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Online gambling in South Africa



Comparative perspectives

1 Introduction to online gambling

The increase in the number of Internet users and the growing confidence of customers in conducting online transactions have led to a greater number of people being willing to engage in online gambling. The potential reach of online casinos is tremendous, taking into account the number of casinos that exist. The constant growth of the industry and the increased number of online casinos and gambling sites are factors to be considered (see M Eksteen 'Internet gambling and the law' in R Buys (ed) *Cyberlaw @ SA: The Law of the Internet in South Africa* (2000) 315). Obviously, the figures are greatly influenced by a number of variables that are difficult to predict, the most important being the regulatory measures undertaken by governments (see United States National Gambling Impact Study — Commission Report (1999) 5-1 (hence 'USNGIS'), accessible at <http://govinfo.library.unt.edu/ngisc/reports/5.pdf>). Global efforts by different states have not been uniform, because of diverse factors. Several states ban online gambling, while others have moved in the opposite direction by allowing licensed gambling operations. Clearly, the politics of Internet gambling are evolving almost as quickly as the medium itself, and with a similar lack of a common direction (ibid).

Nature of online gambling activities

Online gambling can be found in four forms:

- Internet gambling sites (virtual online gaming);

- Internet sport wagering and betting;
- online lotteries and online bingo; and
- online tournaments and online sweepstakes.

The most visible form is that of Internet gambling sites (idem at 5-3), also known as virtual online gaming (see J Forder & P Quirk *Electronic Commerce and the Law* (2001) 333). These sites now feature interactive games and casino-style gambling in the form of blackjack, poker, slot machines, and roulette (see N Rose 'Internet gambling: domestic & international developments' in *Gambling and the Law* vol 4 (23 November 1998), and walk customers through a virtual tour of the site, complete with graphics and background music. Before gambling, people are required by most sites to complete registration forms and either to purchase virtual chips or to create an account with a set minimum amount. Payment is made by debit card, credit card, electronic funds transfer (EFT), or other recognized form of electronic payment (such as Bluebean, PayPal, and Cybercash).

The second most popular form of online gambling is called Internet sport wagering and betting (see USNGIS at 5-3; Forder & Quirk op cit at 333). Wagering is on physical and specific sporting events such as a horse race or a football, tennis, rugby, or cricket game, and through an 'online bookie'. Online betting, however, has taken betting to new heights, because it potentially allows bets to be made interactively, in 'real time', and thus

allows players to change their bets as the game progresses.

The third kind of online gambling consists of online lotteries and online bingo (see USNGIS at 5-4). These types of gambling sites are the virtual equivalent of the physical bingo game and lottery. They have proved very popular in the United States of America, and new ones have been emerging by the day in other countries.

The fourth and last form of online gambling (which may actually fall into the wagering category) is online tournaments and online sweepstakes (ibid). In this type of online gambling, the web-site patrons usually compete against either the web host or other participants, much like playing a video game. These types of sites usually charge an 'entrance fee', part of which is used for the prize to be won (CR Janower 'Gambling on the Internet' 2 J. Computer Mediated.Com, accessible at <<http://jcmc.buji.ac.il/vol2/issue2/janower.html>>).

Important issues related to online gambling

When dealing with these various forms of e-gambling, one must not ignore the socio-economic effect that this modern form of gambling has on the general society of any nation, the inhabitants of which have access to the Internet. As the Internet can be used anonymously, there is a danger that access to Internet gambling will be abused by underage gamblers (see USNGIS at 5-4). In most cases the would-be gambler merely has to fill out a registration form in order to play. Most sites rely on the correctness of the information given by the would-be gambler, without making other verification checks such as ID number and telephonic voice recognition to verify the intending gambler's identity (ibid). This state of affairs has also led to the theft of credit cards and the theft of the use of credit cards where an underage player unlawfully uses his or her parent's credit cards to create accounts for the use of an e-gambling site.

Another growing concern expressed by governments and citizens is the easy and accessible manner in which e-gambling is provided. It has created a new group of pathological gamblers attracted by the easy access to e-gambling sites, the high-speed instant gratification of e-gambling games, and their offer of a high level of privacy. Left unregulated, the problem of pathological gambling will worsen (BP Horn, testimony before the Subcommittee on Crime, Committee on the Judiciary, US Congress (4 February 1998), as referred to in USNGIS at 5-5).

Although underage e-gambling and pathological e-gambling are serious points of concern, it is clear that cyber crimes are on the increase and that different ways of promoting criminal activity are being developed by criminals across the globe. Before Internet gambling appeared, it was fairly easy to catch offenders and enforce gambling legislation (Eksteen op cit at 316). Online gambling has turned the situation upside down, though, and created new possibilities for more specialized crime. One such possibility is that unscrupulous e-gamblers (because of the remoteness of the Internet service provider (ISP) or sometimes offshore) can easily alter, move, or even remove a site in minutes. This mobility enables dishonest operators to take an e-gambler's credit card numbers and money from 'e-gambling deposit accounts' and simply close down (see USNGIS at 5-5).

Another crime risk that e-gamblers face is unauthorized and unlawful tampering with gambling software to manipulate games.

A further unlawful activity is the defrauding of the e-gambler of his electronic identity and concluding fraudulent transactions with acquired banking details. Until about ten years ago, money laundering was a mere term to which no one paid much attention. However, when the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (also known as the Vienna Convention) was enacted, it became clear that money laundering was not

only a daily problem for governments and banks but was also extremely applicable to the gambling world (see J Siska ‘Combating money laundering in the gaming sector’ in G Strejcek et al (ed) *Games of Chance in the EU and in Austria* (2002) 103). The Internet, with its anonymity, remote access, and data encryption, can provide a safe and easy vehicle and environment for money laundering. All the money launderer has to do is to deposit money into an offshore account, gamble a little, make more money and/or lose a fraction of it, and then cash out the remaining funds (see USNGIS at 5-6).

It is clear from the various issues discussed above that e-gambling (online gambling) is an area requiring extensive regulatory measures, because the failure to institute effective countermeasures could lead to a plethora of criminal activities.

Various regulatory models of online gambling

In a global market without borders, as the Internet is said to be, it is difficult to ensure that national regulation is respected and enforced (see E Schriever ‘Conflict and coordination between diverse regulatory environments’ in *Cross-Border Gambling on the Internet — Challenging National and International Law* Swiss Institute of Comparative Law (2004) 103). The divergent interests and philosophies of governments have led to a large variety of approaches by different judicial systems concerning bricks-and-mortar casinos. Each country has a different sociological or philosophical perception of gambling (ibid). This fact appears from the different legislative texts that have been adopted worldwide with respect to the online gambling phenomenon.

There are various factors that guide a particular state when enacting legislation either for or against online gambling. These factors include financial interest (taxes and levies to be applied) and sovereignty (legitimacy and enforceability of the gambling laws of the state), and have led to a proliferation of e-gambling legislation

worldwide. Unfortunately, because of different legal philosophies and socioeconomic factors, the different e-gambling statutes adopted by various governments cannot be harmonized into a single piece of international e-gambling legislation. It will always be difficult to institute control measures that could be applied universally.

To understand issues relating to conflicting laws on cross-border gambling activities, it is essential to classify the different legislative modes (idem at 104). This classification does not apply to all aspects of e-gambling, for that exercise would require a separate essay. However, the relevant cross-border issues that will be used as criteria could be the following:

- whether online casinos are permitted to offer online gambling in their countries of origin; and
- whether there are any restrictions on the eligibility to gamble with regard to the e-gambler’s nationality or residence (ibid).

Schriever suggests that when answering the above questions, one can develop a scheme consisting of five different models (ibid):

- liberal (completely liberal);
- restrictive (restrictive liberal);
- liberal prohibitive;
- prohibitive (totally prohibitive); and
- protectionist (protectionist prohibitive)

These will be described in turn.

Liberal (completely liberal)

Liberal e-gaming systems are characterized by the fact that they expressly authorize online gambling and have no limitations (idem at 115). Nor is there any prohibition on the export or import of online gambling services. Examples of this liberal model are to be found in Canada, Vanuatu, and the United Kingdom.

Restrictive (restrictive liberal)

These systems are essentially liberal but have one distinctive difference: licensed e-gambling

is permitted but is not to be offered to jurisdictions that prohibit it (*idem* at 118). Examples of restrictive liberal models are to be found in Nevada and the United States Virgin Islands.

Liberal prohibitive

Many of the small offshore online gambling havens may be placed in this category (*idem* at 121). In terms of this approach, online gambling activities are authorized within the territory but are not authorized to local inhabitants. The proviso for permitting such conduct is that the country must stand to make financial gain. Examples of this model are to be found in Singapore and Curacao.

Prohibitive (totally prohibitive)

According to this legal system, any form of online offering, commercial exploitation, and online gambling (and/or any other form of electronic gaming practice) is prohibited (*idem* at 105). In other words, 'all practices' are expressly and impliedly prohibited. Examples are to be found in the United States of America, France, most Arab nations, and South Africa.

Protectionist (protectionist prohibitive)

Protectionist systems allow gambling but only if the operator is licensed domestically (*idem* at 109). From a cross-border point of view, they form part of the prohibitive system because the restriction of licensing to home-based casino operators means that foreign gambling activities are actually illegal. Countries in this category wish to have regulated online gambling services that are protected from outside intruders. Examples in this category are Australia, Germany, Austria, and Swaziland. (Although Swaziland does not have any specific legislation regulating online gambling, the Ministry decided, as in the case of *Piggs Peak Casino*, to add a schedule to existing casino licence holders who wish to offer online gambling services (telephone interview with Arnold Dhlamini, Office of the Minister, Department of Tourism, 21 June 2007).)

It is submitted that South Africa's National Gambling Amendment Bill 2007 (Gen Notice 1838 GG 29489) attempts to shift the totally prohibitive legal position towards one of being protectionist prohibitive.

The South African position on online gambling

The present legal regime under the National Gambling Act

Gambling in South Africa is regulated by the National Gambling Act 7 of 2004 ('the Act'). This statute repealed the previous National Gambling Act 33 of 1996 and the Gambling Act 51 of 1965 completely in relation to all online gambling activities (for the legal history of e-gambling, see Eksteen *op cit* at 316). The present National Gambling Act also repealed the Lotteries Act 57 of 1997.

Within the framework of the present National Gambling Act, each of South Africa's nine provinces has authority to enact its own provincial legislation on gambling (see, for example, the Mpumalanga Gaming Act 5 of 1995, the Western Cape Gambling and Racing Law Act 4 of 1997, and the Kwa-Zulu Natal Gambling Act 10 of 1996). In terms of the Act, 'gambling' is any activity involving the following (see Werkmans Inc *Business guide to electronic commerce and the law* (2005) 75, last accessed at <<http://www.werkmans.co.za>> on 22 September 2006; also the definition of 'gambling activity' in s 3 of the Act):

- placing or accepting bets or wagers, including staking or accepting money or anything of value on fixed-odds bets, open bets, and with bookmakers ('bookies') on any contingency (see the definition of 'bets and wagers' in s 4);
- placing or accepting totalizator bets;
- playing bingo (including electronic versions of it) or making available an electronic version of it (see the definition of 'gambling activity' in s 3);
- playing any gambling game (a game for money with a chance of receiving a payout

whether by skill or chance, and/or making such a game available) — see also ‘gambling games’ in s 5; and

- playing any amusement game with a restricted prize, or making it available as prescribed by the provincial Act.

Under section 7(a) of the Act, it is illegal to ‘engage in conduct or make available a gambling activity that depends directly, indirectly, partly or entirely on contingency related to an event or activity that is itself unlawful in terms of the law’. In particular, section 7(b) prohibits the use of any ‘gambling machine or device’ under the person’s control to be used for the purposes of a gambling activity as contemplated by’ section 7(a). (For a discussion of the meaning of ‘gambling device and machine’, see Werksmans *op cit.*) This prohibition is also extended to the ‘maintenance and/or operation of illegal premises’ (s 7(c)). It is submitted that the word ‘premises’ must be read in the context of section 82(4) of the Electronic Communications and Transactions Act 25 of 2003, which may include an ‘information system as well as electronic messages’.

In addition, section 11 of the National Gambling Act expressly prohibits a person from engaging and/or making available interactive games unless that person is authorized in terms of the Act or any other national law (see Notice from the National Gambling Board warning public on interactive gambling, 002/2007 (16 April 2007)). This position is reiterated in both the Western Cape and the Eastern Cape provincial Acts, which provide for the prohibition of unlicensed gambling activities (by including computer hardware or software within the definition of ‘gambling games’).

This position was confirmed in *Eekhout v Chief Magistrate, District of East London* (EC 21 February 2001 (case no 208/2000) unreported). The court in that case had no doubt about issuing a search warrant based on the fact that players were playing poker on a computer that used pre-paid gambling credits and thus contravened the provincial gambling statute.

There are similar judgments in the Transvaal Provincial Division, echoing the same message that ‘unlicensed gambling activities are illegal in the Gauteng Province and the rest of the Republic’ (see Notice from the National Gambling Board Warning Public on Interactive Gambling, 002/2007 (16 April 2007)).

It is clear from these provisions that any form of unlicensed online gambling in South Africa is expressly prohibited and is a criminal offence under sections 82 and 83 of the Act. Persons contravening the Act face imprisonment for up to ten years, a fine of R10 000, or both. This prohibition also applies to unlicensed online bingo operation in terms of the Lotteries Act; similar criminal sanctions may apply.

In line with international legislation on money laundering, South Africa promulgated the Prevention of Organized Crime Act 121 of 1988. This outlaws receiving of and/or benefiting from the proceeds of any criminal activity, as well as the failure to report such activity. This approach is also visible in section 7(a) of the National Gambling Act, which specifically outlaws the engaging in conduct or making available ‘a gambling activity if the outcome of that activity depends directly, indirectly, partly or entirely on a contingency related to an event or activity that is itself unlawful in terms of any law. . .’.

Proposed amendments to the National Gambling Act

It is clear, in the preamble to the National Gambling Amendment Bill 2007 (‘the Bill’), that there is an attempt at shifting the totally prohibitive legal regime to one of being protectionist prohibitive. The preamble reads:

‘to provide for the regulation of interactive gambling; to provide for the registration of players and player accounts; conditions to interactive gambling licenses; to provide for further protection of minors and other vulnerable persons. . .’.

This change to the legal position is clear from clause 5 of the Bill, which intends to extend the meaning of ‘gambling activity’, as prescribed by section 3 of the Act, by inserting the words ‘an interactive game’. In clause 6, the Bill further intends to entrench the legality of engaging in gambling activities by way of electronic communication, by guaranteeing a person’s right to bet and/or wager by electronic means. In this way, section 4 of the Act is amended.

Clause 7 of the Bill intends to amend section 5 of the Act by inserting section 1A. This defines an ‘interactive gambling game’. It clearly requires the e-gambling activity to meet the following requirements (clause 5(a)):

- the winning of money or a prize
- by a registered player who has undertaken to take part in the game by electronic communication and
- who has given his undertaking to pay an entry fee
- in return for a prize and/or money which is due to the e-gambling due to his personal skill and/or chance in the game.

The insertion of section 5A for the purposes of defining ‘interactive gambling transaction’ guides the e-gambling process and deems such transaction to have been concluded if a player’s account is opened, credited and/or debited and such transaction has not miscarried because of human error and failure of the Internet connection (see clause 8). Under the proposed amendments the Minister of Trade and Industry would also be empowered to make regulations directed at or referring to specific categories of electronic communication that may or may not be used for the purpose of online gambling (see clause 5(b)).

The Bill intends to create a standard for the provision of Internet gambling by the insertion of section 11A. An electronic gambler is thus not permitted to take part in an electronic gambling game unless the e-gambler is a registered player and has nominated an account with a licensed financial institution for debits and/or credits of the gambling activity (see clause 10 of the Bill).

An e-gambling provider may not permit an e-gambler to play unless the latter has opened an account in his or her name (ibid).

An e-gambling provider must also ensure that the e-gambler is not in a jurisdiction in which such gambling is not authorized (ibid). The e-gambler must provide a statement to the e-gambling provider that he or she is older than 18 years (ibid). An e-gambling provider must immediately transfer funds in excess of the prescribed maximum held to the credit in the player account to the player’s nominated account (ibid). In addition, the provider must not continue to conduct e-gambling services if there was a miscarriage in the e-gambling activity because of human error or a failure in the operating or telecommunications system, and that further game is likely to be affected by the same error or fault (ibid).

The e-gambling provider is also required to display the web-site licence clearly on the site (clause 12), comply with e-gambling policies on pathological gambling (s 13), comply with the e-gambling advertising code prescribed by the Minister, and ensure compliance with and display all other statutory notices (see clauses 14–18). It is also interesting to note that, as in the casino and limited payout machine industry, the Minister would be empowered to set the maximum number of online gambling sites, taking into consideration the number of existing licensed casinos, the number of other e-gambling sites, Black Economic Empowerment, and competition in the industry (see clause 23, inserting s 37A into the Act). The proposed e-gambling licensing will only take place at a national level (clause 25, amending s 39 of the Act): this will be a shift away from provincial autonomy.

Online gambling compared internationally

Germany

Similarly to the South African position on gambling, each federal state (‘Bundesland’) in Germany is authorized to regulate gambling in its own territory. Electronic gambling in a federal state that does not have legislation is a criminal offence punishable under article 284

of the German Criminal Code (see Schriever op cit at 110). So far, there are few federal states that have instituted Internet gambling. Those that have done so have adopted the protectionist restrictive approach: in addition to the licensing requirement, the e-casino may offer such services only to its residents. Germany has taken many progressive steps in the codification of online gambling law and of lotteries, and its regime is currently undergoing extensive law reform.

Austria

Austria has a purely national market, in which the state holds a monopoly (under art 3 of the Law on Gambling (the Glueckspielgesetz)) in the form of two state-owned companies: Casinos AG and the Oesterrische Lotterien Gesellschaft (see Schriever op cit at 111). In article 56(3) of the Glueckspielgesetz, Austria follows the protectionist system, in restricting e-gambling to its own residents (for further discussion, see C Zib 'Internet gambling and the Unfair Competition Act' in Strejcek et al op cit at 71). Austrian law specifically excludes minors under the age of sixteen from taking part in e-gambling activities, as well as people who do not have a bank account (see Schriever op cit at 111).

Australia

Australia has had an interesting development in the online gambling industry. It was one of the first countries to allow online gambling (as regulated by the particular state) as early as 1998 (see Forder & Quirk op cit at 337). The Queensland Government and the Northern Territory Government were pioneers in the legalization of online gambling. The latter state made such gambling legal to all its residents resident within the state and illegal to countries in which e-gambling was illegal, by virtue of amending the Gaming Control Act (idem at 345). In 1998, the State of Queensland introduced the Interactive (Player Protection) Act, which similarly provided that online gambling was legal to all its residents resident within the state and illegal to countries in which e-gambling was illegal. The influence of the Commonwealth eventually led to Australia's

passing the Interactive Gaming Act 84 of 2000. This prohibits Australian-based operators of Internet casinos from providing Internet gambling services to Australian residents. So Australian licensed casinos are free to organize games online to e-gamblers outside the borders of Australia (see Schriever op cit at 122).

The United Kingdom

A liberal approach has been taken by the United Kingdom authorities. They believe that a liberal approach should be followed, as players are likely to opt for probity and integrity that would make the country an attractive place for conducting an online gambling operation (idem at 117). The Government instituted the Budd Commission to investigate the pros and cons of online gambling. Of the 30 recommendations made, it was clear that the United Kingdom would not follow the prohibition route, as it had a well-established market. The commission also considered that policing it would be far too costly (ibid).

The United States of America (Nevada, Indian Tribal Land and the United States Virgin Islands)

In the United States of America, regulatory authority usually lies with the jurisdiction of each state. This principle has resulted in an interesting mixture of regulatory models within the country. It would generally be correct to say that a totally prohibitive model is followed in the United States, as federal legislation (the Live Wire Act 18 USC 1084) makes it a punishable offence to place or facilitate a wager or a bet via the transmission of a wire communication. Those found guilty face imprisonment of up to two years and/or a fine. There have been a couple of successful prosecutions against companies, in particular their management officials, the most prominent being the company directors of Sports Illustrated online in the much-reported case of *Cohen v United States* 378 F 2d 756 at 757 (9th Cir 1967).

It should be noted that most of the e-gambling takes place in the Native American tribal lands under a specific statute that authorizes online

gaming only within that territory or to people outside its jurisdiction where online gambling is permitted (see Indian Gaming Regulatory Act, Public Law 100-497, codified essentially in 25 USC §§ 2701–2721). There are other states such as Illinois, South Dakota, and Nevada that have legalized regulated online gambling (see Schriever *op cit* at 107).

The Isle of Man

Under section 2(2) of the Online Gambling Regulation Act 2001, it is a criminal offence to provide online gambling services to anyone within the territory and/or to one of the prohibited countries. (This statute is accessible at <http://www.gov.im/gambling/cts/gamblingregulation2001.pdf>.) Section 7 specifically prohibits the ‘accepting of bets or stakes from any person in a country or territory in which it is illegal and/or [the] accept[ing of] bets by means of an electronic communication service’. This prohibition also applies to advertising in the prohibited territories and/or countries (see s 3(3)).

Conclusions and recommendations

The various attempts by different countries to outlaw electronic gambling seem to stem from a dying philosophy. Most jurisdictions around the world have decided to regulate online gambling, instead of outlawing it for economic, social, and

practical reasons. Currently, electronic gambling in South Africa has been prohibited because of the lack of a competent and legitimate legislative model that would govern it within the country.

Most jurisdictions around the world have decided to regulate online gambling, instead of outlawing it for economic, social, and practical reasons

I feel that the most practical and legitimate gambling models applicable to the South African scene would those of a liberal restrictive nature or (in my opinion, the best option) the restrictive prohibitive model, as suggested in the discussion of the proposed amendments to the National Gambling Act. This also seems to be the international trend as well as the most practical and manageable solution. South Africa seems aware of the risks and dangers associated with electronic gambling, and I am sure that our country, with a little more effort, could lead Africa by being a leader in the world of electronic gaming (online gaming) regulation.

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