2007 Journal for Juridical Science 32(2): 1-17

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The role of public policy in the non-enforcement of foreign judgments arising from gambling debts in South African courts: A comparative overview

Summary

The aim of the article is to ascertain whether a foreign judgment, arising from a gambling debt in a foreign land-based casino, would be enforceable in South African courts in light of the partial legalisation of gambling within South Africa. The provisions of the *Enforcement of Foreign Civil Judgments Act* 32/1988 as well as the common law are discussed with specific reference to the possible "public policy"-exception preventing the enforcement of such foreign judgments. The reported judgment of *Casino Hotel Polana Sarl v Tintinger* 2003 JDR 0792 (T) is examined and evaluated in light of the *National Gambling Act* 7/2004. The existing foreign precedents in Malaysia, Switzerland, two states in the USA namely, California and New York, and Canada are referred to, to illustrate the divergent public policies in this regard as well as the varied interpretation of the concept of international comity. The outcome reached in the Malaysian courts is similar to South Africa and also based on reasons of public policy, although religion seems to have played a more important role in the Malaysian decision. The decisions in Switzerland, California, New York and Canada, however, came to a different conclusion based on a changed public policy and for reasons of comity, although it is concluded that it is uncertain whether other, more conservative states in the USA, will follow suit.

Die rol van openbare beleid in die nie-afdwingbaarheid van buitelandse hofbevele, wat voortspruit uit dobbelskuld, in die Suid-Afrikaanse howe

Die doel van die artikel is om vas te stel of 'n buitelandse hofbevel, wat voortspruit uit 'n dobbelskuld aangegaan in 'n oorsese casino, afdwingbaar sal wees in 'n Suid-Afrikaanse hof in die lig van die wettiging van sekere dobbelgeleenthede in Suid-Afrika. Die *Wet op die Afdwinging van Buitelandse Siviele Vonnisse* 32/1988 sowel as die gemenereg word bespreek met spesifieke verwysing na die 'openbare beleid'-uitsondering wat afdwingbaarheid van 'n buitelandse hofbevel kan verhinder. Die gerapporteerde uitspraak van *Casino Hotel Polana Sarl v Tintinger* 2003 JDR 0792 (T) word ondersoek en geevalueer in die lig van die *Nasionale Dobbelwet* 7/2004. Daar word verwys na die beskikbare presedente in Maleisië, Switserland, twee state in die VSA naamlik Kalifornië en New York, en Kanada ten einde die verskeidenheid van openbare beleide, asook die verskillende interpretasies van internasionale hoflikheid, te illustreer. Die konklusie in die Maleisiese hof is soortgelyk aan die Suid-Afrikaanse uitspraak en ook gebaseer op openbare beleid, hoewel godsdiens klaarblyklik 'n belangrike rol daar gespeel het. Die uitsprake in die howe van Switserland, Kalifornië, New York en Kanada het egter tot 'n ander slotsom gekom — hoewel ook gebaseer op openbare beleid en vir redes van internasionale hoflikheid, hoewel dit onseker is of ander, meer konserwatiewe state in die VSA dieselfde slotsom sal bereik.

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1. Introduction

The issue to be discussed in this article is the enforcement, in South African courts, of foreign judgments arising from gambling debts incurred in foreign land-based casinos. The enforcement of interactive gambling debts is specifically excluded from this note. Only one South African case has been reported on this point: *Casino Hotel Polana Sarl v Tintinger*.[1] The aim of this article is to discuss this judgment within a broader legal context with specific reference to the *Enforcement of Foreign Civil Judgments Act*,[2] the common law and the *National Gambling Act*.[3]

Because very few judgments on this point exist worldwide, a brief overview of all available foreign judgments that could be sourced electronically is included. However, the aim is not to fully discuss the legal position in these jurisdictions as each jurisdiction determines the enforceability of such foreign debts according to its own legal system. That is the subject of further research. The overview is merely an attempt to highlight the risks that underlie the enforcement of foreign gambling debts and to point out that the mere fact that a jurisdiction legalises certain forms of gambling, does not necessarily mean that its public policy regarding the enforceability of foreign gambling debt has changed to such a degree that foreign judgments would be enforced in their courts. The foreign judgments included are from Malaysia, Switzerland, two states in the USA namely California and New York, and Canada.

2. Enforcement of foreign civil judgments in South African courts

2.1 Introduction

The basic rule in the South African law is that a foreign judgment is not automatically enforceable in the South African courts.[4] Statutory provision is made for the enforcement of some foreign judgments; the most notable is the *Enforcement of Foreign Civil Judgments Act*.[5] This Act is, however, not applicable to all foreign debts and where the statute is not applicable, the common law position will regulate the situation. Kahn notes that in terms of the common law, a foreign judgment can be recognised in certain circumstances if it is so pronounced by a proper court of law thereby making it enforceable within the ordinary courts in South Africa.[6] Each of these possibilities is discussed in turn.

1 2003 JDR 0792 (T).
2 Act 32/1988.
3 Act 7/2004.
4 Malan et al 1995:282.
5 Act 32/1988. See also the *Recognition and Enforcement of Foreign Arbitral Awards Act* 40/1997 as read with *Seton Co v Silveroak Industries Ltd* 2000 2 SA 215 (T), although a full discussion of arbitration awards falls outside the scope of this note. The *Protection of Businesses Act* 99/1978, although relevant to certain foreign judgments, is not applicable in a gambling scenario and thus also excluded from the discussion.
6 Kahn 2003: par 344.

2.2 *Enforcement of Foreign Civil Judgments Act*[7]

In terms of the *Enforcement of Foreign Civil Judgments Act*, a civil judgment given in a designated foreign country may be enforced in the magistrates' courts within the Republic. Leaving aside the procedure to be followed, it is sufficient to note that the court need only register the final judgment or make an order for the payment of the debt to the foreign court.[8] This order will include taxed costs and interest where applicable.[9] If any amount payable under a judgment registered under this section is expressed in a currency other than the currency of the Republic, the judgment must be registered as if it were a judgment for such amount in the currency of the Republic, calculated at the rate of exchange prevailing at the date of the judgment.[10]

Such registered judgment then has the same effect as a civil judgment of the court at which the judgment has been registered.[11] The serving of a notice of such registration, on the judgment debtor, is compulsory.[12] Moreover, the Act provides that a judgment may not be executed before the expiration of 21 days after service of such a notice, or until an application to set aside the judgment has been finally disposed of.[13]

Section 5 of the Act makes provision for the setting aside of the registered judgment within 21 days after receipt of the notice[14] in certain circumstances. For purposes of this article section 5(1)(e) is of importance:

> The registration of the judgment shall be set aside if the court at which judgment is registered is satisfied … (e) that the enforcement of the judgment would be contrary to public policy in the Republic.

The Act does not define "public policy" and the exact contents of this concept are neither precise nor static. This issue is discussed below. But what is clear is that South African public policy may prevent the registration and enforcement of a foreign judgment, even under this Act.

It should be noted that the scope of this Act is very limited as the Minister has to designate the country by notice in the Government Gazette.[15] Originally only the former so-called TBVC states (former "independent homelands") were designated; but, with their reincorporation back into the South African territory, their designation became superfluous. Only Namibia has since been designated,[16] although an agreement had been entered into with Zimbabwe that such designation would be potentially forthcoming after the adoption of similar legislation by the Republic of Zimbabwe.[17]

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7 Act 32/1988.
8 *Enforcement of Foreign Civil Judgments Act*: section 3.
9 *Enforcement of Foreign Civil Judgments Act*: section 3(1).
10 *Enforcement of Foreign Civil Judgments Act*: section 3(4).
11 *Enforcement of Foreign Civil Judgments Act*: section 4.
12 *Enforcement of Foreign Civil Judgments Act*: section 3(3).
13 *Enforcement of Foreign Civil Judgments Act*: section 4(2).
14 *Enforcement of Foreign Civil Judgments Act*: section 5(2).
15 *Enforcement of Foreign Civil Judgments Act*: section 1.
16 GR 5895 GN 487 *Government Gazette* 1997:17881.
17 GN 1866 *Government Gazette* 1994:16065.

To conclude, a gambling debt incurred in Namibia (and possibly soon also in Zimbabwe) would be enforceable in South African courts in terms of this Act if the procedures are followed and the requirements met and if it would not be regarded by the courts as contrary to South African public policy.

2.3 Recognition and enforcement of foreign judgments under common law

Because of the limited application of the *Enforcement of Foreign Civil Judgments Act*, 1988 discussed above, it has been submitted that the common law enforcement could be the only *de facto* remedy available to foreign judgment creditors.[18] In terms of the common law, enforcement of a foreign debt is a possibility in South African courts where certain requirements have been met.[19] However, even if all the requirements have been met, South African courts could still not enforce the judgment (in terms of the common law) where such enforcement would be in conflict with South African public policy.[20]

2.4 Public policy

2.4.1 Public policy as it relates to gambling *per se*

Both the 1988 Act and the common law provide for a "public policy" exception that could result in a foreign debt not being enforced in South Africa. Public policy is unfortunately not easily determined. Public policy as it relates to gambling *per se* seems to have undergone some change over the past decades. In terms of the Roman-Dutch common law gambling was not prohibited. It was, however, regarded with some distaste and subject to inhibiting rules, most importantly the unenforceability of any gambling debts or debts arising out of gambling. The rationale for the denial of a sanction seems to be that if gambling debts were to be enforceable, it would encourage the activity of gambling — which was regarded as contrary to the public policy of the time mainly on account of the social and economic evils that attended excessive gambling.[21] These debts were always regarded as unenforceable based on public policy reasons.[22] This was so irrespective of whether the gambling contract was entered into within the country or within another country.[23]

This situation changed over the centuries and during the 18th and 19th centuries most forms of gambling were prohibited by legislation, as opposed

18 Kelbrick 2001:157.
19 For a full discussion see Malan 1995:282 and Kahn 2003: par 344-346.
20 *Timms v Nicol* 1968(1) SA 299 (R).
21 Harker: par 414-417, 430; Gane 1955:722.
22 *Dodd v Hadley* 1905 TS 439: 442; *Gibson v Van der Walt* 1952 (1) SA 262 AD; *Estate Wege v Strauss* 1932 AD 76: 81; *Kramer v Maleta* 1949 (2) SA 911 (T).
23 *Timms v Nicol* 1968 (1) SA 299 (R).

to merely being unenforceable.[24] These prohibitions were finally consolidated in the *Gambling Act*[25] whereby all organized public gambling activities were prohibited, with the notable exception of betting on horse races. Public policy was clearly still against enforcement of gambling debts in general, domestic or foreign. In the matter of *Timms v Nichol* the court stated the principle:

> (The court) will not enforce a foreign judgment or contract entered into in another country which is contrary to the ideas of public policy as applied in this court.[26]

Since the 1980s public opinion has changed to become more accepting of gambling as a recreational pastime. The changes in public acuity were first officially noted *obiter* in *Nichol v Burger*.[27] The changing public opinion was also mentioned in *Atlantic Slots v MEC for Economic Affairs, North West*,[28] although the court in *Sea Point Racing CC v Wilkinson*[29] refused to take judicial notice of the changing public policy towards gambling. The change was confirmed in two subsequent governmental investigations into the possible legalization of gambling: the 1993 *Commission of Enquiry into Lotteries, Sports Pools, Fund-Raising Activities and Certain Matters Relating to Gambling*[30] and the 1995 *Main Report of Gambling in South Africa*[31] in terms of the *Lotteries and Gambling Board Act*[32] by the Lotteries and Gambling Board.

The change in public opinion regarding gambling was clear from the fact that the casinos in the so-called "independent" TBVC states flourished with South African patronage, and from the number of successful illegal casinos operating in the country at the time.[33] However, gambling debts remained unenforceable. The changes in legislation were precipitated by the argument that as society at large had little objection to gambling per se, and as a latent demand for gambling already existed within the country, it should be harnessed to fulfill the need for state revenue, from this new and voluntary tax base, to fund much-needed social and economic upliftment programs.[34]

The gaming industry has had a significant effect on the economy. The casino gaming industry has been one of the fastest growing industries in South Africa in the past decade, although it is expected that the growth would taper off as most of the casino licenses have already been awarded. The 23 new casinos have drawn fixed investments to the value of more than R11,7 billion.

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24 See the *Betting Houses, Gaming Houses and Brothels Suppression Act* 36/1902; (Natal) Law to provide for the Discouragement of Gambling 25/1878; and the (Transvaal) *Wet Tegen Hazardspelen* 6/1889 to name a few.
25 Act 51/1965.
26 *Timms v Nicol*: 300A-B. See, however, *Bishop v Conrath* 1947 (2) SA 800 (T).
27 1990 (1) SA 231 (C): 236F-G.
28 1997 (2) BCLR 176 (B): 178I-J.
29 1999 (2) All SA 626 (D): 627H-I.
30 RP 80/1993: 144-145.
31 RP 85/1995: 72.
32 Act 21/1993.
33 The South African Police Service, in 1993, stated that they were aware of about 2000 illegal casinos operating in South Africa (RP 80/1993: 14).
34 RP 85/1995: 55.

The casinos employ about 60 000 persons and have created tourism and conference facilities in most of the nine provinces. Most importantly, the casinos have shown, on average, a historically disadvantage investment (HDI) and procurement interest of 43% — one of the highest in the country.[35] The South African gambling industry is vast: there are currently 32 licensed casinos, a bi-weekly national lottery, wagering on horseracing and sporting events, bingo halls and about 700 of intended 50 000 LPMs operational in the country — all licensed and regulated by one or more of the 11 national and provincial regulatory gambling boards. For the financial year ending March 2004 the total gross gambling revenue generated was R8240,2 million of which 89,1% was by the casinos. The direct gambling tax collected for the same period amounted to R763,7 million, of which 83,3% emanated from casinos.[36] The taxes generated from the National Lottery for the same period were more than R986 million. Gambling is clearly being embraced by South African society.

Changes in public opinion regarding gambling and changes in the economy are, however, not necessarily enough to ensure a change in public policy regarding the enforcement of foreign gambling debts. The answer hereto should be sought in the Constitution and the gambling legislation. In the words of Harms JA:

> … laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments.[37]

With the advent of the new constitutional system in the mid-1990s gambling in various forms was legalised subject to licensing and strict regulation thereof. Leaving aside lotteries and sports pools,[38] both national and provincial legislatures were given the power to regulate casinos, racing, gambling and wagering.[39]

Nationally, certain uniform gambling rules and standards are applicable throughout the country. These uniform rules include that gaming must be effectively regulated, licensed, controlled and policed; that the participatory public must be protected; and that society and the economy must be protected against the over-stimulation of the latent demand for gambling.[40] All of the

35 Erwin 2002: 4 as read with the National Gambling Board 2004:42.
36 National Gambling Board 2004: 42.
37 *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA): par 7.
38 Lotteries and sport pools are regulated exclusively by the *Lotteries Act* 51/1997.
39 *Constitution of the Republic of South Africa Act* 106/1996: section 104(1)(b). Ten statutes are relevant hereto: *National Gambling Act* 7/2004; *Eastern Cape Gambling and Betting Act* 5/1997; *Free State Gambling and Racing Act* 6/1996; *Gauteng Gambling Act* 4/1995; *KwaZulu-Natal Gambling Act* 10/1996; *Mpumalanga Gaming Act* 5/1995; *Northern Cape Gambling and Racing Act* 5/1996; *Northern Province Casino and Gaming Act* 4/1996; *North West Gambling Act* 2/2001 and the *Western Cape Casino and Racing Law* 4/1996. Each of these provincial statutes includes a set of comprehensive regulations and rules.
40 *National Gambling Act*, 2004: preamble; a repeat of the *National Gambling Act*, 1996: long title and preamble as read with sections 10(a) and 13(1).

gambling statutes dealing with casino gaming contain provisions making gambling debts, lawfully incurred, enforceable in the courts.[41] The inter-provincial enforceability of gambling debts was confirmed in *Sea Point Racing CC v Pierre de Villiers Berrange NO*.[42]

It is submitted that there has been a change in the public policy with regard to gambling *per se* within the country and that it has become bifurcated: one public policy exists for licensed and regulated gambling and another public policy for other types of gambling. But, does the change in the public policy go so far as to extend to the enforcement of foreign gambling debts?

2.4.2 Public policy regarding the enforcement of foreign gambling debts

Only one judgment is available on the issue of enforcement of a foreign gambling debt in South Africa: *Hotel Polana Sarl v Tintinger*.[43] The plaintiff, a Mozambican company that operates a casino in the Polana Hotel in Maputo, sued Tintinger, a resident of Gauteng, for a gambling debt incurred at the said casino.[44] Only one issue was to be determined by the court: whether a gambling debt incurred in Mozambique could be enforced in South Africa more, particularly in Gauteng.

The plaintiff relied on the provisions of section 18 of the *National Gambling Act*[45] (prior to its repeal by the *National Gambling Act*, 2004[46]) and the equivalent provincial statutory provision, section 75 of the *Gauteng Gambling Act*,[47] both allowing the enforcement of gambling debts *lawfully* incurred. The plaintiff also relied on the preamble of the *National Gambling Act* which stated its objectives as uniform norms, the determination of national economic policy and the prevention of provincial laws prejudicing the economic interests of other provinces.[48] The plaintiff argued that a gambling debt, lawfully incurred according to the laws of Mozambique, was a gambling debt lawfully incurred for the purposes of the *National Gambling Act* and the *Gauteng Gambling Act*.

The respondent argued that the *National Gambling Act* and the *Gauteng Gambling Act* do not have extra-territorial operation. He argued that, to the extent that the two Acts changed the common law, they should be interpreted

41 *National Gambling Act* 7/2004: section 16, replacing the *National Gambling Act* 33/1996: section 18; *Gambling and Betting Act* 5/1997 (Eastern Cape): section 87; *Free State Gambling and Racing Act* 6/1996: section 95; *Gambling and Betting Act* (Gauteng) 4/1995: section 75; *KwaZulu-Natal Gambling Act* 10/1996: section 92; *Mpumalanga Casino and Gaming Act* 5/1995: section 87; *Northern Cape Gambling and Racing Act* 5/1996: section 93(1); *Limpopo Casino and Gaming Act* 4/1996: section 91; *North West Gambling Act* 2/2001: section 75(1) and the *Western Cape Casino and Racing Law* 4/1996: section 79(1).

42 (N) 1-8-2000 (case AR 774/99 unreported).

43 2003 JDR 0792 (T).

44 *Hotel Polana Sarl v Tintinger*: par 1.

45 Act 33/1996.

46 Act 7/2004.

47 Act 4/1995.

48 *Hotel Polana Sarl v Tintinger*: par 2-3.

restrictively. He referred to the provisions of both Acts and contended that the *National Gambling Act* applied only to gambling within the Republic; and the *Gauteng Gambling Act* only applied to gambling within Gauteng, as regulated by those Acts. The respondent also referred to the definition of the word "law" in the *Interpretation Act*, 1957[49] and argued that the reference in sections 18 and 75 to lawfully incurred debts can only refer to debts lawfully incurred in terms of South African legislation.[50]

The court stated that it was unsure whether allowing the recovery of gambling debts contracted in other countries amounted to an extra-territorial operation of the *National Gambling Act* and/or the *Gauteng Gambling Act* — especially if recovery took place within this country.[51] The wording of sections 18 and 75 of the two Acts respectively are capable of the interpretation that the recovery of gambling debts lawfully incurred anywhere in the world is legalised. The court noted that the conclusion rests on the intention of the legislature to be determined by having regard to the whole texts of the two Acts as established from the language and the context in which they appear in the scheme of the legislation, also bearing in mind the scope and purpose of the statutes.[52]

With reference to *Timms v Nicol*[53] the court noted that there was no dispute that the common law, though not prohibiting gambling as such, does not allow the enforcement of gambling debts incurred in a foreign country where they are enforceable. It was also accepted that the *National Gambling Act* and the *Gauteng Gambling Act* did not altogether abolish the common law with regard to gambling.[54]

After noting the preambles of both the Acts and considering how tightly the operation of casinos is regulated, the court found that there was no reason to suppose that the two Acts intended anything more than to render lawful the recovery of gambling debts incurred under their own strict conditions — for the social and economic purposes to the benefit of the people of this country. The court noted further that it could not discern any intention to make gambling debts, incurred all over the world, enforceable in the South African courts without any regard to the contents of the municipal legislation under which they arose.[55]

The court noted that where these two sections have the effect of *pro tanto* cutting back the common law, it must be presumed that this is not done to any greater extent than is strictly required for the purposes of these Acts.[56] The provisions for the enforcement of gambling debts for the purposes of these

49 Act 33/1957.
50 *Hotel Polana Sarl v Tintinger*: par 3.
51 *Hotel Polana Sarl v Tintinger*: par 3.
52 *Hotel Polana Sarl v Tintinger*: par 4.
53 1968(1) SA 299 (R).
54 *Hotel Polana Sarl v Tintinger*: par 4.
55 *Hotel Polana Sarl v Tintinger*: par 5-8.
56 *Hotel Polana Sarl v Tintinger*: par 8-9.

Acts are only required to protect locally licensed casinos against defaulters. Otherwise the intended social advantages of legalised gambling will not accrue.[57]

The court further noted that if the interpretation proposed by the plaintiff were taken to its logical consequence, there would be no reason why private gambling debts incurred in the Republic, but not on premises licensed in terms of the legislation under consideration, should not be enforceable. After all, in terms of the common law such debts are not unlawful, but merely unenforceable. It is inconceivable that the law-makers would have intended to bring about such a result.[58] The plaintiff's claim was dismissed with costs.[59]

Subsequent to the *Tintinger* judgment, however, the previous *National Gambling Act*, 1996[60] upon which the decision was partly based, was repealed and the replaced by the 2004 Act with the same short title.

The question is whether the *National Gambling Act* amended the common law with regard to the public policy on the enforcement of foreign gambling debts. The best indication of public policy is found in section 16 of the *National Gambling Act*[61] which sets out the enforceability of gambling debts:

> 16 Enforceability of gambling debts and forfeiture of unlawful winnings
>
> (1) Despite any provision of the common law, or any other law other than this Act-
>
> (a) a debt incurred by a person, other than an excluded person, subject to paragraph (d) (ii), or a minor, in the course of a gambling activity that is licensed in terms of this Act or provincial law, is enforceable in law;
>
> (b) a debt incurred by a person other than an excluded person, subject to paragraph (d) (ii), or a minor, in the course of a gambling activity that is lawful but not required to be licensed, in terms of this Act or provincial law, is enforceable in law only to the extent that it is enforceable in terms of the common law or another law;
>
> (c) a debt incurred by a person in the course of any gambling activity that is unlawful in terms of this Act or applicable provincial law is not enforceable in law;
>
> (d) a debt incurred in the course of a gambling activity-
>
> (i) by a minor is not enforceable in law; or
>
> (ii) by an excluded person is not enforceable in law, unless that excluded person gained access to that gambling activity by fraudulently claiming to be a different person; and
>
> (e) an informal bet is not enforceable in law.

In short: (1) all gambling debts incurred in a licensed gambling activity, in terms of South African legislation only, are enforceable; (2) gambling debts lawfully incurred, but not subject to licensing, are only enforceable if they are

57 *Hotel Polana Sarl v Tintinger*: par 9.
58 *Hotel Polana Sarl v Tintinger*: par 10.
59 *Hotel Polana Sarl v Tintinger*: par 11.
60 Act 33/1996.
61 Act 7/2004.

enforceable in terms of the common law or the provincial law; (3) unlawful gambling debts remain unenforceable; (4) any gambling debt incurred by minors or excluded persons are unenforceable; (5) as is any other informal wagering debt. The Act is silent on the issue of the enforcement of foreign gambling debts.

Returning to the question as to whether the change in the public policy goes so far as to extend to the enforcement of foreign gambling debts, it is submitted that the answer is "no". It is clear that the section only changes the common law in a limited manner and that the common law is still applicable in those instances not specifically amended. It is thus concluded that only gambling debts entered into in the course of a gambling activity licensed in terms of the South African legislation, and not foreign legislation, have become enforceable. The argument in the *Tintinger* judgment, namely that the aim of the South African gambling statues is to protect locally licensed casinos and not foreign gambling operations, remains valid and it is submitted that foreign gambling debts would still be unenforceable in South African courts.[62]

2.5 Conclusion

In conclusion it is submitted that the law regarding the enforcement of a foreign gambling debt has not changed as the public policy regarding such enforcement has not changed, although it might be argued that the public policy regarding gambling *per se* might have become bifurcated. The *National Gambling Act*, 2004 specifically only provides for the enforcement of gambling debts licensed in terms of the South African legislation.

3. Foreign case law

As mentioned above, very few judgments that deal with the issue of the enforceability of foreign gambling debts are available worldwide. With the global increase in the legalisation of gambling in many jurisdictions, the issue should become more important in future. From the outset it should be noted that the solution to the problem would be determined by the law of each of these jurisdictions. It is reiterated that the aim of the inclusion of these judgments in this article is not to argue that the South African courts should necessarily follow these judgments, but merely to provide an overview to the gambling industry of the problems relating to this issue. It should be pointed out that the mere fact that a jurisdiction legalises certain forms of gambling does not necessarily mean that its public policy regarding the enforceability of foreign gambling debt has changed to such a degree that these foreign judgments would be enforced in their courts. A variety of jurisdictions are available and included from numerous countries: Malaysia, Switzerland, the USA (California and New York) and Canada.

62 As public policy exclude enforcement of foreign judgments, the issue of the applicable law does not arise and is excluded from this discussion. Whether this would remain the same in light of the Internet Gambling Bill, 2006 remains to be seen and this issue is excluded from this discussion as well.

3.1 *Malaysia: Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*[63]

On 5 July 2005 the High Court of Sabah and Sarawak at Kota Kinabalu in *Malaysia, in The Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*, found that an English High Court judgment for an equivalent of RM 7,142,859.98 which was registered in terms of the *Reciprocal Enforcement of Judgment Act*, 1958 was not enforceable in Malaysia as it contravened the public policy of that country — notwithstanding the fact that gambling is allowed under license in Malaysia.[64]

The facts were briefly as follows: the plaintiff allowed the respondent to gamble on credit in their London casino. When the credit was not honoured, they obtained judgment against him in the English courts. The respondent, however, returned to Malaysia. The question before the Malaysian court was whether this foreign judgment was enforceable in Malaysia.[65] The court determined that there was no doubt that gambling is injurious to the public welfare or else there would not have been a law from time immemorial that gambling debts are irrecoverable. The court based its finding on the two principles of Malaysian national philosophy called the *Rukun Negara: Belief in God* and *Good Social Behaviour*, culminating in the conclusion that gambling is injurious to the public welfare as it is against the *Rukun Negara*. The court noted specifically that in the multi-racial and multi-religious Malaysia, all religions condemn gambling: *inter alia*, Islam, Christianity, Hinduism and Buddhism, as well as the faith of the Malaysian people of Chinese descent. Justice Datuk Ian HC Chin went further and equated gambling to prostitution as twin vices that should be avoided and noted that it could not be good social behaviour to indulge in either of these vices, even though both might be legal in many foreign countries. The court decided that gambling, like prostitution, is contrary to public policy. It overturned the previous decision in *The Aspinall Curzon Ltd v Khoo Teng Hock*[66] which allowed the registration of a foreign judgment for a gambling debt based on the argument that the court in the Hock matter never considered the issue of public policy.[67]

The argument was raised by the Respondent that gambling debts incurred in Malaysia would suffer the same fate in foreign countries if the court decided not to enforce similar foreign judgments. The court's short answer hereto was that the world would be a much better place in such a case as it would make for a better public policy. In fact, the court suggested that a law should be enacted to allow a gambler to sue a casino for enticing him to gamble beyond his means, as the populace must be protected from being enticed to gamble on credit. The only way to discourage this type of "entrapment", according to the court, is to prevent such foreign judgment founded on gambling from being registered in terms of the Act and from being enforceable in Malaysia.[68]

63 Originating Summons No.K24-105 of 2004.

64 *Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*: par 357.

65 *Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*: par 357.

66 [1991] 2 MLJ 484.

67 *Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*: par 355-360.

68 *Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*: par 360.

The decision with regard to costs did not follow the norm. Although the court dismissed the application for the registration of the English judgment, it made no order as to costs. The court found that the respondent was not deserving of a cost order as he had engaged in an activity upon which his religion frowns and that was against public policy.[69]

3.2 Switzerland

Bonomi refers to a 2000 Swiss Federal Tribunal[70] decision which held, after the enactment of the 1998 Act 515a of the Code of Obligations that made gambling debts contracted with a licensed casino enforceable, that Swiss public policy is not opposed to the recognition and execution of a foreign judgment condemning a player to the payment of a wagering debt under the Lugano Convention (European Community). The court concluded that in light of the acceptance of gambling by the populace and the legalisation of casino gambling in the country, having recourse to the judiciary and to the procedure of execution in order to enforce foreign gambling debts contracted at a legally authorised casino is not contradictory with the Swiss public order.[71] Foreign judgments resulting from a legal gambling debt are thus enforceable in the Swiss courts under the Convention.

3.3 California and New York, USA

It should be noted that with regard to the public policy of inter-states enforcement, where recognition of a sister state judgment on gambling debts is sought, a state cannot prevent the recognition of the judgment.[72] The issue of enforcement of a judgment from one state in another state (in the USA) is ignored for purposes of this article.[73]

69 *Ritz Hotel Casino Limited and R.H.C Limited v Datu Seri Osu Haji Sukam*: par 360.

70 19.9.2000, ATF 126 III 534 as quoted in Bonomi 2004:213-4.

71 Bonomi 2004: 214.

72 Bonomi 2004: 215. However, in the case of *Metropolitan Creditor Service of Sacramento v Sadri* 15 Cal App 4th 1821:par 1826, the court concluded that two things had changed since the 1947 *Hamilton*-case: firstly, the state from which the judgment originated (Nevada *in casu*) had amended its own laws to make gambling debts enforceable; and secondly, the people of California had demonstrated an increased tolerance of gambling by legalization of certain types of gambling in California itself (1827). The court went further and made a distinction between the public tolerance towards gambling and the strong public policy against the enforcement of gambling debts and reconfirmed the *Hamilton* rule that gambling debts cannot be enforced based on public policy reasons (par 1832).

73 For a full discussion in this regard, see Lord 2006:17:8. In *Bryant v Mead* (1881) 1 Cal 441: par 444 it was stated that wagering and the enforcement of gambling contracts was *contra bonos mores*. In *Carrier v Brannan* 3 Cal 328, 1853 WL 707 (Cal) 329 the court noted that it would be humiliating for the courts to enforce any order based on a gambling debt. These decisions were confirmed in *Hamilton v Abadjian* (1947) 30 Cal.2d 49, 179 P 2d 804.

The public policy exception to the enforcement of foreign judgments in the USA dates back to 1895. In the case of *Hilton v Guyot*[74] the court refused to enforce a foreign judgment that violated the public policy of the court.[75] Danford is of the opinion that the US courts construe this public policy exception narrowly in most states, and only rarely exercise it.[76]

In the state of California, the courts, until the 1980s consistently refused to enforce foreign judgments based on gambling debts. However, in the decision of *Crockford's Club Ltd v Si-Ahmed*[77] the court did enforce a judgment by an English court arising out of gambling by relying on California's "expanded acceptance" of gambling. Minehan refers to the similar case of *Aspinall's Club Ltd v Aryeh*[78] where the court noted that in view of the expanded acceptance of gambling in California as manifested by the introduction of the state lottery, it could not be maintained that the enforcement of a foreign judgment based on a gambling debt was "so antagonistic to California public policy interests as to preclude the extension of comity".[79]

In New York State the situation is similar. In *Intercontinental Hotels Corp (Puerto Rico) v Golden*[80] the court enforced the foreign judgment even though it was based on a gambling debt, rejecting the argument that a Puerto Rican judgment to recover gambling debts was contrary to New York's public policy.[81] W h at is interesting is that the court noted that public policy could not be determined by mere reference to the laws of the forum alone. A strong indication of a public policy is also found in the prevailing social and moral attitudes of the community.[82] The court concluded that changing attitudes of the community could be seen in the legalization of gambling within the state. Moreover, it held that the New York public did not consider authorised gambling a violation of "some prevalent conception of good morals (or), some deep-rooted tradition of the common weal".[83] The dissenting judgment on the other hand refused to ignore the common law and noted that public policy has not changed enough as to allow for the enforcement of foreign judgments based on gambling debts.[84] The majority decision was, however, confirmed in *Crockford's Club Ltd v Si-Ahmed*[85] where the New York Appellate Division confirmed that gambling in its legalised and appropriately supervised form is not against the New York State's public policy.[86]

74 159 U.S. 113, 164-165 (1895).
75 Danford 2004:428; Reed 2003:256.
76 Danford 2004:428; Minehan 1996:799.
77 (1988) 203 Cal.App.3d.1402, 250 Cal.Rptr.728.
78 250 Cal Rptr 728 730 (Ct App 1988).
79 Minehan 1996:801 fn 38.
80 203 NE2d 210 214 (NY 1964); Danford 2004:429 and Minehan 1996:801.
81 Danford 2004:429; Minehan 1996:801.
82 *Intercontinental Hotels Corp (Puerto Rico) v Golden*: par 212-213.
83 *Intercontinental Hotels Corp (Puerto Rico) v Golden*: par 213.
84 *Intercontinental Hotels Corp (Puerto Rico) v Golden*: par 216.
85 450 NYS 2d 199 203 (App Div 1982).
86 Minehan 1996:801 fn 38.

Although recent cases in California and New York suggest a more liberal approach, one can only agree with Bonomi that it remains uncertain whether other, more restrictive jurisdictions will follow the same approach.[87] Due to a lack of judicial precedent in this regard it would be difficult to make a prediction.

3.4 Canada

In the Ontario Court of Appeal in *Boardwalk Regency Corp v Maalouf*[88] the issue of public policy also came to the fore. The majority decision found that a judgment for a New Jersey, USA, gambling debt was enforceable in Ontario despite the national legislation rendering the gambling agreement void.[89] The court noted that the New Jersey judgment did not offend "essential morality" and Lacourciere JA noted: "Where the foreign law is applicable, Canadian courts will generally apply the law even though the result is contrary to domestic law".[90] The judge adopted a "contemporary community standard of morality" to determine whether the enforcement of the foreign gambling debt would be contrary to public policy.[91] Carthy JA put it as follows:

> This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general outlook to countenance the conduct, no matter how legal it may have been where it occurred.[92]

On the other hand, Arbour JA, in his dissenting judgment, rejected the idea that public policy is also determined by morality. He concluded that, as a gambling contract would be void in Ontario, it is a clear indication of the public policy and that the foreign judgment should therefore not be enforceable in Ontario.[93]

In *Resorts International Hotel Inc v Auerbach*[94] the Court of Appeal in Quebec allowed the enforcement of a judgment for $10 000 given in the Superior Court of New Jersey. The court concluded:

> public order is not, in any event, a static or immutable concept. What may have affronted public order in the distant past may not do so today. Given the range of lotteries, pari-mutual betting activities, casinos and other gambling activities in many countries of the civilized world, (including some in Quebec), I do not believe we can easily be shocked if gambling contracts are legally permitted and enforced in other jurisdictions. We may have our own domestic rule which denies recovery on such contracts when they are made here, but I do not see any principle of public order by which our rule should be extended to contracts governed by foreign law.[95]

87 Bonomi 2004:215.
88 (1992) 6 O R (3rd) 737, 88 D L R (4th) 612, 51 O A C 64.
89 *Gaming Act*, R.S.O. 1990.
90 *Boardwalk Regency Corp v Maalouf*: par 748.
91 *Boardwalk Regency Corp v Maalouf*: par 9; *The Society of Lloyd's v Paul F Saunders* [2001] I.L.Pr. 18.
92 *Boardwalk Regency Corp v Maalouf*: par 9.
93 *Boardwalk Regency Corp v Maalouf*: par 50.
94 43 Q A C 75.
95 *Resorts International Hotel Inc v Auerbach*: par 7.

The majority in both cases enforced the foreign judgments arising from outstanding gambling debts.

4. Conclusion

In South African law the common law seems to be intact. Although it might be argued that there has been a shift in the public policy regarding gambling per se, this change does not extend to the enforcement of foreign gambling debts. This is confirmed, by implication, in the *National Gambling Act*, 2004. Foreign gambling debts thus remain unenforceable in the courts for reasons of public policy. The outcome is the same whether the enforcement is sought in terms of the *Enforcement of Foreign Civil Judgments Act* or the common law.

In all the foreign jurisdictions mentioned, the arguments by the plaintiffs included the following: as gambling had been legalised within the country where enforcement was sought, foreign gambling judgments should be enforceable in the courts. The success of this argument depended on the jurisdiction.

In Malaysian law, the *Reciprocal Enforcement of Judgment Act*, 1958 provides for the possibility of non-enforcement of a foreign debt based on public policy. The court interpreted its public policy in light of the general national philosophy, the injurious nature of gambling and the viewpoints of the prevalent religions in the area. The court found that it would be against public policy to enforce a foreign gambling debt in Malaysia — notwithstanding the legalisation of some forms of gambling within that country. The outcome is thus similar to the South African scenario even though the South African decision was based on the common law and not the statute for reasons explained above.

The courts in Switzerland, California, New York and Canada, however, came to the opposite conclusion. In all these jurisdictions the enforcement of a foreign judgment based on gambling debts were based on a change in public policy in the enforcing country.

The Swiss court enforced the foreign gambling debt as it had been incurred with a licensed operator in the foreign country and in accordance with their laws. In addition hereto, as the Swiss population was accepting of gambling *per se*, and as such enforcement was not regarded as contrary to Swiss public policy.

In both California and New York the courts confirmed a change in gambling public policy amongst their residents in light of the changing social and moral attitudes. This change was further manifested in the legalisation of various forms of gambling by the respective states. International comity also played a role in the Californian court. It is, however, important to remember that it is uncertain whether the other states in the USA will follow these rulings.

Although the decisions in Canada were divided — both with strong dissenting views — the majority confirmed a change in public policy based on the standards of morality and the legalisation of certain forms of gambling within the country. The courts enforced the foreign gambling judgment even though the national legislation rendered the underlying contract void.

The determination of public policy seems to depend on various issues: the moral, social and religious views of the population and how it impacts on gambling *per se*; whether some legalisation of gambling exists within the country where enforcement is sought; and international comity to a lesser extent. The interpretation of the issues, however, differs between jurisdictions. It was only in Malaysia where the injurious nature of gambling still played a role.

A note of caution should thus be extended to gambling operators licensed in terms of South African law not to presume that because a country has legalised gambling that foreign judgments arising from gambling debts would be enforceable in their courts. The issue is not that straightforward in light of the divergent laws and interpretation of public policies in various jurisdictions. Even if there is a change in public perceptions regarding gambling, it is not certain that it would extend to the enforcement of foreign gambling judgments. South Africa is the perfect example.

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