents from the gaming’s ravages. Although assumed to be “morally blameworthy,” it was better for gaming activity to be legal than clandestine. The primary purpose was to strictly prohibit nationals and residents from entering into gaming areas, therefore making gaming an activity exclusively for foreigners.

Among other things, the 1961 Gaming Law:

- Gave the Council power to suspend the operation of the games in “cases of national mourning, cases of evident impossibility or fair public scandal.”⁹⁷
- Established the working hours of the casinos by agreement with the Governor after consulting with the Council for Gaming Inspection, with the concessionaire being obliged to operate casinos daily.⁹⁸
- Required that gaming should be operated away from daily-working-life settings.⁹⁹

⁹² Decreto Legislativo n° 1496 [Legislative Decree No. 1496] (1961) art. 1 [hereinafter 1961 Gaming Law].

⁹³ *Id.* art. 7.

⁹⁴ Macau Official Gazette No. 16, 488, Apr. 21, 1962, cl. 6. STDM (Sociedade de Turismo e Diversões de Macau) was the exclusive casino concessionaire from 1962 to 2002.

⁹⁵ Ten percent of the net profits for social assistance and ninety percent for economic investment (industrial and commercial), as approved by the government.

⁹⁶ Obligation of STDM is still in force. SJM Resorts Limited (“SJM”) is jointly liable for the fulfillment of this obligation by STDM under the SJM concession contract.

⁹⁷ 1961 Gaming Law, *supra* note 92, art. 18, § 1.

⁹⁸ *Id.* art. 18, § 2.

⁹⁹ *Id.* art. 16.

- Prohibited signage that would make the public aware of the games.¹⁰⁰
- Required signage (in Portuguese, Chinese, and English) at the entrance and at each table.¹⁰¹
- Set entry requirements in the gaming areas,¹⁰² with several restrictions for the Portuguese nationals consistent with the option of the Portuguese legislator in the mainland in 1958, which tried to limit the entry to casinos by Portuguese nationals.¹⁰³
- Provided for permanent bans of certain individuals from entering the casinos,¹⁰⁴ and prohibited the concessionaire employees from gambling in the concessionaires' casinos.¹⁰⁵
- Dictated how the concessionaire employees should dress, among other employment-related duties.¹⁰⁶
- Provided means of rent payment.¹⁰⁷
- Detailed the powers of the Council and its members, who had police powers, i.e., could arrest whoever slandered, reviled, threatened, or attacked them when exercising their duties.¹⁰⁸
- Set several accounting and operation rules, including a cooperation duty that is essential for controlling the concessionaire.¹⁰⁹
- Imposed penalties on the concessionaire, including loss of the bond granted to secure the concession in the case of non-compliance with the concession contract, non-completion of construction works set in the concession contract, operation of games in rooms other than gaming rooms, inaccuracies in accounting books and other records linked to the operation of games, or breach of working-hours obligations.¹¹⁰ In addition, the concession could be terminated if transfer of the operation to third parties occurred without authorization or the operation was abandoned for more than three months without legitimate cause.¹¹¹

¹⁰⁰ *Id.*

¹⁰¹ *Id.* art. 32.

¹⁰² *Id.* art. 23.

¹⁰³ Decreto Legislativo n.º 41812 [Legislative Decree No. 41812] (1958) art. 22.

¹⁰⁴ 1961 Gaming Law, *supra* note 92, art. 23, § 3.

¹⁰⁵ The same rule was established in Law No. 10/2012 for the casinos where the employees worked. The rule was extended to all casinos in Macau by the amendments introduced by Law No. 17/2018.

¹⁰⁶ 1961 Gaming Law, *supra* note 92, art. 29.

¹⁰⁷ *Id.* art. 29, § 3.

¹⁰⁸ *Id.* arts. 36, 44.

¹⁰⁹ *Id.* art. 47.

¹¹⁰ *Id.* art. 51.

¹¹¹ *Id.* art. 53.

The concession contract also established an obligation to invest the net revenues in Macau, which marked the origin of accounting and corporate rules.¹¹²

The government awarded the 1962 gaming concession to STDM.¹¹³ The initial concessions started with a short eight-year term for the operation but were soon after extended to twenty-five years. STDM's monopoly lasted until March 31, 2002.¹¹⁴

In 1962, a Gaming Control Regulation was enacted,¹¹⁵ and a Commission was formed to monitor the fulfillment of the concession contract obligations. One year later, the Commission's competencies were transferred to the Tourism and Information Centre.¹¹⁶

In 1964, Macau passed its first piece of legislation with rules governing games,¹¹⁷ some of which are still in force.¹¹⁸

The concession concept and model had not changed with the 2001 international bid.¹¹⁹ Rather, it established an oligopoly model that had been anticipated since 1982.¹²⁰ The same happened with the 2022 international bid.¹²¹ The Macau gaming concession contracts state and reflect most of the Macau Gaming Law provisions mentioned above, expanding the concessionaire's obligations and duties. They regulate the relation between the parties—the grantor (Macau SAR) and the concessionaires—and establish all contractual obligations that operators must fulfill. The contracts also establish special

¹¹² See Godinho, *supra* note 61, at 328.

¹¹³ 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 Macau's entire civil society (it was not uncommon during the STDM monopoly era to find written references suggesting STDM "owned Macau"). See Luís Pessanha, *O Jogo de Fortuna e Azar e a Promoção do Investimento em Macau* [Games of Chance and the Promotion of Investment in Macau], 77 REVISTA DE ADMINISTRAÇÃO 856 (2007); see also Cortés, *supra* note 52, at 56.

¹¹⁴ See Cortés, *supra* note 52, at 56.

¹¹⁵ Order No. 7206, Macau Official Gazette No. 31, Aug. 4, 1962.

¹¹⁶ See Godinho, *supra* note 61, at 329.

¹¹⁷ Regulation of Chinese and European Games, Order No. 7461, Macau Official Gazette No. 5, Feb. 1, 1964. This includes the rules of fantan, roulette, different types of baccarat, ecarté, trente et quarente, French bank, boule, blackjack, and craps.

¹¹⁸ The legislation also details how the games should be played and how prizes shall be paid, among other particulars.

¹¹⁹ Law No. 6/82/M (Aprova o Novo Regime Jurídico das Concessões Para Exploração de Jogos de Fortuna ou Azar no Território de Macau) [Approves the New Legal Regime for Concessions for the Operation of Games of Fortune or Chance in the Territory of Macau] (1982). It established as three the number of concessions to be granted "by special license."

¹²⁰ See generally *id.*

¹²¹ Despacho do Chefe do Executivo n.º 136/2022 [Dispatch of the Chief Executive No. 136/2022] (2022) (opening an international public tender).

mechanisms of government control over the activity.¹²² The implementation of the legal, regulatory, and contractual mechanisms under the concession model has the objective of fulfilling the expressed public policy, for the first time, in the Macau Gaming Law.

Some changes, however, accompanied the opening of the Macau market to foreign companies. The last decade of the twentieth century was marked by a wave of criminality that the public associated with the gaming industry.¹²³ That decade also spawned the Asian financial crisis in 1997.¹²⁴ These two problems influenced the legislative approach under the Portuguese Administration of Macau¹²⁵ and the public policies stated in the Macau Gaming Law after the handover in 1999. In response to the criminal activities in the 1990s,¹²⁶ gaming public policies provided that games should be “conducted in a [manner] fair, honest and free from criminal influence.”¹²⁷

The current laws, regulations, and concession contracts that govern the industry impose more burdensome obligations on operators due to the prevailing public policy and market entry by companies from the United States¹²⁸ and other countries with common law legal systems.¹²⁹ These companies and their foreign regulators are more familiar with the command-and-control approach that imposes fines for non-compliance in foreign gaming activities. At the start of this century, Macau began to add significant elements of the command-and-control approach used by other regulated jurisdictions to satisfy the new casino companies’ concerns.

1. *Gaming in the Macau Concession Model*

Macau is the only jurisdiction in the People’s Republic of China (PRC) where casino gaming is lawful. Macau law departs from a principle of prohibition: if a type of gaming is not permitted, then it is prohibited. Games of chance are defined as “those in which the result is contingent because it depends

¹²² The general rules are established in the Macau Administrative Procedure Code.

¹²³ Triads reportedly took over major portions of the junket business during this period. See Angela Veng Mei Leong, *The “Bate-Ficha” Business and Triads in Macau Casinos*, 2 QUEENSLAND U. TECH. L. JUST. J. 83, 96 (2002). For the current impact of triads in gaming operations, see T. Wing Lo & Sharon Ingrid Kwok, *Triad Organized Crime in Macau Casinos: Extra-Legal Governance and Entrepreneurship*, 57 BRIT. J. CRIMINOLOGY 589, 589 (2017).

¹²⁴ See, e.g., Int’l Monetary Fund Staff, *The Asian Crisis: Causes and Cures*, FIN. & DEV. 18 (June 1998).

¹²⁵ Law No. 6/97/M (Estabelece o Regime Legal Contra a Criminalidade Organizada) [Establishes the Legal Regime Against Organized Crime] (1997) (enacted to fight organized crime).

¹²⁶ See Cortés, *supra* note 52, at 57.

¹²⁷ Macau Gaming Law, *supra* note 91, art. 1, § 2(3) (emphasis added).

¹²⁸ First, Wynn Resorts and Las Vegas Sands, then MGM.

¹²⁹ For example, Australia, through Publishing and Broadcasting Limited.

exclusively or mainly on the luck of the player.”¹³⁰ Article 118 of the Macau Basic Law states that “[t]he Macau Special Administrative Region shall, on its own, make policies on tourism and recreation in the light of its overall interests.”¹³¹

The Macau Gaming Law reinforces this doctrine by establishing the principles of primary and exclusive economic intervention of the Macau SAR in commercial casino gaming activities.¹³² This means that the lawful¹³³ operation of casino gambling is reserved to the Macau SAR, and entities other than the Macau SAR that intend to engage in commercial gaming must be granted a concession,¹³⁴ which concedes privilege to private entities.¹³⁵ Although casino gaming is legally reserved for the Macau SAR’s public economic initiative, it can also be “exercised by limited liability companies set up in the Region [that] have been awarded a concession by means of an administrative contract.”¹³⁶

A state public reserve can be explained by “the interest in channeling the outcomes of a natural instinct for personal enrichment in the fulfillment of public interest purposes, thereby reducing the dangerous or harmful effects that may be associated with gambling.”¹³⁷ In some jurisdictions, the reserve of the operation of games of chance “relates to devaluating judgments associated with the consequences of the activity, as well as the need to ensure public order and the general interests of the community.”¹³⁸

¹³⁰ Macau Gaming Law, *supra* note 91, art. 2, § 1(1).

¹³¹ In Macau, concessions concerning the operation of a public service are regulated in Law No. 3/90/M of May 14, 1990.

¹³² See Macau Gaming Law, *supra* note 91, art. 3, § 1, art 7, § 1.

¹³³ Commercial casino gambling activities not entitled to a concession are prohibited, illegal, and constitute serious criminal offenses.

¹³⁴ See MACAU GAMING LAW VOL. 1, *supra* note 23, at 251 (discussing the principle of a prior concession, based on the Macau SAR’s legal reserve for the operation of casino games of chance).

¹³⁵ *Id.* at 398 (“Corollaries of this privilege are to be found in the provisions that limit or restrict the transfer of shares, shareholder agreements, step-in rights, the constitution of liens or encumbrances, the transfer or assignment of the gaming operation and the MSAR’s rights of sequester, redemption or unilateral termination.”).

¹³⁶ ANTÓNIO LOBO VILELA, MACAU GAMING LAW: ANNOTATED WITH COMMENTS, VOLUME II – ARTICLES 11 TO 21 52 (2020) [hereinafter MACAU GAMING LAW VOL. 2] (quoting Macau Gaming Law, *supra* note 91, art. 7, § 1).

¹³⁷ PEDRO COSTA GONÇALVES, A CONCESSÃO DE SERVIÇOS PÚBLICOS 95–96 (1999) (suggesting that commercial casino gaming is an economic activity reserved to the Region because the fiscal revenues deriving from the gaming industry constitute the backbone of the SAR’s budget).

¹³⁸ Presidência do Conselho de Ministros e Ministério da Agricultura, Pescas e Florestas, Despacho Conjunto n.º 231-A/2005, 50 OFFICIAL GAZETTE [PORTUGAL], SERIES II 4004(2), 4004(2) (2005), <https://files.dre.pt/2s/2005/03/050000001/0000200014.pdf> (referencing the Study of

Under the Macau Gaming Law, the Macau SAR is precluded from granting more than six casino gaming concessions.¹³⁹ The transfer or assignment to a third party of the right to operate casino games of chance is prohibited, therefore subconcessions can no longer be authorized.¹⁴⁰ In Macau, the concession mechanism is the best fit for its semi-closed market (oligopoly), allowing a high level of taxation.¹⁴¹ Unrestricted competition produces a decrease in the economic value (marginal utility) of the goods or services provided by operators in an open market. This reality will pressure the government to significantly lower the rate of the special gaming tax. Currently, a public tender (or a governmental authorization for sub-concessions) is required only for casino gaming.¹⁴²

the Current Situation of the Portuguese Gaming Market, to Define the National Gaming Policy and the Strategy for its Pursuit, Identifying Measures to be Adopted in its Implementation).

¹³⁹ See Macau Gaming Law, *supra* note 91, art. 7, § 2, art. 17, §§ 7, 9. Before the Macau Gaming Law was amended, the Macau SAR was precluded from granting more than three casino gaming concessions. Notwithstanding this, the Macau government had authorized three casino gaming sub-concessions, permitting each casino gaming concessionaire to enter into a sub-concession. See *id.* art. 17, § 9.

¹⁴⁰ See *id.* art. 7, §§ 2–3.

¹⁴¹ See *id.* art. 20, § 1, art. 22, § 1(2)–(3), art. 27, §§ 1–2. Aside from an annual premium to be determined in the concession contracts, casino operators pay 35% special gaming tax (which is levied on gross gaming revenues), 2% of gross gaming revenues as contributions to a public fund for the promotion, development or study of cultural, social and economic, educational, scientific, academic and philanthropic activities, and 3% of gross gaming revenues as contributions for urban development, tourism promotion, and social security. *Id.*

¹⁴² Concessions regarding the operation of commercial gambling are only one modality of concessions. There is no framework law (similar to Law No. 3/90/M) for the former yet. The Macau Gaming Law only regulates concessions for the operation of casino gaming, leaving out all the other types of commercial gambling, such as lotteries (including sports lottery) and horse racing, which are governed by the terms of other legislative acts and/or concession contracts. Exceptions have been made for interactive gaming (for which no legislation was enacted, nor was a concession ever granted), pari-mutuels, and operations offered to the public (which are granted in exclusivity to a single entity). A recent change in Macau Slot's concession contract for sports lottery (basketball and soccer) ended the monopoly and the activity may be operated by more than one entity. See Pedro Cortés & Luís Machado, *Sports Betting in Macau – Opportunity to Change the Games*, LEXOLOGY (Aug. 12, 2021), <https://www.lexology.com/commentary/private-client-offshore-services/macau/rato-ling-lei-corts-advogados/sports-betting-in-macau-opportunity-to-change-the-games>.

2. *Public Policy*

Public policy concerning gaming is defined in Article 1-A of the Macau Gaming Law¹⁴³ and aims to ensure:

- the exploration and operation of casino games of chance under the premise of safeguarding national security and the security of the Macau SAR;
- the promotion of appropriate diversification and sustainable development of the economy of the Macau SAR;
- the fair and honest exploitation and operation of casino games of chance;
- the operation of casino games of chance free from criminal influence, ensuring that the exploitation and operation of the casino is consistent with the policies and mechanisms of the Macau SAR in respect of combating the illicit flow of transborder funds and preventing money laundering and terrorism;
- the size and operation of casino games of chance, as well as the practice of games of chance are subject to legal restrictions;
- the persons involved in the supervision, exploitation, management and operation of casino games of chance are suitable to perform such functions;
- the interests of the Macau SAR in the collection of taxes and other fees resulting from the operation of casinos are adequately protected.

The public policy stemmed from the experience of more than 150 years of legalized gaming in Macau and the new legislation before the 2001 and 2022 international public tenders.¹⁴⁴ The concession model is part of a civil law legal system based on the state's capacity and power to decide and impose its decisions.¹⁴⁵

F. Areas of Command-and-Control Incorporated in Macau's Concession Model

The Macau Gaming Law, the regulations, and the concession contracts contain commands that address the following areas: operational duties, minimum

¹⁴³ See Macau Gaming Law, *supra* note 91, art. 1-A, § 1–7.

¹⁴⁴ See Cortés, *supra* note 52, at 50 n.11 (detailing how Administrative Regulation No. 26/2001 of Oct. 29, 2001, establishes the regulation for the public tender regarding the award of the concessions of casino games of chance, the concession contract, and the suitability and financial capacity requirements of the bidders and concessionaires).

¹⁴⁵ In the case of Macau, the Macau SAR.

internal controls, anti-money laundering, reporting and record-keeping, and information and access and ownership.

1. *Operational Duties*

Legal Commands that impact **who** can gamble include prohibiting: (a) minors younger than twenty-one years old and legally incapacitated from gambling; (b) persons who are visibly intoxicated to participate in gaming activity; (c) certain casino employees and civil servants to enter casinos; (d) members of the governing bodies of the concessionaires to gamble at their casinos; (e) those banned from entering in casinos; and (f) persons in government-supplied exclusion lists based on problem gambling or on administrative or judicial decisions to enter casinos.¹⁴⁶

Legal Commands that impact **what** the casino can offer include: (a) offering only approved gaming devices, games, gaming equipment or associated equipment, chips, tokens, or promotional devices at the casino (i.e., free play device), and making any modifications to them; (b) meeting standards for securing the gaming device and its CPU; (c) accepting only authorized bets; and (d) displaying payoff schedules on game and slot machines that accurately reflect the actual payouts.¹⁴⁷

Legal Commands that impact **when** gambling can occur include setting casino operating hours.¹⁴⁸

Legal Commands that impact **where** gambling can occur include: (a) limiting casinos to approved locations and permitted premises; and (b) maintaining approved surveillance overall games.¹⁴⁹

Legal Commands that impact **how** gambling can occur include: (a) following the published/posted rules of the games;¹⁵⁰ (b) using only licensed

¹⁴⁶ See Law No. 10/2012 (Condicionamento da Entrada, do Trabalho e do Jogo nos Casinos) [Conditioning Entry, Work, and Play in Casinos], Aug. 27, 2012, amended by Law No. 17/2018, art. 2, § 1(1)–(4), 1(7)–(8), 6.

¹⁴⁷ See generally Administrative Regulation No. 26/2012 (Regime de Fornecimento e Requisitos das Máquinas, Equipamentos e Sistemas de Jogo) [Regime of Supply and Requirements for Gaming Machines, Equipment, and Systems], Nov. 26, 2012, art. 1, §§ 2(1), 16(2)–(3), 17(4).

¹⁴⁸ Casinos operate twenty-four hours a day without interruption. See Macau Gaming Law, *supra* note 91 art. 6, § 1.

¹⁴⁹ The operation of casino games of chance is confined to those places and premises authorized by the Chief Executive. See Macau Gaming Law, *supra* note 91, art. 2, § 1(5). Casino gaming operators are obligated to install electronic surveillance and control equipment in casinos. See *id.* art. 22, § 1(9).

¹⁵⁰ The rules of execution for the practice of games of chance are approved by order of the Secretary for Economy and Finance at the request of the Gaming Inspection and Coordination Bureau and published in the Official Gazette. See *id.* art. 3, § 4.

gaming promoters (junkets);¹⁵¹ and (c) conducting advertising provided that the essential target of the message is not casino games of chance.¹⁵²

2. *Minimum Internal Controls*

The casino gaming concessionaires must observe all instructions issued by the Gaming Inspection and Coordination Bureau (DICJ), the Financial Services Bureau, and other government authorities.¹⁵³ DICJ approved an instruction with the Minimum Internal Control Requirements (MICR).¹⁵⁴ Each concessionaire may have a more detailed internal controls plan than what is established in the instruction. Given the content of MICR,¹⁵⁵ it is expected that all concessionaires will have in place more detailed and exhaustive internal control rules, and that they will have added more rules after U.S. companies started their operations.

3. *Anti-Money Laundering*

The Anti-Money Laundering (AML) compliance programs aim to protect their integrity and reputation and enhance the public's faith in the ability of all regulatory authorities to ensure that gaming is conducted free from criminal and corrupt elements.¹⁵⁶ According to the specific activity, the Macau government oversees AML regulations through several entities.¹⁵⁷ For gaming, the relevant entities are DICJ and Financial Intelligence Office.

¹⁵¹ Gaming promoters are licensed by the Macau government. *See* Administrative Regulation No. 6/2002 (Regula as Condições de Acesso e de Exercício da Actividade de Promoção de Jogos de Fortuna ou Azar em Casino) [Regulates the Conditions of Access and Exercise of the Activity of Promoting Casino Games of Chance], Apr. 1, 2002, art. 6, § 1.

¹⁵² *See* Law No. 7/89/M (Actividade Publicitária) [Advertisement Activity], Sept. 4, 1989, art. 8, § 1(b).

¹⁵³ Macau Gaming Law, *supra* note 91, art. 30, § 1.

¹⁵⁴ Gaming Inspection and Coordination Bureau, Instruction No. 1/2018: Minimum Internal Control Requirement (2018), effective from Jan. 1, 2019.

¹⁵⁵ The MICR are divided into the following areas: table games operation, electronic gaming ("slot") machines operation, treasury ("cage/vault") operation, drop & count, sensitive keys & restricted area control, gaming fixed assets & consumables, information technology, internal audit, surveillance, junket operations, insurance, and general.

¹⁵⁶ *See* Macau Gaming Law, *supra* note 91, art. 1-A(4).

¹⁵⁷ The entities are the DICJ, the Financial Intelligence Office, and the Judiciary Police. *See* Law 2/2006 (Região Administrativa Especial De Macau) [Macau Special Administrative Region] art. 6; *see also* Despacho do Chefe do Executivo n.º 227/2006 [Dispatch of the Chief Executive No. 227/2006] ((2006); Law 5/2006 (Região Administrativa Especial De Macau) [Macau Special Administrative Region] (2006) art. 7, § 1(11).

All gambling operators and gaming promoters must adopt internal controls, policies, and procedures to prevent and repress money laundering and financing of terrorism crimes.¹⁵⁸ They must also appoint a compliance officer who is approved by DICJ and functionally independent.¹⁵⁹

The threshold to report currency transactions is MOP 500,000 (USD \$62,500) or more.¹⁶⁰ The reports shall include the following information about customers involved in the transactions: name, gender, date and place of birth, nationality, home address, profession or occupation, type of identity document, date of the transaction, amount and source of funds, as well as the beneficiary owner, method of payment and signature of compliance officer.¹⁶¹

Casinos must also report suspicious transactions, which are defined as the operation related to the practice of gaming or betting which, by its nature, unusual nature, or complexity, suggests an activity of money laundering or financing of terrorism.¹⁶²

Regardless of the amounts involved, gambling operators and casino gaming promoters shall identify the parties and record as suspicious the following operations or attempt thereof:

1. Game or bet, or
2. Grant of credit for casino gaming, or
3. Promotion of casino gaming that, due to their nature, complexity, amounts involved, or unusual nature, suggests the practice of money laundering or financing of terrorism crimes.¹⁶³

The gambling operators and gaming promoters shall refuse to carry out operations with patrons who do not provide the necessary information to comply with the duties to which they are bound.¹⁶⁴

A regular assessment of their AML and Combating Financing of Terrorism (CFT) internal control systems must be carried out to ensure the adequacy and effectiveness of the measures implemented.¹⁶⁵

¹⁵⁸ See Gaming Inspection and Coordination Bureau, Instruction No. 1/2016 (Medidas Preventivas da Prática do Crime de Branqueamento de Capitais e Financiamento do Terrorismo) [Preventative Measures for Anti-Money Laundering and Combating Financing of Terrorism], as amended by Instruction No. 1/2019, art. 4, § 1 (2016).

¹⁵⁹ *Id.* art. 28, §§ 1–2.

¹⁶⁰ *Id.* art. 10, § 1.

¹⁶¹ *Id.* art. 10, § 2.

¹⁶² *Id.* art. 2(11).

¹⁶³ *Id.* art. 11, § 1(3).

¹⁶⁴ Gaming Inspection and Coordination Bureau, *supra* note 158, art. 22, § 1.

¹⁶⁵ *Id.* art. 6, § 1. Macau SAR is a member of the Asia-Pacific Group on Money Laundering (APG) since May 2001 and has in force an AML legal framework

4. *Duty of Compliance*

All casino operators must observe the Macau SAR laws and regulations and comply with all concession contracts.¹⁶⁶ To be permitted to operate casino games of chance in any other jurisdictions, casino operators must seek authorization from the Chief Executive.¹⁶⁷ A duty to inform the Macau government applies once the casino operator becomes aware that any of its shareholders who directly or indirectly hold 5% or more of its registered share capital engages in such foreign gaming activity.¹⁶⁸

designed to combat money laundering and financing of terrorism. Since 2015, DICJ has been setting higher standards for anti-money-laundering compliance by introducing new accounting requirements for gaming promoters and by updating guidelines applicable to gambling operators and gaming promoters. DICJ also uses a risk-based approach that enhances customer due diligence procedures, requiring, among other things, stricter identification of patrons and bettors and reporting of suspicious transactions. The APG has acknowledged the efforts and progress made by the Macau government. In the 2017 Mutual Evaluation Report, Macau SAR was deemed compliant with thirty-seven out of the forty Financial Action Task Force (FATF) recommendations on technical compliance assessment (the remaining three recommendations required only further improvements). In the 2019 Mutual Evaluation Report, the Macau SAR successfully upgraded the remaining three FATF recommendations to largely compliant ratings, becoming the first member to pass all forty FATF recommendations on technical compliance assessment among all globally evaluated members.

¹⁶⁶ Concessionaires are also obliged to renounce the right to invoke legislation from outside the Macau SAR, namely, to exempt themselves from fulfilling the obligations or the conduct to which they are bound. *See* Concession Contract for the Operation of Games of Chance or Other Games in Casinos in the Macau Special Administrative Region, cl. 4 (2002), https://www.sec.gov/Archives/edgar/data/1174922/000091205702032887/a2085104zex-10_24.htm [hereinafter 2002 Concession Contract].

¹⁶⁷ Macau Gaming Law, *supra* note 91, art. 22-B, § 1. Under the 2002 Concession Contract, casino operators only need to inform the Macau government if the concessionaires engage in any licensing process or contract to operate casino gaming in any other jurisdictions, even if it is through a management contract. *See* 2002 Concession Contract, *supra* note 166, cl. 5.

¹⁶⁸ Macau Gaming Law, *supra* note 91, art. 22-B, § 2(1). Under the 2002 Concession Contract, the duty to inform applies once the casino operator becomes aware that any of its directors, controlling shareholders (including the ultimate controlling shareholder), or anyone who directly or indirectly holds 10% or more of its registered share capital engages in such foreign gaming activity. *See* 2002 Concession Contract, *supra* note 166, cl. 5.

5. *Duty of Information*

Under the concession contracts, concessionaires are bound to a general duty to inform and submit any documents or data required by the government. This duty to inform covers any circumstance that may affect the normal operation, such as:

- liquidity or solvency, legal proceedings, including those filed against directors and qualified shareholders (5% or more of the share capital);
- any act or fact that takes place in the casinos that may be considered a crime or administrative offense;
- any adverse act toward the concessionaire or members of its governing bodies, by any public official or civil servant;
- 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; and
- remuneration of directors, financiers, and casino key employees.¹⁶⁹

A general duty of cooperation also applies to tax obligations and accounting.¹⁷⁰

6. *Duty Related to Ownership*

Concessionaires must obtain prior government authorization to transfer shares or for any act involving granting voting rights or other social rights to a third party.¹⁷¹ They also must endeavor to subject to the government's authorization a transfer of shares that indirectly represent 5% or more of its share capital.¹⁷² A Macau permanent resident must act as managing director and hold at least 15% of the concessionaire share capital. In addition, concessionaires, and holders of 5% or more of their share capital cannot directly or indirectly hold 5% or more of the share capital of another concessionaire.¹⁷³

¹⁶⁹ 2002 Concession Contract, *supra* note 166, cl. 23, § 1(1)–(3).

¹⁷⁰ Macau Gaming Law, *supra* note 91, art. 36, § 1.

¹⁷¹ *Id.* art. 17, §§ 7(1)–(2).

¹⁷² 2002 Concession Contract, *supra* note 166, cl. 16, § 5.

¹⁷³ Macau Gaming Law, *supra* note 91, art. 19, § 2, art. 17, § 10.

7. *Duty Related to Problem Gambling*

DICJ and other government departments maintain close contact with the gaming concessionaires, and civic organizations to prevent patrons from becoming problem gamblers and to help them return to social life and work.¹⁷⁴

With the revocation of articles 24 to 26 of the Macau Gaming Law¹⁷⁵ by the law on the entering, working, and gambling in casinos, the minimum age to enter, work, or gamble in casinos has been raised from eighteen to twenty-one years old.¹⁷⁶ In 2018, the law was further amended to impose entry restrictions on the employees of certain casinos and gaming promoters.¹⁷⁷

Self-exclusion and third-party exclusion measures are available for a maximum of two years.¹⁷⁸ Defined family members may request DICJ to have a problem gambler excluded from all or certain casinos, with the patron's acceptance/ratification.¹⁷⁹ The list of excluded persons is not publicly available.

Since the 2022 amendment to the Macau Gaming Law, concessionaires are bound to produce a responsible gaming promotion plan.¹⁸⁰

Other responsible gambling duties include restrictions on gaming advertisements and the location of ATMs. Macau residents have access to hotlines that provide resources, on treatment for problem gambling, problem gambling information kiosks, and gambling treatment and prevention centers.¹⁸¹

¹⁷⁴ See *Responsible Gambling*, DICJ GAMING INSPECTION AND COORDINATION BUREAU, MACAU SAR, <http://www.dicj.gov.mo/web/en/responsible/responsible01/content.html#1> (last visited Jan. 8, 2022) (detailing how studies show that the prevalence of problem gambling had risen from 4.3% to 6% from 2003 to 2007).

¹⁷⁵ Law No. 10/2012, *supra* note 146, art. 20.

¹⁷⁶ *Id.*, art. 2, § 1(1). All other types of permitted gambling apply the legal age of eighteen years old.

¹⁷⁷ Those who work at gaming tables, gaming machines, cashiers, public relations, catering, cleaning, security, and inspection areas in casinos, as well as employees of gaming promoters who work in casinos. See *id.* art. 2, § 1(7).

¹⁷⁸ See *id.* art. 6, § 1.

¹⁷⁹ The spouse, ascendant, descendant, or collateral relative to the second degree are the only family members that may request the exclusion. See *id.*

¹⁸⁰ Macau Gaming Law, *supra* note 91, art. 42-A, § 4, art. 42-B.

¹⁸¹ The Social Welfare Bureau of the Macau government runs the Problem Gambling Prevention and Treatment Division – The Resilience Centre, “which aims to provide counseling services to people affected by gambling addiction problems and to their families and, through community prevention activities, reduce the possible harm caused to these individuals.” See *Service Introduction*, PROBLEM GAMBLING PREVENTION AND TREATMENT DIV.: THE RESILIENCE CTR., <http://iasweb.ias.gov.mo/cvf/en/> (last visited Feb. 9, 2023).

G. Areas of Control Under the Concession Model

Under the administrative rules of civil law jurisdictions, the concession model embodies control features. Unlike the command-and-control model, these include the reversion of casinos and gaming equipment, the concession's redemption, unilateral termination, and sanctions. Both models often contemplate sequestration with the notable difference that the command-and-control model typically involves a private receiver, rather than the government, taking over the casino operations. Like the command-and-control model, the concession model includes unilateral termination based on non-compliance.

1. *Reversion*

Reversion entitles the Macau SAR to enter, at the time of the termination of a concession—which may occur through unilateral termination or following the redemption—and seize the casinos and gaming equipment to continue operation without interruption.¹⁸²

2. *Sequestration*

Sequestration is an administrative act of a sanctioning nature. These cases must be serious and comprehend imminent operational interruption, disturbances, or serious organization deficiencies to the functioning of the concessionaires or in the general assets' condition. The government can continue the operation while holding the concessionaire liable for the expenses required for the operation's maintenance and regularization. The sequestration may be maintained for as long as it is deemed necessary. The Macau government may terminate the concession contract if the concessionaire does not accept the operation resumption.¹⁸³

¹⁸² Macau Gaming Law, *supra* note 91, art. 40. *See also* António Lobo Vilela, *The Reversion of Casinos and Gaming Equipment*, ASIAN GAMING L., Sept./Oct. 2015, at 14 (describing how upon the termination of the concession, all casinos, gaming equipment, and utensils revert to the granting entity); António Lobo Vilela, *The Reversion of Casinos Under Macau's Concession Model*, 12 UNLV GAMING L.J. 241 (2022); ANTÓNIO LOBO VILELA, MACAU GAMING LAW: ANNOTATED WITH COMMENTS, VOLUME IV – ARTICLES 32 TO 57 119–57 (2020) [hereinafter MACAU GAMING LAW VOL. 4].

¹⁸³ The right to sequester a concession is one of the defining characteristics of the concession system:

By sequestration, the government temporarily replaces the concessionaire “directly or through third parties, thus ensuring the operation of the [concession/sub-concession] and promoting the implementation of the necessary measures to ensure the purpose of the . . . [concession/sub-concession] contract,” by taking over

3. *Redemption*

“Redemption is a unilateral option right of the Macau SAR to resume the operation of the gaming reserved to the Region by an act of the government. Concessionaires have the right to be compensated.”¹⁸⁴ Under the concession contracts, there is an agreed-upon period, which varies from operator to operator, when the redemption cannot be exercised.¹⁸⁵ Authorities call this the “guarantee term of non-redemption,”¹⁸⁶ which assures the concessionaire that there will be no redemption during this grace period.

4. *Unilateral Termination Based on Noncompliance*

The Chief Executive may unilaterally terminate the concession if the concessionaire does not comply with obligations to which the concessionaire is legally or contractually bound.¹⁸⁷ The article of the law gives several examples of breach of fundamental obligations, including abandoning or suspending the operation for unjustified reasons, transferring the operation in violation of the law, regulations or concession contract, failing to pay taxes, premiums, and other amounts, or non-compliance with the investment amount and the respective

and using the facilities, materials, and equipment, in order to take the necessary measures to ensure the continuity and regularity of the concession or sub-concession activity, as long as the conditions that legitimized it are fulfilled.

MACAU GAMING LAW VOL. 4, *supra* note 182, at 208. *See also* Macau Gaming Law, *supra* note 91, art. 44.

¹⁸⁴ Pedro Cortés & António Lobo Vilela, *The Gambling Law Review: Macau*, GAMBLING L. REV. 254 (May 2022). “Redemption translates the MSAR’s optional right . . . to resume, ‘before the expiry of the contractual term,’ operation on the concession . . . through compensation . . . ‘[R]edemption is the Government’s right, before the expiry of the contract, to resume the performance of the administrative tasks entrusted to the private contractor, not as a punishment to the private contractor but for the public interest, and through fair compensation.’” MACAU GAMING LAW VOL. 4, *supra* note 182, at 247–67 (quoting DIOGO FREITAS DO AMARAL, DIREITO ADMINISTRATIVO: VOL. 3: LIÇÕES AOS ALUNOS DE CURSO DE DIREITO 465 (1989)). *See also* Macau Gaming Law, *supra* note 91, art. 46.

¹⁸⁵ 2002 Concession Contract, *supra* note 166, cl. 78, § 1.

¹⁸⁶ JORGE ANDRADE DA SILVA, CÓDIGO DOS CONTRATOS PÚBLICOS ANOTADO 853 (2013). *See also* Catarina Sofia Camacho de Jesus, *A Resolução do Contrato Administrativo* (Nov. 2014) (Master’s dissertation, Escola de Direito de Universidade Católica Portuguesa - Centro Regional do Porto) (on file with Universidade Católica Portuguesa).

¹⁸⁷ Macau Gaming Law, *supra* note 91, art. 47, § 1. *See also* Cortés & Vilela, *supra* note 184, at 254.

criteria foreseen in the concession contract within the deadline set by the Secretary for Economy and Finance.¹⁸⁸

5. *Termination Based Upon the Public Interest*

“[T]he government may exercise the right of termination of the concession irrespective of the concessionaire’s compliance of its legal and contractual obligations,”¹⁸⁹ but must give fair compensation in the same amount as in redemption, i.e., considering the concessionaire’s investments and the time remaining before the concession expires.¹⁹⁰

These three legal concepts are closely linked with the nature of the concession and give effective powers to the Macau government concerning the concessionaires. It is as if the “Sword of Damocles” or “atomic bomb” lies in the head of each casino operator during the term of the concession. The fines, suspension, and revocation of the licenses parallel the command-and-control model of the common law jurisdictions.

6. *Termination Based Upon Other Grounds*

The Chief Executive may unilaterally terminate the concession if the concessionaire endangers national security or the security of the Macau SAR.¹⁹¹

7. *Sanctions*

The 2022 amendment to the Macau Gaming Law introduced a set of administrative and criminal sanctions that trigger if certain legal duties and obligations are breached.¹⁹² These sanctions include fines of up to MOP 5 million (USD 625,000) and the closing of casino premises for up to one year.¹⁹³ The concessionaires can also be charged with the crime of civil disobedience if they refuse the entry and stay of DICJ and Financial Services Bureau inspectors or fail to show or provide requested documents and data.¹⁹⁴

¹⁸⁸ *Id.* See also Macau Gaming Law, *supra* note 91, art. 47, § 2.

¹⁸⁹ Cortés & Vilela, *supra* note 184, at 254. See also Macau Gaming Law, *supra* note 91, art. 48, § 1.

¹⁹⁰ Termination on public interest grounds is a concession cause of extinction. It translates the resumption of the operation of the conceded activity throughout the concession term on public interest grounds, entitling the concessionaire to receive fair compensation. See MACAU GAMING LAW VOL. 4, *supra* note 182, at 309–15.

¹⁹¹ Macau Gaming Law, *supra* note 91, art. 48, § 1.

¹⁹² *Id.* arts. 48-B, 48-C, and 48-D.

¹⁹³ See *id.* art. 48-B.

¹⁹⁴ See *id.*

H. Filling in the Gaps in the Concession Model

Despite the recent changes to the legal framework, Macau still has room to enhance its casino gaming regulations.¹⁹⁵ These gaps can be filled through concession contracts and the instructions of DICJ.¹⁹⁶

1. *Concession Contracts*

The concession contracts are extensive repositories of rights and, above all, obligations of concessionaires. They regulate the relations between the grantor—Macau SAR—and the grantees and provide a means to fill in any gaps in the legislation and the potential shortcomings due to the impossibility of getting all the necessary legislation approved in time. Those contractual rights and obligations could then be crystallized into laws and regulations over time. However, with rare exceptions,¹⁹⁷ this has not happened.¹⁹⁸

2. *DICJ Instructions*

DICJ instructions are another tool that the Macau government may use to fill in the gaps. The force of the instructions derives directly from the concession contracts, which stipulate that repeated opposition constitutes a special reason for unilateral termination of the concession contract.¹⁹⁹ With rare exceptions,²⁰⁰ DICJ instructions are not made public.²⁰¹

¹⁹⁵ See António Lobo Vilela, *Current Casino Gaming Regulations in Macau*, GAMBLING REV. (Feb. 2021), <https://cdn.flipsnack.com/widget/v2/widget.html?hash=zt5oimmzhm> (click through slide eleven times).

¹⁹⁶ See 2002 Concession Contract, *supra* note 166, cl. 64, § 3 (stating that under the casino gaming concession contracts, operators shall abide by and comply with the government's determinations issued within the scope of inspection and monitoring powers, namely the instructions of the DICJ).

¹⁹⁷ See, e.g., Dispatch of the Chief Executive No. 136/2022 (2022) (for example, the rules regarding the regulation of the public tender and some rules on administrative offenses inserted in the Gaming Promotion Regulation).

¹⁹⁸ To learn how the drafts were prepared, see MACAU GAMING LAW VOL. 4, *supra* note 182, at 343–79 (noting that Macau Gaming Law determined that the chief executive and the government would approve the necessary supplementary regulations of the Gaming Law. In fact, the Macau Gaming Commission prepared and drew up many supplementary statutes to the Gaming Law that were never enacted).

¹⁹⁹ See 2002 Concession Contract, *supra* note 166, cl. 80, § 2(6).

²⁰⁰ See, e.g., Gaming Inspection and Coordination Bureau, *supra* note 158.

²⁰¹ See, e.g., Alex Lee, *EXCLUSIVE MNA: Total Blackout*, MACAU NEWS AGENCY (last updated Sept. 21, 2019), <https://www.macaubusiness.com/exclusive-mna-total-blackout/> (citing Instruction No. 3/2019 on “transfer of information about gaming

3. *Principles of Administrative Law*

Casino gaming concession contracts fall under administrative contracts, so they are ruled by administrative law and subject to certain administrative principles.²⁰² Those principles are the polar star that guides the performance of the administration when dealing with the concessionaires and, in some cases, the concessionaires when dealing with third parties.

4. *Rules of Interpretation*

According to Macau law, in civil matters, the cases that the law does not provide for are regulated according to the rules applicable to analogous cases.²⁰³ In the absence of analogous cases, the situation is resolved according to the norm that the interpreter would create if he or she had to legislate within the spirit of the system.

IV. COMMON LAW ORIGINS OF COMMAND-AND-CONTROL

In the United States and most jurisdictions with casino regulation, the governments have adopted a system of regulatory oversight known as command and control. The command-and-control system has four steps.²⁰⁴ First, the legislature writes regulations setting general standards for casino regulation.²⁰⁵ Second, the legislature grants discretion to an administrative agency to adopt regulations to achieve the legislation's broader policy goals and general standards.²⁰⁶ As the Nevada Supreme Court noted: "It is entirely appropriate to lodge such wide discretion in the controlling administrative agency when a

activities or operations, including customer personal data"). The nature of DICJ's Instruction is of an administrative act directed toward the concessionaires with a confidential nature in most cases.

²⁰² Macau Administrative Procedure Code, *supra* note 55, arts. 3–5, 7–9. The principles are stipulated in the Macau Administrative Procedure Code, including: the principles of legality (art. 3), the pursuit of the public interest and protection of the rights and interests of residents (art. 4), equality and proportionality (art. 5), justice and impartiality (art. 7), good faith (Article 8), and collaboration between the Administration and individuals (art. 9).

²⁰³ CÓDIGO CIVIL DE MACAU [Macau Civil Code] art. 9, § 1. "There is an analogy whenever the reasons justifying the regulation of a case mentioned in the law apply to an unregulated case." *Id.* art. 9, § 2.

²⁰⁴ 1 ENV'T L. INST., LAW OF ENVIRONMENTAL PROTECTION § 3:25 (Spring ed., 2022).

²⁰⁵ *Id.*

²⁰⁶ Cong. Rsch. Serv., *An Overview of Federal Regulations and the Rulemaking Process* (IF 10003), prepared by Maeve P. Carey, Mar. 19, 2021.

privileged enterprise is the subject of the legislative scheme.”²⁰⁷ Third, the regulated entities can operate their casinos without substantial government interference, provided they meet the minimum regulatory standards and license conditions.²⁰⁸ Finally, if a regulated casino violates the regulations, the government may bring enforcement actions against the private parties and issue fines or revoke licenses.²⁰⁹ In most places, the government agency also requires

²⁰⁷ State v. Rosenthal, 93 Nev. 36, 43 (1977).

²⁰⁸ ENV'T L. INST., *supra* note 204, § 3:25.

²⁰⁹ Gaming regulators most often enforce rules against licensees through civil sanctions, including the threat or imposition of fines or license revocation. Violations by non-licensee are often dealt with by criminal sanctions. Criminal law “should be reserved to prohibiting conduct that society believes lacks any social utility, while civil penalties should be used to deter (or ‘price’) many forms of misbehavior (for example, negligence) where the regulated activity has positive social utility but is imposing externalities on others.” John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992). For example, if a casino licensee offers a game that has not been previously approved by the regulators, the casino could face criminal or civil penalties. The same result could occur if the casino failed to pay taxes on the gaming contract. Likewise, if the casino player, the offeree, is under the age at which offerees are permitted to enter gambling contracts, both the casino and the player could be subject to criminal or civil sanctions. Command regulations backed by the power of the state, however, are not the only type of regulatory tools. The other types of regulation include communication, negative and positive incentives, self-regulation, and techno-regulation. These types of regulation are much less prevalent. Communication regulation is where the government mandates:

[T]he disclosure of information relating to the composition, its side-effects . . . of production, with the aim of facilitating more informed decision-making by citizens in their purchasing and consumption decisions. Such mandatory disclosure regimes may be valuable in responding to “market failures” arising from circumstances in which the market fails to generate the “optimal” amount of information (“information deficits”), or in responding to circumstances in which a regulated activity generates external costs (“externalities”) which may be efficiently dealt with by informing third parties about the externality to enable them to take steps to avoid it, rather than prohibiting or otherwise restricting the regulated activity.

BROWN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION: TEXT AND MATERIAL 96 (2012) (quoting Karen Yeung, *Government by Publicity Management: Sunlight or Spin*, PUB. L. 360, 360–83 (2005)). As problem gambling is a consequence of a gambling contract, communication regulation can, and often does, play a part in addressing this issue. These types of communication regulations can address two major areas: either that gambling itself can lead to the externality or that disclosure of information regarding the contract may make the player more informed and thus make decisions that have a lesser

private parties to have some form of occupational license. In the case of casino operators or owners, this includes granting licenses on a discretionary and occasionally exclusive or limited basis that permits the license holder to operate gambling.

Command-and-control regulation has direct ties to the common law. If an activity is gambling, under the Common Law, it is generally illegal and a public nuisance.²¹⁰ The government can bring suit to abate “public nuisances” as “an unreasonable interference with a right common to the general public.”²¹¹ Maintaining a common gaming house is a nuisance due to “its tendencies to bring together disorderly persons, promote immorality, and lead to breaches of the peace.”²¹² Courts have classified a gambling house as a nuisance “per se,” even if it does not disturb the public peace, does not involve noise or boisterous conduct, is not visible from the outside, and is not frequented by dissolute or criminal characters.²¹³ Public nuisance operates under the theory that someone

impact on externalities. Examples include “problem gambling signage” and slogans on advertising. The second approach is better disclosure regarding the contract itself. For example:

[R]ecent research indicates that pathological gamblers often engage in defective gambling strategies, misjudging their inability to control random events and evaluate their losses. This research indicates that the provision of accurate information about the true costs of gambling and the likelihood of losing may aid pathological and problem gamblers in their efforts to gain control over their gambling habits.

Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217, 219 (2004) (citing Anthony D. Miyazaki et al., *Promoting and Countering Consumer Misconceptions of Random Events: The Case of Perceived Control and State-Sponsored Lotteries*, 20 J. PUB. POL’Y & MKTG. 254, 254 (2001) and Francine Ferland et al., *Prevention of Problem Gambling: Modifying Misconceptions and Increasing Knowledge*, 18 J. GAMBLING STUD. 19, 20 (2002)).

²¹⁰ See Anthony Comstock, *Lotteries and Gambling*, 154 N. AM. REV. 217, 217–24 (1892).

²¹¹ See RESTATEMENT (SECOND) OF TORTS § 821B(1) (explaining that the interference can be to public health, safety, peace, morals, comfort, or convenience); see also John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 276–99 (2001); *Phalen v. Virginia*, 49 U.S. 163, 168 (1850) (“The suppression of nuisances injurious to public health or morality is among the most important duties of government.”).

²¹² *Goose v. Commonwealth*, 205 S.W.2d 326, 329 (Ky. 1947).

²¹³ 66 C.J.S. *Nuisances* § 77 (2022). See also MINN. DEP’T HUM. SERVS., *PROBLEM GAMBLING: A REPORT ON THE STATE’S PROGRESS IN ADDRESSING THE PROBLEM OF COMPULSIVE GAMBLING AND ON THE PERCENTAGE OF GAMBLING REVENUES THAT COME FROM PROBLEM GAMBLERS* 11 (2017) (finding that studies indicated that “the nearby presence of gambling facilities and increased gambling opportunities as a contributing factor to problem and pathological gambling. A 2013 study by the National Association of Realtors cited negative impacts of a prospective casino on

who caused an injury to a public right should pay the cost to redress the harm.²¹⁴ “When the court finds a continuing nuisance, it can, within its police power, ‘order its abatement and award damages for injury already sustained.’”²¹⁵

Historically, common law tort claims were used to abate gambling houses.²¹⁶ The difficulties in adjudicating a common law tort claim progressively caused a shift from tort actions to more direct regulation.²¹⁷ Both state governments and the federal government became more involved in creating command-and-control statutes and other legislation designed to set standards and mandate compliance through the threat of fines for violation.²¹⁸

Command-and-control regulations interfere with otherwise consensual gambling contracts between persons physically within their borders. Where the government bans gambling contracts as a nuisance inconsistent with the public good, offering casino gaming is both an actionable tort and a crime that can lead to arrest and detention. The government can enforce these proscriptions on the gaming contracts because it has the exclusive police powers to compel

the local housing market due to nuisance traffic and increased home foreclosure associated with personal bankruptcies”); Shou-Tsung Wu & Yeong-Shyang Chen, *The Social, Economic, and Environmental Impacts of Casino Gambling on the Residents of Macau and Singapore*, 48 TOURISM MGMT. 285, 286–87 (2015) (“[M]ost studies have shown that casino gambling may be correlated with the following social deviations: domestic violence, divorce, bankruptcy, drug and alcohol abuse, risky or illicit sexual behavior (especially prostitution), and problem gambling”); Erica L. Okerberg & William N. Thompson, *Problem Gambling: Costs and Best Practices for Mitigation*, 6 UNLV GAMING L.J. 1, 2 (2015) (“There has been an array of studies evaluating costs attached to behaviors of problem gamblers. According to such studies, the cost imposed by problem gamblers on non-family members is approximately \$10,000 per year.”).

²¹⁴ See HORACE G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 49–85 (3d ed. 1893) (describing cases involving houses of ill fame, disorderly houses, houses of assignation, billiard rooms, gaming houses, theaters used for low and vicious plays, common scolds, eavesdroppers, indecent exposure, and selling obscene pictures and books).

²¹⁵ John McCool, *Convenience Gambling as a Public Nuisance: An Ancient Tort Solution to a Modern Problem*, 9 WAKE FOREST J.L. & POL’Y 135, 145 (citing State ex rel. Howes v. W.R. Peele, Sr. Tr., 876 F. Supp. 733, 741 (E.D.N.C. 1995)).

²¹⁶ See John C. Nagle, *Moral Nuisances*, 50 Emory L.J. 265, 281 (2001).

²¹⁷ *Id.*

²¹⁸ See James E. Krier & Richard B. Stewart, *Using Economic Analysis in Teaching Environmental Law: The Example of Common Law Rules*, 1 UCLA J. ENV’T L. & POL’Y 13, 15 n.3 (1980); see also CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 23–26, 29 (1990); JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 22 (1960).

conformity to rules by force.²¹⁹ The policy goals to eradicate gambling contracts are unachievable unless a framework exists to detect and prohibit them. Such a framework involves law enforcement mechanisms and court systems that enforce laws severe enough to deter a potential violator from engaging in the activity—usually through incarceration.²²⁰

When the government decides to permit some forms of gambling, it does so as an exception to the general prohibition against gambling recognized by the common law and generally by statute. This forms the basis for the notion in common law countries that permitted gaming is not a right, but a privilege. The privilege is in the form of an exception to criminal prohibitions against gambling whereby the government issues a license allowing a party to engage in commercial gaming.²²¹ In the same year that Nevada legalized casinos, its Supreme Court stated:

We think the distinction drawn between a business of the latter character [liquor] and useful trades, occupations, or businesses is substantial and necessary for the proper exercise of the police power of the state. Gaming as a calling or business is in the same class as selling intoxicating liquors in respect to deleterious tendency. The state may regulate or suppress it without interfering with any of those inherent rights of

²¹⁹ See MAX WEBER, *Politics as a Vocation*, in MAX WEBER: ESSAYS IN SOCIO. 77, 78 (H. H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946) (according to German social theorist Max Weber, “state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory”).

²²⁰ To be effective, laws must be sufficiently precise to identify the prohibited gambling activity, and police and prosecutors must have sufficient resources and motivation to enforce such laws. While seemingly simple, activities like fantasy sports that resemble gambling can become major industries by working around imprecise laws. Defining gambling is not simple and missteps can lead to the creation of a gaming industry that is unregulated, such as the pachinko and electronic gaming machine industry in Japan. See generally Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195 (2007); see generally also Erick C. Sibbitt, *Regulating Gambling in the Shadow of the Law: Form and Substance in the Regulation of Japan’s Pachinko Industry*, 38 HARV. INT’L. L.J. 568 (1997).

²²¹ Nevada law is illustrative: “Any license issued or other Commission or Board approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.” NEV. REV. STAT. § 463.0129(2) (2021). This has ramifications in all areas of gaming regulation. For example, Mississippi gaming regulations provide: “An application for a state gaming license or any other affirmative Commission action is seeking the granting of a privilege, and the burden of proving his qualification to receive any license, registration, finding of suitability or approval, is at all times on the applicant.” 13-1 MISS. CODE R. § 1.1 (1991).

citizenship which it is the object of government to protect and secure.²²²

In contrast, those who conduct gambling activities without a license are subject to criminal sanctions. Hence, two distinct sets of gambling laws arise that interfere with otherwise consensual contracts. The first set relates to gambling laws defining general prohibitions and criminal penalties against gambling activities.²²³ The second deals with provisions that limit the exceptions to the ban and govern the conduct of commercial gambling.²²⁴

A. The Origins of Command-and-Control in the U.S. Gaming Industry

For almost fifty years, Nevada was the first and only U.S. state to legalize casino gaming. When these two sets of laws arose in Nevada in 1931, the government had options to address its nascent casino industry. Nevada did not adopt either a command-and-control model or a concession model, and instead permitted gambling contracts without regulating them. The 1931 law created “wide open gaming,” legalizing all forms of gambling, except lotteries.²²⁵ Nevada did not regulate its casinos other than imposing a very modest tax under the new laws.²²⁶ The legislature corrected this oversight when it granted local authorities the power to regulate or prohibit gaming shortly after its adoption.²²⁷ Nevada is unique in that it is now a highly regulated land-based

²²² State *ex rel.* Grimes v. Bd. of Comm’rs, 1 P.2d 570, 572 (Nev. 1931), *accord* Dunn v. Nev. Tax Comm’n, 216 P.2d 985, 997 (Nev. 1950).

²²³ For example, in New Jersey, criminal prohibitions against gambling are found in the section of the New Jersey Code devoted to criminal activities. *See* N.J. STAT. ANN. § 2C:37-2 (1997). However, regulations governing legal gambling are in separate provisions of the Code. *See generally* N.J. STAT. ANN. § 5:12.

²²⁴ The government may interfere in gambling contracts through regulation in one of four broad categories: (1) determining who, if anyone, can offer the contract; (2) determining who, if anyone, may accept the contract; (3) regulating the time, place, manner or terms of the contract; or (4) conditioning the right to provide the contract on paying a tax or undertaking some other burden.

²²⁵ Former Nevada Governor Fred B. Balzar signed the legislation into law on March 19, 1931, as the Gaming Act of 1931. *See History of Gaming in Nevada*, NEV. RESORT ASS’N, <http://www.nevadaresorts.org/about/history/> (last visited Jan. 8, 2022). Since then, Nevadans have been able to gamble through numerous games, including “faro, monte, roulette, keno, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondyke, craps, stud poker, draw poker, or any banking or percentage game played with cards, dice, or any mechanical device or machine,” so long as they did so at a licensed establishment. *See A Bit of History: Nevada Gambling Legalized*, 15 UNLV GAMING RSCH. & REV. J. 95, 95 (2011).

²²⁶ LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 11 (Dave Palermo, 2d ed. 1995).

²²⁷ *Id.*

casino environment that evolved from a situation in which gambling occurred without government interference.²²⁸ Nevada eventually adopted a command-and-control regime that its regulators and politicians often refer to as the regulatory “gold standard.”²²⁹ This transformation, however, was a long process that reflected a fundamental change in government intervention into what were considered public nuances under the common law.

From 1931 to 1945, industry regulation was at the local level, often enforced by the county sheriff or local elected body.²³⁰ A person was not required to obtain a state license to conduct gaming.²³¹ Nevada had no restrictions on the type or location of casinos and no meaningful license requirements. State law “did not regulate gaming.”²³² Moreover, “Nevada did not directly tax casinos, and state services were not dependent on gaming revenues.”²³³

Nevada did not begin regulating gaming until 1947 when the state attorney general opined that the State Tax Commission could adopt regulations requiring “inquiry into the antecedents, habits and character of applicants in order to satisfy the Commission that they will not violate the gaming law . . . prohibiting thieving and cheating games . . .”²³⁴ The opinion said that if the Tax Commission “finds reasonable grounds to apprehend that the grant of a license would be against the public interest, [the Tax Commission] would be within the powers delegated to [it] to refuse the license.”²³⁵

Between 1931 and 1978, Nevada had few barriers to entry. Consequently, organized crime was an early investor in Nevada’s gaming industry. Bugsy Siegel, a notorious mobster, opened the Flamingo, the prototypical Las Vegas resort, at a total cost of \$6 million on December 26, 1946.²³⁶ Siegel partnered with Meyer Lansky, a more notorious mobster.²³⁷

²²⁸ See generally *id.* at 1–28.

²²⁹ See O’Connor, *supra* note 2.

²³⁰ SAWYER & COLLINS, *supra* note 226, at 11.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 12.

²³⁴ Robert D. Faiss & Gregory R. Gemignani, *Nevada Gaming Statutes: Their Evolution and History*, 10 L.V. CTR. FOR GAMING RES. 1, 2 (2011).

²³⁵ *Id.*

²³⁶ Robin Leach, *Strip Scribbles: Flamingo’s \$100M-plus Makeover for 75th Anniversary*, L.V. SUN (May 2, 2016, 6:00 PM), <https://web.archive.org/web/20180915192639/https://lasvegassun.com/vegasdeluxe/2016/may/02/flamingo-100-million-plus-makeover-75th-anniversar/>. See also EUGENE P. MOEHRING, *RESORT CITY IN THE SUNBELT: LAS VEGAS, 1930-2000* 48 (Jerome E. Edwards ed., 2d ed. 2000) (describing how the Flamingo initially offered guests a 105-room hotel, a casino, a host of amenities including restaurants, shops, a showroom, stables, trap shooting, a swimming pool, a health club and spa, a golf course, tennis, and other sports facilities).

²³⁷ Larry D. Gragg, *Las Vegas: Who Built America’s Playground?*, HIST. TODAY (2007), <https://www.historytoday.com/archive/las-vegas-who-built-america%E2%80%99s-playground>.

Despite the attendance of the Hollywood elite, the opening was a failure and the Flamingo closed in January 1947.²³⁸ Failure had consequences; Siegel was murdered on June 20, 1947.²³⁹ Nevertheless, Siegel's pioneering resort established both the template for lavish Las Vegas casino resorts and the participation of organized crime in Nevada's gaming industry.²⁴⁰ During this time, the state casino license system focused not on controlling gaming activity but on "assessing and collecting tax on gaming revenues," with the Nevada Tax Commission becoming the industry's regulatory authority.²⁴¹

In 1949, the Nevada Legislature "formally set in law its blueprint to rid the casino industry of organized crime,"²⁴² giving licensing powers to the State Tax Commission, which had "authority to consider the suitability of the applicants."²⁴³ The timing preceded a federal investigation into organized crime, led by Senator Estes Kefauver of Tennessee, that pointed its finger at Nevada casinos.²⁴⁴ The federal government was targeting organized crime, focusing on the use of Nevada-based casino operations to finance or conceal profits generated from other illegal activities.²⁴⁵ The Kefauver Committee's report concluded that Nevada's licensing structure in the 1940s had "not resulted in excluding the undesirables from the state, but merely served to give their activities a seeming cloak of respectability."

Under the pressure of federal authorities, Nevada began more rigorous development of a regulatory process for casinos focusing on licensing, which went on to be a decades-long effort. The creation of the Board in 1955, with investigative and enforcement powers of the Tax Commission, and the amendments to the Gaming Control Act created a "much more comprehensive" system.²⁴⁶ Until then, the regulations comprised only five pages.²⁴⁷ In 1959, the Nevada Gaming Commission replaced the Tax Commission. The Nevada Gaming Commission was tasked with undertaking "exhaustive investigations" aimed "to be as certain as humanly possible that criminal elements, mobs, or syndicates have neither interests nor control of existing businesses."²⁴⁸

²³⁸ See MOEHRING, *supra* note 236, at 47–48.

²³⁹ See *id.* at 67; see also Leach, *supra* note 236 (commenting that despite being what would be considered, at best, a modest casino resort today, the Flamingo did what every future iteration of the destination gaming resort casino would do: create a new standard in leisure travel that transformed the sawdust casinos of the nineteenth and early twentieth centuries into global tourist destinations).

²⁴⁰ See MOEHRING, *supra* note 236, at 47–49.

²⁴¹ Faiss & Gemignani, *supra* note 234, at 2.

²⁴² SAWYER & COLLINS, *supra* note 226, at 16.

²⁴³ See *id.* at 19.

²⁴⁴ *Id.* at 18.

²⁴⁵ See Faiss & Gemignani, *supra* note 234, at 3.

²⁴⁶ SAWYER & COLLINS, *supra* note 226, at 19.

²⁴⁷ *Id.*

²⁴⁸ Faiss & Gemignani, *supra* note 234, at 4.

Once the threat of direct federal intervention dissipated in the late 1960s, the instruments for keeping criminals out of Nevada gaming were broadened to include helping develop the industry by opening financial markets.²⁴⁹ As a growth industry, gaming needed the support of capital markets, banks, and stock exchanges. Access to these markets is often contingent on these institutions having favorable perceptions of the gaming industry.²⁵⁰ Increased regulation helped create the perception that criminals were not involved in casino operations and that the games themselves were honest.²⁵¹

1. *Licensing*

The initial focus of the Nevada gaming regulatory system was not based on command-and-control principles, but rather on occupational licensing.²⁵² This process requires persons wanting to operate a casino or have another role in the gaming industry to complete an application, undergo an investigation, and be found “suitable” for the part being sought.²⁵³ Licensing is a tool to exclude persons from an industry, occupation, or profession before their actions compromise public goals. It is not unique to casino gaming. Governments often impose licensing requirements on various trades to protect the public. Lawyers,

²⁴⁹ See RICHARD LEHNE, *CASINO POLICY* 45–46 (1984). For example, when New Jersey allowed casinos, its purposes for licensing extended beyond those of Nevada. *Id.* Likewise, the public policy of Nevada toward gaming has evolved since 1931, as shown by the additions to its policy statement to include, as an example, that casinos do not “unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods,” and “that the rights of the creditors of licensees are protected.” See NEV. REV. STAT. § 463.0129(1)(b) (2021).

²⁵⁰ William R. Eadington, *The Casino Gaming Industry: A Study of Political Economy*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 23–35 (1984).

²⁵¹ Alfred N. King, *Public Gaming and Public Trust*, 12 CONN. L. REV. 740, 750 (1980).

²⁵² Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 676–87 (2010) (showing how only about 10% of the US workforce in 1970 had to obtain licenses, but this number grew to nearly 30% by 2008).

²⁵³ See NEV. REV. STAT. § 463.1405 (2003). Suitability is part of the qualifications required by an applicant to obtain and maintain a license. In assessing the suitability of an applicant, the Nevada regulators exercise “discretionary powers.” For example, under NRS 463.1405, regulators have full and absolute power and authority to recommend: the denial of any application; the limitation, conditioning or restriction of any license, registration, finding of suitability or approval; the suspension or revocation of any license, registration, finding of suitability or approval; or the imposition of a fine upon any person licensed, registered, found suitable, or approved for any cause deemed reasonable by the regulators. *Id.*

doctors, contractors, and beauticians go through licensing scrutiny before they can offer their services.²⁵⁴

Nevada initially used licensing for the primary purpose of excluding organized crime to temper federal government criticism and the potential for federal legislation that could make gambling illegal. Licensing, however, has evolved to address public policy goals. Governments are interested in assuring the games are honest and players are paid. Licensing attempts to predict whether, if permitted to operate a casino or manufacture a gaming device, a person would likely cheat players or fail to have enough funds to pay winnings or return deposits. Other government interests include protecting against persons who may skim funds without paying taxes or those who are so incompetent that the government will lose tax revenues through poor management or employee or patron theft. In other circumstances, the government may require applicants to have sufficient competency to detect and prevent schemes designed to cheat players, whether by employees or third parties. In this context, licensing seeks to protect the public by requiring licensing of persons with responsibilities that could compromise the honesty or fairness of the games if not performed competently. If the state goals include assuring operators protect player funds, the scope of the licensing review may look at the operator's financial strength and accounting competency.²⁵⁵

²⁵⁴ See, e.g., *In re Application of Cason*, 294 S.E.2d 520, 523 (Ga. 1982) (citing *Penobscot Bar v. Kimball*, 64 Me. 140, 146 (Me. 1875)) (“The function of the Fitness Board is to prevent those not demonstrating the requisite moral character and fitness from being allowed to become lawyers. This is for the protection of the public.”).

²⁵⁵ See NEV. GAM. REG. 4.010 (2022). The applicant has the burden of proving his qualifications for the license. *Id.* at 4.010, 5.040. There are licensing guidelines followed by Nevada Gaming Authorities to assess the qualifications, which may include the examination of the following areas: character, financing of the operation, business competence, suitability of the location, ownership of the location, multiple licensing criteria, and conduct during the investigative process. SAWYER & COLLINS, *supra* note 226, at 57.

Only suitable persons can be granted a gaming license by proving to the authorities that they are:

- (a) A person of good character, honesty and integrity;
- (b) A person whose prior activities, criminal record, if any, reputation, habits[,] and associations do not pose a threat to the public interest of the State or to the effective regulation and control of gaming or charitable lotteries, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or charitable lotteries or in the carrying on of the business and financial arrangements incidental thereto; and
- (c) In all other respects qualified to be licensed or found suitable consistently with the declared policy of the State.

2. *Evolution to Command-and-Control*

Nevada's evolution from an occupational licensing regime to a command-and-control regime occurred between 1960 and 1980. This corresponded to the rise of command-and-control regulation at the federal level in the United States. By the 1960s, "Congress and the President [were] invok[ing] the rhetorical power of the civil rights movement on behalf of causes involving not only discrimination on various grounds, but also the environment, workers, the poor, and even consumers."²⁵⁶ Congress passed laws setting out to accomplish "bold regulatory initiatives in a number of new areas, most prominently involving air and water pollution, discrimination, and management of social risks in general."²⁵⁷ Administrative rulemaking was preferred as "forward-planning is more possible."²⁵⁸ As a result, Great Society-vintage agencies declared problems like clean air, clean water, workplace safety, and traffic safety to be national menaces; the operative language gave the agencies broad enforcement powers to reduce or eliminate these problems.²⁵⁹ "To avoid 'one case at a time' administrative adjudication, Great Society-vintage agencies acquired much more sweeping rulemaking powers."²⁶⁰

3. *Areas of Command*

In the casino environment, significant sets of command standards concern six areas: operations, internal controls, anti-money laundering, reporting and record-keeping, information access, and information ownership.

4. *Operational Duties*

Command standards that impose a duty on casino operations impose general restrictions on the scope of the permitted contracts between the casino and the patron, typically impacting the who (age/status), what (permitted games), when (hours of operation), and where (permitted game areas).

Casino Operational Commands that impact **who** can gamble include prohibiting: (a) minors from loitering or playing a game; (b) persons who are visibly intoxicated to participate in gaming activity; (c) persons of unsavory

NEV. REV. STAT. § 463.170(2)(a)–(c) (2021). The applicant for a casino license also must have "adequate business probity, competence and experience, in gaming or generally" and the proposed financing of the entire operation must be "adequate for the nature of the proposed operation" and come from a suitable source. NEV. REV. STAT. § 463.170(3)(a) (2021).

²⁵⁶ SUNSTEIN, *supra* note 218, at 24–25.

²⁵⁷ *Id.* at 25–26.

²⁵⁸ LANDIS, *supra* note 218, at 22.

²⁵⁹ SUNSTEIN, *supra* note 218, at 29.

²⁶⁰ *See id.* at 23, 29.

character; (d) officers, director or key employee or government employees to gamble at the casino; and (e) persons on government-supplied exclusion lists based on criminal antecedents, status, or problem gambling.

Casino Commands that impact **what** the casino can offer include: (a) offering only approved gaming devices and games, gaming equipment, or associated equipment, chips, tokens, or promotional devices at the casino (i.e., free play device), and not making any modifications to them without approval; (b) meeting standards for securing the gaming device and its CPU; (c) accepting only bets that the operator is licensed to take; (d) conducting operations following good taste custom or decorum; and (e) displaying payoff schedules on game or slot machines that accurately reflect the actual payouts.

Casino Operational Commands that impact **when** gambling can occur include operating hours.

Casino Operational Commands that impact **where** gambling can occur include: (a) limiting casinos to approved locations and permitted premises; (b) maintaining approved surveillance over all games; and (c) conspicuously posting problem gambling information.

Casino Operational Commands that impact **how** gambling can occur include: (a) standards for complimentary service of intoxicating beverages; (b) following the published/posted rules of a game; (c) promptly paying winnings to a patron after being directed to do so by regulators; (d) monitoring employment to exclude persons denied a license or who have criminal records, (e) using only licensed Junket representatives; and (f) conducting advertising only if it is truthful, decent, and within good taste.

5. *Mandated Internal Controls*

Internal controls are procedures that a casino must implement to prevent or detect errors or irregularities. Accounting regulations control and protect casino revenues, maintain accountability for transactions, and prevent and detect any errors and irregularities that might occur.²⁶¹ Internal control procedures

²⁶¹ E. MALCOLM GREENLEES, CASINO ACCOUNTING AND FINANCIAL MANAGEMENT 96 (1st ed. 1988). *See generally* STEVEN M. BRAGG, ACCOUNTING FOR CASINOS AND GAMING (2d ed. 2019).

established in a casino environment incorporate combinations of access controls,²⁶² documentation controls,²⁶³ and personnel controls.²⁶⁴

6. *Anti-Money Laundering*

Gaming licensees must have compliance programs to prevent money laundering and terrorist financing. The federal government oversees anti-money laundering (AML) regulations through two departments within the Department of Treasury: Financial Crimes Enforcement Network (FinCEN) and Internal Revenue Service (IRS).

The threshold to report currency transactions is \$10,000 or more. Reports shall include name, address, social security number, and identity

²⁶² Susan H. Ivancevich, *Casino Surveillance: Internal Control Structure and Beyond*, 10 J. INT'L ASS'N HOSP. ACCT. 30, 30–33 (1995) Access controls are physical safeguards generally involving security devices, such as locks and cameras. Access to the most sensitive areas in a casino (e.g., cashier's cage, slot booths, hard and soft count rooms) is physically restricted and closely monitored by surveillance cameras). *Id.* See also *Gaming Policy Models, Part V: Accounting Regulations*, CASINORANKINGS.COM (Nov. 1, 2010), <https://web.archive.org/web/20200927204242/https://www.casinorankings.com/gaming-policy-models-part-v-accounting-regulations/>.

²⁶³ Documentation controls result in physical evidence of a transaction from its origin by recording the casino's financial records. Most businesses use extensive documentation controls to create an "audit trail" of transactions. Casinos, however, are limited in the level of document controls available to trail cash transactions, such as cash wagers that occur on the gaming floor. Documentation controls, nevertheless, are effective in many areas of a casino operation. For example, accounting department employees can use an audit checklist to document the procedures performed to verify the casino's financial activity. This checklist assists the accounting department in proving compliance with regulatory auditing standards. Maintaining systems whereby transactions can be documented, reviewed, authorized, and verified (whenever possible) is an essential element of any internal control environment. Documentation control is of little value unless the records are maintained. Therefore, governments usually mandate that casinos keep all required records for a specified time, often up to six years. This facilitates the government and independent accountant's audit process and allows for government investigations into the casino's activities. See *Gaming Policy Models, Part V: Accounting Regulations*, *supra* note 262.

²⁶⁴ Examples of personnel controls include staff supervision, secondary review and approval of transactions, and appropriate segregation of job duties to assure the independent performance of the recording function, custody, and accountability of company assets. See *id.*; see also GAMING INDUS. SPECIAL COMM., AM. INST. OF CERTIFIED PUB. ACCTS., AUDITS OF CASINOS 18 (1984), ("As in any sound system of internal accounting control, segregation of duties is of paramount importance in the overall control considerations.").

verification for customers involved in such transactions.²⁶⁵ Licensees are required by the federal government to have an AML compliance program with the minimum covering: internal controls for ensuring compliance, independent testing of the internal controls, compliance officer and/or compliance committee, employee training, policies, and procedures.²⁶⁶

As to suspicious transactions, reports on suspicious transactions of \$5,000—including those suspected or thought to have come from illegal activities or to avoid legal or regulatory requirements—must be filed.²⁶⁷

7. *Duty of Compliance*

A general duty of compliance obliges each casino to comply with all federal, state, or local laws and regulations, and with all the conditions and limitations of its license. These include those relating to payment or withholding of license fees, payroll taxes, liquor taxes, entertainment taxes, antitrust and monopoly statutes, and workplace discrimination or harassment of a person based on the person's race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin.²⁶⁸

Most casinos must have a compliance plan “to self-regulate and monitor all aspects of its business.”²⁶⁹ This obliges that compliance teams be put in place to verify the compliance of the casino's activities with laws and regulations.

The compliance program assumes “a contractual commitment between the gaming licensee and the Nevada Gaming Control Board,”²⁷⁰ under which the casino abides by the laws and regulations. The compliance plans require the casino to monitor compliance with the gaming laws applicable to the operations. The compliance program serves as the guide for the committee to address problems that may adversely affect gaming control. It creates specific reports that must be submitted to the regulators.

8. *Duty of Information*

The duty of information refers to the casino's obligations to (a) maintain or acquire information from operations, systems, patrons, or employees; (b)

²⁶⁵ 31 C.F.R. § 1010.330 (2021).

²⁶⁶ 31 C.F.R. § 1021.210 (2021).

²⁶⁷ 31 C.F.R. § 1021.320 (2021).

²⁶⁸ See NEV. GAM. REG. 5.030 (2022). The violation of any provision of the Nevada Gaming Control Act or of the Regulations by a licensee, a licensee's agent, or a licensee's employee “shall be deemed contrary to the public health, safety, morals, good order[,] and general welfare of the inhabitants of the State of Nevada and grounds for suspension or revocation of a license.”

²⁶⁹ JENNIFER ROBERTS ET AL., UNLV INT'L GAMING INST., PRACTICAL PERSPECTIVES ON GAMBLING REGULATORY PROCESSES FOR STUDY BY JAPAN: ELIMINATING ORGANIZED CRIME IN NEVADA CASINOS 19 (2017).

²⁷⁰ *Id.*

retain custodianship over the information; (c) report or provide that information accurately and thoroughly to the regulators either regularly or on demand; and (d) the ultimate disposition through archiving or deletion.²⁷¹

Command regulations regarding the duty of information can include (a) truthfully answering questions asked and providing any information or document requested by the regulator; (b) providing access to any portion of the casino to a gaming agent; (c) reporting gaming disputes; (d) reporting any crimes occurring at the casino or by casino employees;²⁷² (e) notifying the regulator of change of casino ownership; (f) notifying the regulator if the licensed owner files bankruptcy; (g) reporting loans;²⁷³ (h) reporting any suspected violation of gaming crimes; (i) preparing and filing tax returns; (j) filing complete and accurate cash transaction and suspicious activity reports; (k) retaining all accounting records; and (l) submitting an annual financial statement.

9. *Duty Related to Ownership*

Duties related to ownership refer to the casino's obligations to (a) assure that only licensed persons have ownership interests; (b) restrict transfers of ownership only to licensed persons; (c) transfer ownership between licensed owners only with approval; and (d) escrow the purchase price for an interest in a casino until licensure.

10. *Duty Related to Problem Gambling*

Duties related to problem gaming refer to the casino's regulatory obligation to establish programs to address problem gambling. They can include posting written materials concerning the nature and symptoms of problem gambling and the toll-free telephone number for organizations that provide information and referral services for problem gamblers in conspicuous places, such as in or near gaming and cage areas or cash dispensing machines. Procedures and training for casino staff who interact with gaming patrons shall also be implemented.

²⁷¹ See Phillip Lawrenson, *Duties to Warn, Advise and Provide Information: A Comparative Study of the Obligations of Contractors and Design Professionals in French and English Law*, 16 *CONSTR. L. INT'L* 51 (2021).

²⁷² See *NEV. GAM. REG. 5.055* (2022).

²⁷³ See *NEV. GAM. REG. 5.050* (2022). For example, Nevada requires casinos to report to the Board "the full name and address of every person, including lending agencies, who has any right to share in the profits of such licensed games, whether as an owner, assignee, landlord or otherwise, or to whom any interest or share in the profits of any licensed game has been pledged or hypothecated as security for a debt or deposited as a security for the performance of any act or to secure the performance of a contract of sale." *Id.*

B. Control

If a regulated casino violates the command regulations, the government may bring enforcement actions against the private parties and issue fines or revoke licenses. Depending on the nature or severity of the violations, the enforcement actions can be either criminal (imprisonment or fines) or civil (loss or suspension of license, license conditions, or fines). Crimes and liabilities concerning gaming have a separate Nevada statute, which defines fraudulent acts and the penalties for violations.²⁷⁴ For example, casinos that cheat players are subject to criminal actions.²⁷⁵

The more common regulatory tool to initiate the control process is disciplinary action. In Nevada, the regulators have the authority to limit, revoke, or suspend any gaming license or fine any casino for “any cause deemed reasonable.”²⁷⁶ These causes, however, must relate to a violation of the commands expressed either in laws, regulations, standards, or internal controls. Violations can result in substantial fines. While the laws and regulations allow fines up to \$250,000 per violation, in practice, the regulators have ignored these requirements and imposed fines above statutory amounts.²⁷⁷ Among their administrative powers, the regulators can order the casino to keep an individual off-premises or to not pay any remuneration for services or any income on investment. The regulators also have emergency powers to revoke or suspend licenses.²⁷⁸

²⁷⁴ NEV. REV. STAT. § 465.070 (2021).

²⁷⁵ See NEV. REV. STAT. § 465.083 (2021) (making it unlawful to cheat at any gambling game); see also NEV. REV. STAT. § 465.015 (2021) (defining cheating as any alteration of the elements of chance, method of selection, or criteria that determine the result of the game, the value of the wagering instrument, or the value of the wagering credit); NEV. REV. STAT. § 465.070 (2021).

²⁷⁶ See NEV. GAM. REG. 1.100 (2022).

²⁷⁷ See NEV. REV. STAT. § 463.310 (2021). The imposition of fines is also possible and may constitute: between \$25,000 to \$250,000 for each separate violation of Title 31, Bank Secrecy Act; other violation not more than \$100,000 per violation in an initial complaint (regularly ignored); not more than \$250,000 for each separate violation that is the subject of any subsequent complaint (which the regulators regularly and completely ignore). *Id.* at 4(d)(1)–(2).

²⁷⁸ See NEV. REV. STAT. § 463.311 (2021) (giving the Commission the special power to issue emergency orders in the following cases: willful failure to pay license fee or tax (skimming); cheating; the action is necessary to prevent cheating; operating a gambling game or establishment without a license (hidden owners); such action is necessary for the immediate preservation of the public peace, health, safety, morals, good order, or general welfare).

V. ADVANTAGES AND DISADVANTAGES

A. Concession Model

Although gaming activity on its face cannot be classified as in the public interest,²⁷⁹ there are similarities between this activity and the goals of public services and public works, for which concession system was designed. This system relies upon a real collaboration between the grantor and the grantee of the concession as both are, for different reasons, interested in fulfilling common goals. The success of one is the success of the other.

It proves to be a flexible system as the interaction between the grantor and the grantee of the concession is sometimes more valued than the legal and regulatory framework itself. This section analyzes the advantages and disadvantages of the concession system.

1. *The Collaborative Nature of the Concession System is Key*

The collaboration between the grantor (through the regulators) and grantees (operators) assumes particular relevance in the concession system. Like a fruitful partnership, regulators and operators work closely to achieve common goals and, ultimately, realize the public policy.

2. *The Concession System is Flexible*

Regulators and operators can take collaborative actions without the need for prolonged or expensive rulemaking. Operators can operate in an under-regulated environment as general principles and mechanisms other than laws and regulations fill in the gaps.

3. *The Concession System Promotes Innovation*

The collaborative relationship allows operators to exercise greater innovation based on their knowledge of operations to propose solutions to problems. However, such an intention to innovate may fade toward the end of the concession.

4. *Regulators Can Use More Risk-Based Analysis*

Regulators can identify and assess factors that could negatively affect the industry's success, emphasizing certain areas and devoting fewer resources to areas that do not pose problems.

²⁷⁹ See FREITAS DO AMARAL, *supra* note 22, at 204.

5. *The Grantor Is Always Vested with a Contractual Advantage*

A concession system primarily serves the public goals. The system is intended to give more leeway to the grantor than to the grantee. The contractual advantage is evident in some of the concession system features, such as the redemption right,²⁸⁰ the sequestration right,²⁸¹ termination on public interest grounds,²⁸² or in the specific case of gaming concessions, the reversion of casinos, gaming equipment, and utensils.²⁸³

6. *Gambling Operators Are Vested in Public Power*

As a rule, concessions are awarded through an administrative act and implemented by a contract, as operators exercise an activity typically reserved for the State. This fact vests, in certain cases, the operator with public duties. As such, operators are subject to administrative law rules and principles.²⁸⁴ Administrative courts are, in some instances, the appropriate forum to resolve disputes with concessionaires.

7. *Members of the Operator's Boards and Operator's Employees Are Comparable to Civil Servants for Criminal Purposes*

Members of managing, oversight, and other boards and the workers of companies operating an activity on an exclusive basis are treated as civil servants for criminal purposes.²⁸⁵ Thus, they are subject to the types of penalties related

²⁸⁰ *Id.* at 174.

²⁸¹ MACAU GAMING LAW VOL. 4, *supra* note 182, at 205.

²⁸² *See id.* at 309.

²⁸³ *See id.* at 137.

²⁸⁴ *Basic Law of the Macau SAR*, *supra* note 63, art. 3–5, 7–9 (including the principles of legality (art. 3), the pursuit of the public interest and protection of the rights and interests of residents (art. 4), equality and proportionality (art. 5), justice and impartiality (art. 7), good faith (art. 8), and collaboration between the Administration and individuals (art. 9)).

²⁸⁵ *See* CÓDIGO PENAL DE MACAU [Macau Criminal Code], art. 336, § 2(c) (2005) [hereinafter Macau Criminal Code]. Although Macau has a closed oligopoly (of six casino operators), several Macau courts ruled that the current casino operators shall be treated as civil servants for criminal purposes. *See also* Acórdão do Tribunal de Segunda Instância [Court of Second Instance ruling] Oct. 13, 2005, Case No. 145/2005 (Mac.) (with an explanation of vote); Acórdão do Tribunal de Segunda Instância [Court of Second Instance ruling] Nov. 6, 2008, Case No. 570/2007 (Mac.); Acórdão do Tribunal de Segunda Instância [Court of Second Instance ruling] Feb. 11, 2010, Case No. 687/2009 (Mac.).

to crimes committed while exercising public functions,²⁸⁶ which are more heavily sanctioned.

8. *Concession Contracts Have Erga Omnes Effects*

Concession contracts are administrative in nature and produce effects in the legal sphere of the contracting parties and of third parties.²⁸⁷

9. *The Concession System Does Not Foster Transparency*

The interaction between regulators and operators can be less transparent than in a command-and-control system, resulting in a loss of public trust or increased potential for corruption.

10. *The Concession System May Be Less Doable*

The more operators there are, the more regulators need to devote substantial resources to manage each contractual relation.

11. *The Concession System May Increase Bureaucracy*

In the case of an under-regulated jurisdiction, each and every aspect of the gaming operation may require filing for the regulator's authorizations and/or approvals.

12. *Operators May Have a Knowledge Advantage*

Operators may gain a knowledge-based competitive advantage when negotiating the initial concession contract, and the terms of that agreement may constrain some significant changes.

²⁸⁶ See Macau Criminal Code, *supra* note 285, arts. 337–350. These crimes include corruption, embezzlement, abuse of authority, breach of confidentiality, and abandonment of duties. *Id.*

²⁸⁷ See Acórdão do Tribunal de Segunda Instância [Court of Second Instance ruling] June 6, 2013, Case No. 22/2013 (Mac.) at 38–39, (showing that legitimacy is granted to persons other than “subjects of the contractual relationship,” i.e., holders of “subjective rights or legally protected interests according to which the contractual clauses have been established.”); see also CÓDIGO DE PROCESSO ADMINISTRATIVO CONTENCIOSO DE MACAU [Macau Administrative Litigation Procedure Code], art. 114(3).

13. *Concessions Are Always Limited in Time and Are Not Necessarily Renewable*

Concessions are, by definition, granted for a fixed period under the principle of the finitude of concessions. The “granting entity, when setting the respective term, must meet the number of years necessary (or foreseeable, in terms of normal operation) to amortize the assets to revert and the large investments involved, under penalty of the number of interested private entities in their operation becoming less.”²⁸⁸

B. Advantages and Disadvantages of Command-and-Control

Command-and-control regulation attempts to create and impose a broad scope of industry mandates across differently situated gaming operators to address a myriad of circumstances that can be detrimental to achieving policy goals. The one-size-fits-all approach does not distinguish casinos based on economic, technological, or organizational differences.²⁸⁹ For example, Nevada regulations regarding problem and responsible gaming, casino operations, and internal controls generally are the same and apply equally whether the casino has 16 or 1,600 machines or tables, is in an urban or remote setting, or has a skilled or unskilled workforce. The Nevada regulatory structure successfully coerces its roughly 3,000 gaming locations to maintain minimum standards to achieve the state’s narrowly defined policy goals. Under a “one size fits all” scheme, inherent operator inefficiencies are expected, and the government measures success based on whether the regulated industry as a whole meets policy goals. By most accounts, Nevada has successfully met its primary policy goals for the casino industry to generate maximum economic activity (at the expense of responsible gaming or tax maximization). This, however, does not mean that Nevada’s system is transferable, flexible, responsive, or efficient, or that it promotes innovation. This section reviews the advantages and disadvantages of command and control.

1. *Command-and-Control Requires a Solid Gaming Regulatory Knowledge Base to Properly Implement*

Command-and-control regulation requires a tremendous amount of industry, government, and regulatory information.²⁹⁰ Creating the most effective

²⁸⁸ MACAU GAMING LAW VOL. 2, *supra* note 136, at 54.

²⁸⁹ Timothy F. Malloy, *The Social Construction of Regulation: Lessons from the War Against Command-and-Control*, 58 BUFF. L. REV. 267, 269 (2010).

²⁹⁰ ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE 107 (2d ed. 2012). *See also* David A. Dana & Hannah J. Wiseman, *A Market Approach to Regulating the Energy Revolution: Assurance Bonds, Insurance, and the Certain and Uncertain Risks of Hydraulic Fracturing*, 99 IOWA L. REV. 1523, 1548 (2014).

casino regulatory system first requires a government to formulate and understand its policy goals. To avoid knowledge failure, the government must compile information: (a) to identify what policy goals the regulation is attempting to accomplish, and (b) to design appropriate laws or regulations.²⁹¹ Design requires a thorough understanding of each jurisdiction's individual conditions, including market size, casino locations, population density, potential casino customers, availability of skilled casino labor, culture, external government restraints (such as privacy laws, labor laws, money transfer restrictions), regional competition, government structure and regulatory experience, financial and other resources, legal and illegal history, and unique problems—such as organized crime, corruption, money laundering, and underground economies. Considering these facts, choosing complex regulations that best achieve public policy and avoid unintended detrimental outcomes to those it regulates is daunting.

Mature gaming regulatory jurisdictions can often conduct the research necessary to adopt informed regulations. New jurisdictions that transition from a prohibition against gambling to regulating a complex and often substantial industry rarely have historical or intellectual capital internally to effectuate this policy change successfully.

A new jurisdiction can look to Nevada or other places but be easily confounded by command-type regulations that often are hundreds of pages long. Moreover, these are not “model” systems. Calling any regulatory system a “model”—or worse, the “gold standard” against which all others are judged—gives a false impression that a particular set of laws and processes are the only correct way to regulate gaming. This leads to a belief that adopting one of these “gold standards” or “models” is the proper course of action. However, no two jurisdictions have identical structures, needs, or policy goals. No “models” exist that a new jurisdiction should adopt. Every attempt by a government to copy another government's “model” regulations has been a failure at some level.

An example is a self-exclusion program, in which a patron with a gambling problem can place themselves on a list and the casinos must exclude listed persons from the casino. The effectiveness of a self-exclusion program may depend on the existence and prevalence of other available legal and illegal gambling in the jurisdiction. If, as in Japan, alternative forms of gambling, such as pachinko and pachislo, are available in thousands of convenient locations, keeping a person from the casinos is less likely to be effective. Jurisdictions must have different gaming laws and regulations that reflect individual histories, governmental structures, issues, capabilities, and resources.

Another common reaction is to demand that the new regulations be the most stringent. This is based more on politics than good policy. Clearly, an initial benefit of command-and-control regulations is political. It shows that the politicians are acting decisively to address public concerns such as problem gambling or the impact of casinos on neighborhoods.²⁹² However, a problem is

²⁹¹ Julia Black, *Critical Reflections on Regulation*, 27 *AUSTL. J. LEGAL PHIL.* 1, 10–11 (2002).

²⁹² BALDWIN, ET AL., *supra* note 290, at 107.

that politics and exemplary policy implementation are often inconsistent. Atlantic City is an example of initial “stringent” regulations that were counterproductive to maintaining a competitive casino industry and ultimately reformed.²⁹³ Further, reliance on the creation of “stringent” regulations leads to adopting rules that appeal to the public perception of control but have no proven efficacy. Command-and-control regulations are “coercive state intrusions into private affairs”²⁹⁴ that come with implementation or profitability costs.

Another example is a requirement popularized in Singapore requiring casinos to collect an entry levy from citizens or permanent residents of USD \$74 per twenty-four hours, or about \$1,500 annually.²⁹⁵ Singapore had no evidence-based research to support this requirement. Still, it made a regulation decision based on the theory that the fees would inhibit problem gamblers and the lower classes from visiting the casinos.²⁹⁶ One study that reviewed this regulation concluded that “theoretical support for entry fees’ use as [a] responsible gambling tool” is weak because “they primarily distort the demand of more price sensitive recreational gamblers.”²⁹⁷ “This creates a potentially large dead weight loss in the economy, and likely increases the share of revenue from players with a gambling disorder.”²⁹⁸

Competition among various jurisdictions for the most “stringent” regulatory standards is commonplace.²⁹⁹ In New Jersey, regulatory reforms in 2010 were opposed because the proposal “guts the law and blows up a system recognized worldwide as the gold standard of casino regulation” because, among other things, it rolled back occupational licensing for non-gaming casino service industries and some casino employees, and removed the mandate that casino inspectors be present in the count room.³⁰⁰ Like in New Jersey, stringent occupational and command-and-control regulation often results from a government, such as in Singapore and Japan, wanting the benefits of casinos but

²⁹³ Anthony N. Cabot et al., *A Tale of Two Cities: Las Vegas and Atlantic City*, 20 GAMING L. REV. & ECON. 718, 739 (2016).

²⁹⁴ Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 663 (2012).

²⁹⁵ Kahlil S. Philander, *Entry Fees as a Responsible Gambling Tool: An Economic Analysis*, 21 UNLV GAMING RSCH. & REV. J. 43, 44 (2017).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 43.

²⁹⁸ *Id.*

²⁹⁹ See *About Us*, NEV. GAMING CONTROL BD. GAMING COMM’N, <https://gaming.nv.gov/index.aspx?page=2> (last visited Jan. 9, 2022) (“The Nevada Gaming Commission and the Nevada Gaming Control Board govern Nevada’s gaming industry through strict regulation of all persons, locations, practices, associations and related activities.”).

³⁰⁰ Carl Zeitz, *Bill Doesn’t ‘Reform’ Casino Regulations -- It Destroys Them*, PRESS OF ATL. CITY, https://pressofatlanticcity.com/opinion/commentary/guest-column-carl-zeitz-bill-doesnt-reform-casino-regulations----it-destroys-them/article_c81fc11f-8a36-5661-9b00-33da4e4473d7.html (June 20, 2019).

needing to politically address public opposition and discomfort with a radical policy change.³⁰¹

2. *Command-and-Control Regulation Lends Itself to Rent-Seeking and Capture by Private Interests*

Rather than relying on other jurisdictions' regulatory structures, a government can obtain a knowledge base from regulated entities. However, casinos lack the incentive to share relevant information and may only share information that can reduce their regulatory burden or increase barriers to entry.³⁰²

Because legislators and regulators write command-and-control regulations, they are subject to compromises in the political process. Large or existing gaming companies may have disproportionate political influence.³⁰³ This can lead to different standards for large firms or increased burdens on new casinos hoping to enter the market.³⁰⁴ Corporations control most casinos and have a principal responsibility to derive profit for their shareholders.³⁰⁵ Within

³⁰¹ See Muhammad Cohen, *House Rules*, *INSIDE ASIAN GAMING*, 32–35 (Feb. 2015), <https://www.asgam.com/mags/201502/32/>.

³⁰² See Dana & Wiseman, *supra* note 290, at 1548.

³⁰³ See Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 *DUKE J. CONST. L. & PUB. POL'Y* 37, 53 (2014).

³⁰⁴ See *id.*; see also GEORGE J. STIGLER, *Introduction*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* xi, xi (1975); GEORGE J. STIGLER *The Theory of Economic Regulation*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 114, 114 (1975). Capture occurs when the industry's position is given preferential consideration by excluding other interested parties or contravention of public policy. Capture is not necessarily the result of corrupt motives. Instead, both the regulators and the regulated may be acting consistently with both the law and economic incentives. In some cases, regulators may lack sufficient perspective or information to understand the impact of their decisions. Regulatory capture is often associated with the teachings of George Stigler, who postulated that "as a [general] rule . . . regulation is acquired by the industry and is designed and operated primarily for its benefit." This acquisition, Stigler argued, comes about because the regulatory apparatus can assist the industry by allowing it to (1) acquire cash subsidies, (2) limit entry, (3) control complements and substitutes, and (4) help in price-fixing schemes. *Id.* The acquisition of cash subsidies, Stigler's first reason for the industry to demand regulation, is tenuous because it would tend to excite entry by new firms. Cash subsidies would only be sought by an industry having control over entry, or if the subsidies could be earmarked for existing firms. Although Stigler appears to come to this realization in *THE CITIZEN AND THE STATE*, his same general argument holds for his contention that an industry demands regulation to control complements and substitutes, and to assist in price-fixing schemes.

³⁰⁵ The government should create and enforce regulations designed to direct casino behavior in a way that is consistent with public policy. This does not mean, however,

the bounds of the law, most will attempt to use the regulatory apparatus to their benefit. This bilateral relationship between the regulators and the regulated may lead to the interests of the public or other parties being neglected.³⁰⁶ For example, casinos can appear before regulators to argue for or against regulations allowing or prohibiting the advertising of casino odds based solely on their economic interests.³⁰⁷

3. *Command-and-Control Has High Regulatory Costs for the Industry*

The “one size fits all” approach to regulating casinos and suppliers of gaming equipment draws no distinctions between large and small, urban or rural, or those with different patron demographics and risk profiles.

Command-and-control regulation can create unnecessarily high compliance costs. Instead of allowing the casino company to individualize how it will meet policy goals, regulators mandate the procedures and technologies that casinos must use.³⁰⁸ Multiple studies of environmental command-and-control revealed significant cost differences between command-and-control and least-cost alternatives.³⁰⁹ In many cases, command-and-control regulation is “less efficient [and] less responsive” than market-based approaches.”³¹⁰

that the industry cannot benefit from some regulatory actions. When considering some government benefit goals, such as maximizing employment, the interests of the government and the industry are often congruent. Even when the goals are different, the regulatory solution could be the same, benefiting the government, the players, or the industry. For example, the government may police and arrest people who cheat at casinos. Players benefit when cheaters are arrested and their money is not stolen, the industry benefits by protecting casino revenues, and the government benefits by ensuring revenues are collected and taxes are maximized.

³⁰⁶ BALDWIN ET AL., *supra* note 290, at 107.

³⁰⁷ See generally PETER GRABOSKY & JOHN BRAITHWAITE, *OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES* (Leona Jorgensen ed., 1986). Gaming regulatory structures often lend themselves to the preconditions that make regulatory capture more likely. Professors Grabosky and Braithwaite described the primary preconditions as where (1) the regulators have responsibility for only one industry, (2) the regulators are part of a larger governmental unit, (3) conflict occurs between the regulator and the regulated, (4) the regulator and the regulated have regular contact, and (5) significant personnel interchange occurs between the regulator and the regulated. *Id.*

³⁰⁸ David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 296–97 (1998).

³⁰⁹ Tom H. Tietenberg, *Economic Instruments for Environmental Regulation*, 6 OXFORD REV. ECON. POL’Y 17, 23 (1990).

³¹⁰ Norman W. Spaulding III, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENV’T L.J. 293, 294 (1997).

4. *Implementation of Command-and-Control Regulations in the Gaming Industry Has Advantages Over Other Regulatory Systems*

A government will fail to implement gaming regulatory mandates when enforcement mechanisms are insufficient to assure compliance.³¹¹ For jurisdictions initially welcoming casinos and lacking gaming regulatory skills and experience, command-and-control is simple to understand—the government is issuing blanket prohibitions or requirements that prohibit or mandate behavior.³¹² With exceptions for some complex matters like money laundering restrictions, command-and-control regulations are simple to enforce for straightforward matters.³¹³ Regulators do not need to have the deep knowledge or resources required to engage in a complicated cost-benefit analysis³¹⁴ or undertake complex policy decisions.³¹⁵ The regulations create the same standards that all licensed entities must follow regardless of their size, regulatory risk, compliance structure, regulatory history technology, or expertise. They can immediately inspect and determine violations of unambiguous rules.³¹⁶ Here, command-and-control is optimal because it allows new regulators to understand and enforce regulations without significant training or expertise. So, for example, while the risk of maintaining honest gaming devices is likely not threatened if an Oklahoma casino uses a slot machine that had Iowa-approved software, the Oklahoma regulator can check the software and fine the casino. Simply, imposing fixed command-and-control standards allows regulators to respond quickly to activities that do not abide by the set standards.³¹⁷

In jurisdictions with high monitoring costs caused by multiple casinos or other factors, command and control can be more efficiently implemented than other regulatory regimes.³¹⁸ Nevada is an example. The state has almost 3,000 licenses, including nearly 500 locations with more than fifteen slot machines,³¹⁹

³¹¹ See Black, *supra* note 291, at 10–11.

³¹² Aaron M. Levine & Joshua C. Macey, *Dodd-Frank Is a Pigouvian Regulation*, 127 *YALE L.J.* 1336, 1346 (2018).

³¹³ See Blake C. Norvell, *Business Regulatory Lessons Learned from Amusement Park Safety Concerns: An Integrated Approach to Business Regulation*, 27 *TEMP. J. SCI. TECH. & ENV'T L.* 267, 272 (2008).

³¹⁴ Levine & Macey, *supra* note 312, at 1346–47.

³¹⁵ See Lauren E. Glesby, *Fitting the Bill: Proposed Regulatory and Non-Regulatory Approaches to Advancing Green Building Technologies*, 21 *FORDHAM ENV'T L. REV.* 637, 643 (2010).

³¹⁶ Norvell, *supra* note 313, at 272.

³¹⁷ BALDWIN ET AL., *supra* note 290, at 107.

³¹⁸ Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 *WIS. L. REV.* 887, 936 (1999).

³¹⁹ Nevada Gaming Control Board Information Sheet FY21, NEV. GAMING CONTROL BD. & GAMING COMM'N,

in an area covering over 110,000 square miles. In this setting, the logistics and implementation of risk- or concession-based regulatory systems would be problematic. Command-and-control regulation can more rapidly achieve a reasonable degree of adequate compliance results.³²⁰ The command-and-control approach provides the regulated casino with clear instructions for meeting regulatory requirements.³²¹ This is particularly applicable when rules involve technology-based standards that can be easily understood, such as slot machine or gaming device standards.³²² For example, an economic instrument that acts to reduce compliance costs may turn out to be more expensive given the price of the high-level monitoring needed to make an incentivized method viable and successful.³²³ While the one-size-fits-all approach of command-and-control is not inherently inefficient, it is a less costly option in some circumstances.³²⁴

5. *Command-and-Control Can Be Bureaucratic and Overly Legalistic*

A centralized bureaucracy, “remote from the concerns of local constituencies and staffed by unaccountable bureaucrats[,]” typically administers command-and-control regulation.³²⁵ Bureaucracies can make the process of achieving policy goals more costly than necessary.³²⁶

When gaming law becomes a complex legal scheme dominated by “bureaucrats who apply it and the lawyers who interpret it,” the result is a complex system that makes no pretense of being understandable or accessible to the frontline workers.³²⁷ Persons, including nongaming lawyers, who review the multiple hundreds of pages of Nevada laws, regulations, and internal controls are confounded by their complexity and lack of organization. This regulatory evolution—from gaming regulations that were a few dozen pages long in the 1960s to their current state—is the result of an incremental process in which regulations attempted to address individual problems with industry mandates to prevent a recurrence of those problems. As one scholar noted:

<https://gaming.nv.gov/modules/showdocument.aspx?documentid=17987> (last visited Jan. 10, 2022).

³²⁰ BALDWIN ET AL., *supra* note 290, at 113; Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine-Tuning” Regulatory Reforms*, 37 STAN. L. REV. 1267, 1273 (1985).

³²¹ NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 52–54 (1998); Glesby, *supra* note 315, at 642.

³²² Glesby, *supra* note 315, at 642.

³²³ Daniel H. Cole & Peter Z. Grossman, *Toward a Total-Cost Approach to Environmental Instrument Choice*, 20 RSCH. L. & ECON. 223, 225–26 (2002).

³²⁴ *Id.*

³²⁵ Short, *supra* note 294, at 663.

³²⁶ Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENV'T L. REV. 1, 7, 17 (1985).

³²⁷ Short, *supra* note 294, at 663.

[R]ules beget more rules in a seemingly inevitable process of regulatory expansion.” The morass of law compounds the sense of constraint felt by regulated entities because it leaves them at the mercy of regulators, who are accused of applying standards rigidly and irrationally in a cycle of “mindless rule worship.”³²⁸

A “highly legalized environment [can] render[] regulated entities dependent on the expertise of lawyers, and thus unable to act autonomously.” “When a body of law becomes so complex, it may be rendered virtually incomprehensible in parts of the country where specialists are rare.”³²⁹

“These arguments about legalism ironically amount to a charge of arbitrary lawlessness, the touchstone of tyrannical government.”³³⁰

6. *Command-and-Control Is Rigid and Discourages Innovation*

“Rigid [regulatory controls] impose[] additional limitations. For instance, there are generally long delays” before companies can implement new, more efficient technology.³³¹ “As a result, when the government finally determines the proper technology equipment or processes, the regulated industry [has often adopted] a newer, more efficient, or a comparable, less costly technology.”³³²

Regulatory changes often occur only after a regulatory failure and tend to address that singular failure rather than implementing broad policy changes that deal with issues or root causes.³³³ These are small and unplanned regulatory changes.³³⁴

Moreover, command-and-control regulation rarely keeps up with new technologies or economies because legislative and bureaucratic inertia results in regulators lacking the knowledge necessary to initiate and create effective regulation. Furthermore, regulated entities infrequently bridge this gap through education or lobbying³³⁵—unless the regulation provides them with competitive advantages or creates new barriers to entry. Otherwise, command-and-control regulation encourages companies to install minimum technology requirements,

³²⁸ *Id.* at 670–71 (quoting Daniel J. Fiorino, *Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach*, 26 ENV'T L. 457, 463 (1996); Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 74 (2003)).

³²⁹ *Id.* at 671 (quoting Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 Rutgers L.J. 395, 413–14 (1995)).

³³⁰ *Id.*

³³¹ Glesby, *supra* note 316, at 644.

³³² *Id.*

³³³ Short, *supra* note 294, at 663.

³³⁴ There are numerous examples of this stagnation in U.S. environmental law and regulation. *See, e.g.*, Dana & Wiseman, *supra* note 290, at 1548.

³³⁵ *Id.*

rather than innovate, unless newer technology serves another overriding business purpose.³³⁶

7. *Command-and-Control's Inefficiency May Favor Larger Casino Companies*

Command-and-control regulation tends to be stable and amenable to established industry actors; “the regulated community may strongly prefer it, at least compared to meaningful market-based regulation.”³³⁷ Command-and-control regulation can “cause[] inefficiencies or distortions in the operations of markets or regulated firms.”³³⁸ Casino gaming is subject to “economies of scale” in highly competitive gaming markets, like Las Vegas or Atlantic City, with the consolidation of casino properties.³³⁹ Some general and administrative costs—such as government requirements for non-gaming amenities (Integrated Resorts requirements), regulation (surveillance, accounting, compliance, and licensing), and natural market forces (e.g., sales, marketing, purchasing, and training)—can contribute to fixed costs.³⁴⁰ Large casino companies have a price advantage in these markets because they can distribute fixed costs, such as licensing, legal, accounting, marketing compliance, and some salaries and wages for executives over multiple properties.

8. *Command-and-Control Is Not Optimal for Broad, Complex Regulations That Face the Casino Industry Opposition*

Command-and-control regulation is a “prescriptive system that both undervalues and heavily constrains decision-making by businesses.”³⁴¹ The casino business is complex.³⁴² However, casinos know their business better than the regulator and can meet policy goals more efficiently.³⁴³ “[R]egulated entities have no incentive . . . to improve . . . compliance beyond [the command-and-control requirement,] hence [they have] no incentive to research” and implement new and potentially better methods of meeting broader policy goals.³⁴⁴ This lack of dynamic efficiency occurs when a company that exceeds standards is in the

³³⁶ Norvell, *supra* note 313, at 271–72.

³³⁷ Dana & Wiseman, *supra* note 290, at 1550.

³³⁸ Short, *supra* note 294, at 663.

³³⁹ See, e.g., Zheng Gu, *Economies of Scale in the Gaming Industry: An Analysis of Casino Operations on the Las Vegas Strip and in Atlantic City*, 9 J. HOSP. FIN. MGMT. 1, 13 (2001).

³⁴⁰ *Id.* at 12.

³⁴¹ Malloy, *supra* note 286, at 283.

³⁴² Peter Ferentzy & Nigel Turner, *Gambling and Organized Crime — A Review of the Literature*, 23 J. GAMBLING ISSUES 111, 112 (2009).

³⁴³ Driesen, *supra* note 308, at 296–97.

³⁴⁴ Dana & Wiseman, *supra* note 290, at 1548.

same position as a company that barely complies with standards.³⁴⁵ Moreover, innovative companies receive no benefit but invite new regulatory requirements if the government determines that the government standards are too low or require updating.³⁴⁶

Command-and-control regulation also “makes it difficult for regulated entities to adapt to changing circumstances.”³⁴⁷ “This deprives the public of new alternative strategies that would accomplish [policy] goals, perhaps at a lesser cost, if they do not meet the specified requirements.”³⁴⁸ “Indeed, the best available technology sets a threshold standard, and companies have little interest in innovating to make the best available technology even better.”³⁴⁹

VI. CONCLUSION

Good gaming regulation should strive to meet four primary principles: (1) effectiveness (meets policy goals); (2) efficiency (has the lowest economic impact and administrative cost); (3) equity (fairly distributes burdens among players); and (4) political acceptability.³⁵⁰ Comparing gaming regulations between the command-and-control and concession models reinforces three main points regarding good regulation. First, neither model is inherently superior. Both models have been used with successes and failures. Monaco, France, and other countries with significant casino industries have concessions rather than licenses and have encountered a few problems. In contrast, the rigidity of the command-and-control model may have contributed to initial failures in Atlantic City.³⁵¹ Simply, both models have advantages and disadvantages. For example, the concession model allows the government to tailor its regulatory oversight to the circumstances not only of its jurisdiction but also to the strengths and weaknesses of the concession holder. However, the concession model has disadvantages when the jurisdiction has several casinos in a competitive market. Moreover, the relative lack of transparency may have less political acceptability in some societies.

But, at their core, both systems address the essential elements of gaming regulation: suitability, auditing/accounting, and enforcement. Only the processes are different. In the concession model, the government can adequately review the suitability of the proposed concessionaries both before awarding the contract and throughout the concession period. In contrast, in the command-and-control model, the government conducts the suitability review through occupational licensing. Like a bank financing a multibillion-dollar company, a concession contract can set out detailed and strenuous accounting requirements, default provisions, and the government’s auditing authority. The command-and-control model attempts to

³⁴⁵ Norvell, *supra* note 313, at 271.

³⁴⁶ Dana & Wiseman, *supra* note 290, at 1548.

³⁴⁷ Glesby, *supra* note 315, at 643.

³⁴⁸ *Id.* at 643–44.

³⁴⁹ Norvell, *supra* note 313, at 271.

³⁵⁰ See Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 L. & POL’Y 49, 52, 62 (1999).

³⁵¹ See Cabot et al., *supra* note 293, at 739.

accomplish this by uniform minimum accounting standards for all licensed casinos and mandatory auditing provisions. Finally, enforcement in a concession system is typically achieved through administrative and contract law by the regulators or in the administrative and civil courts, while the command-and-control system uses disciplinary procedures reviewable by the civil courts.

Second, comparisons of gaming regulatory systems disproportionately focus on the process rather than outcomes. Success in gaming regulation has five major components: knowledge, laws and regulations, implementation, process, and motivation. While the command-and-control system may be superior in some circumstances, such as an open market with numerous competitors, the concession system has distinct advantages in places where land is scarce and the government grants shorter-term concessions because of long-term economic uncertainty (potentially good or bad).

When regulatory failures occur, they are rarely the result of the process used. More often, they are instrument failures where the jurisdiction imposes overly strict regulations or high taxes that raise prices and negatively impact the jurisdiction's competitiveness. Or, because of incompetence or corruption, the jurisdiction fails to properly vet a casino owner/operator for financial or background suitability. Moreover, those in charge of making and implementing controls often may not have sufficient regulatory knowledge, education, or experience. The jurisdiction may also lack the motivation to enforce rules due to inadequate funding or staff, or because of corruption.

Governments seeking successful regulatory systems need to focus less on process and more on regulatory outcomes. In general, gaming regulation needs to employ more extensive outcome evaluations that assess the effectiveness of programs in producing change. In practice, efficiency testing does not exist outside of reacting to anecdotal evidence. For example, a jurisdiction that faces a major scandal, whether based on a concession or command-and-control system, is criticized as ineffective. The resulting regulatory reforms are then addressed by specific regulations designed to prohibit the recurrence of the scandal's facts. Program evaluation should be the systematic assessment of the outcomes to further its development and improvement, including "(1) assessment of merit and worth, (2) oversight and compliance, (3) program and organizational improvement, and (4) knowledge development."³⁵²

Third, the idea that a command-and-control model is a gold standard is misplaced and often counterproductive. In practice, the Nevada command-and-control regulatory experience has an overemphasized influence because of its successful transition from organized crime to corporate control. This tendency toward extensive command-and-control regulation has led to unsustainable claims of a "gold standard" and criticism that other processes, such as the concession system, are inferior simply because they lack the voluminous uniform mandatory controls. Criticism of another jurisdiction's regulatory system can have a legitimate basis. In certain circumstances, one process may have advantages, but neither is inherently superior outside the context in which they are employed.

³⁵² Melvin M. Mark et al., *Toward an Integrative Framework for Evaluation Practice*, 20 AM. J. EVALUATION 177, 188 (1999).