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PERSONA E ATTIVITÀ ECONOMICA TRA LIBERTÀ E REGOLA

Studi dedicati a Diego Corapi

a cura di

Barbara De Donno Federico Pernazza
Raffaele Torino Gianluca Scarchillo Domenico Benincasa

EDITORIALE SCIENTIFICA
NAPOLI

Under the maximum harmonization approach, consumer law is centered not only (not so much?) on protecting the weaker party in a standard individual transaction against the risks of an unbalanced bargaining relationship, but also (above all?) focuses on meeting the expectation of empowered consumers who are willing and competent to play an active role in the completion of the internal market[53].

Whether the average European consumer resembles more closely to the former or the latter model, is still to be fully understood, and debated, also in the light of the overall balance between the business needs and individual rights the EU is willing to promote.

[53] H.-W. MICKLITZ, *European Consumer Law*, 529.

SALVATORE CASABONA

ONLINE GAMBLING CONTRACTS AS NEW FRONTIER OF INTERNATIONAL CONSUMER TRANSACTIONS

SUMMARY: 1. Preface. – 2. Conclusion of online gambling contract. – 3. Notes on content of Internet gambling contract. – 4. Conflict of laws and laws in conflict. – 5. Conclusion.

1. *Preface*

Online gambling is a fast growing phenomenon and the economic significance of the sector is clearly shown by the high level of innovation of gambling operators, as well as by the increasing amount of tax revenues generated in those States that allow this activity.

Nevertheless, States face many difficulties in controlling and regulating the phenomenon, given either the specific nature of the Internet, either the never lasting tension of gamblers in searching always new gaming websites that offer superior odds, a wider events variety for betting, a greater bets' combination.

The legal analysis seems anchored – at least in Europe – in a relatively safe bay ruled, on one hand, by the specialized literature dealing with administrative and criminal law aspects (from the public license regimes and monopolies to the very sensitive matters concerning frauds or money laundering); and on the other hand, governed by the scientific debate arising from the European court of Justice case law that periodically challenges the Member States to demonstrate why and how their protective/protectionist domestic regimes were justifiable in light of European law and were compatible with the freedom to provide services between Member States.

In fact, in application of the subsidiarity principle and given social and cultural factors specific to each Member State, the EU decided that the supply of online gambling services is not subject to a specific regulation at EU level[1]; however the full right of EU Member States to determine how the offer of online gambling services is organised and regulated does not

[1] Despite three important regulatory initiatives that have fostered a more efficient and effective integration and legal harmonization inside the internal Market (such as the European Parliament and Council Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 8 June 2000; the European Parliament and Council Directive 2006/123 on services in the internal market, 12 December 2006; and the the European Parliament and Council Directive 2011/83 on consumers' rights, 25 October 2011.

mean that there is not a precise duty to observe related Union law by the national regulators. Indeed, the national margin of discretion to regulate the online gambling sector has to be exercised behind a "red line" marked by principles such as proportionality, consistency, non-discrimination and transparency of the national regulatory measures[2].

Having said that, what seems to me dramatically neglected is the punctual analysis of the contractual relations between online gambling service providers and the community of online gamblers.

It is a matter of fact that – from the European perspective – online gambling as a service industry is subject to a number of EU secondary legislative acts concerning unfair contract terms[3] and unfair commercial practices[4], as well as privacy, data protection and electronic communication[5].

Furthermore, given the trans-border nature of most part of Internet transactions, critical problems of conflict of laws and consumer protection do arise, particularly where one of the parties is not domiciled in the European area.

A first glance at such agreements, downloaded from the online gambling websites, gives back a twist between international contractual drafting, consumer contractual regimes and electronic contractual environment: thus, a rather difficult interplay between various sets of rules and legal regimes.

Trying to provide a basic tassonomy of the contracts under exam, one could use the expression of "*electronic international consumer contracts*".

Purpose of this short essay, that much benefitted from some leading cases stemmed from the common law tradition, is to illustrate some critical points of this kind of trans-border agreements such as their conclusion,

[2] For an overview about the evolution of European Court of Justice concerning the above mentioned principle, see Salvatore Casabona, The EU's online gambling regulatory approach and the crisis of legal modernity, EU Centre in Singapore, Working Paper, no. 19 January 2014, available at www.eucentre.sg.

[3] Council Directive 93/13 on unfair terms in consumer contracts, 5 April 1993.

[4] European Parliament and Council Directive 2005/29, concerning unfair business-to-consumer commercial practices in the internal market, 11 May 2005.

[5] European Parliament and Council Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 24 October 1995; European Parliament and Council Directive 2002/58 European Parliament and Council Directive, 12 July 2002; European Parliament and Council Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, 15 March 2006; European Parliament and Council Directive 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, 25 November 2009.

content and some aspects dealing with international private law matters concerning applicable law and jurisdiction.

2. *Conclusion of online gambling contract*

From a first analysis of the gambling contract templates, the well known debate, mostly stemmed from the common law case law[6], about how treating the ecommerce webpages, seems to reconcile form with substance.

As commonly sustained, ecommerce pages are assessed as mere *invitations to treat*: the seller/service provider, retaining the power to accept or refuse the *offer* of the customer, can refuse undesirable customers and jurisdictions without fearing breach of contract[7].

However, such contractual classification is likely to be upheld provided that the parties enjoy the rights that are consistent with the classification: the customer/offeror should be able to withdraw the offer at any time after clicking the "Confirm" or "Accept" button, but before the acceptance; and the seller/offeree should be not bound to accept the contract regardless of his wish to do so.

[6] Carlill v. Carbolic Smokeball Company (1893) 1 QB 256; Phamaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd (1953) 1 QB 401; Fisher v. Bell (1961) 1 QB 394; Partridge v. Crittenden (1968) 2 All ER 421; Thornton v. Shoe Lane Parking Ltd. (1971) 2 QB 163;

In literature, see A. D. MURRAY, *Entering into contracts electronically: the real W.W.W.*, in L. EDWARDS, C. WAELDE, *Law & the Internet – A framework for electronic commerce*, Hart Publishing, Oxford, 2000 18-35; R. DUNNE, *Computers and the Law – An Introduction to the basic legal principles and their application in Cyberspace, Cambridge University Press*, Cambridge, 2009, 33: "In general, a website merely displaying product information is considered an advertisement (...)".

[7] In the EU context, the Directive on Electronic Commerce 2000/31 does not seem to shed light on the ambivalence between standing offer and invitation to treat, see D. ROWLAND, U. KOHL, A. CHARLESWORTH, *Information Technology Law*, Routledge, London, 2012, 237: "The first paragraph seems to suggest that the supplier of online activities *accepts* the customer's *offer* when he *acknowledges* the customer's *order*. This assumes that the term "order" equates with the legal concept of "offer" and the term "acknowledgement" with the legal concept of "acceptance". (...) Thus even in respect of the above second paragraph, it cannot be assumed that the acknowledgment of the order is an acceptance. Although such assumptions would be helpful in providing answers to the online contracting analysis, they are not justified. First, the language of the article (...) does not support such an interpretation: an "acknowledgment" of an order does not convey whether the supplier is willing to accept it or not. Second, the provision are, on their face intended to give additional safeguards (...) to online contractual parties in view of the perceived unreliability of cyberspace. (...) So the Directive does not offer any guidance as to the proper contractual analysis of offers and acceptance online". See also A. MURRAY, *Information technology law*, Oxford University Press, Oxford, 2013.

"If that is not the case, the "labels" in the contractual terms must be taken as wrong in light of the objective intention of the parties"[8].

In the online gambling business the (sometimes daring) reasoning for sustaining an invitation to treat over a standing offer seems to dampen its importance and plausibility from a legal analysis point of view.

Firstly, it has to be said that the reduced margin of discretion of the standing-offer scheme seems to be amply balanced by a series of contractual clauses that, on one hand, allow both parties to suspend or terminate the relationship at any time, either with or without cause; and that, on the other hand, define strict eligibility criteria for playing (such as the major of age or jurisdiction of origin of the player)[9].

Furthermore, as it will be explained after, since the online gambling contracts are click-wrap or browse-wrap agreements (in which the customer has simply to click a "I Confirm" button after a box showing the terms and conditions or in which the terms and conditions are only hyperlinked in other webpages), it would be reasonable for the customer to expect that this constitutes the acceptance, and not the offer – contrary to the academic opinion[10].

As noted above, most of online contracts are accepted by a "*click-wrap*", that is where a contract is presented in a window on-line, and the customer is asked to click " I accept", or "I agree" button.

However, gambling contract is mostly presented as "*browse-wrap*" contract, that does mean that the user has the opportunity to look at the terms of the service that are hyperlinked in another page. So that, for example, the website may contain a button saying "terms and conditions", "legal terms", or simply "T & C", not requiring the user to click on anything to indicate assent to these terms before starting to play.

All these two types have raised fundamental questions, especially about assent and timing: in particular, there are issues about how to treat terms that are not proposed or disclosed until after the user has already agreed to go forward with gambling services. Moreover, there are also questions related to disclosure about whether there was assent and when was it manifested. Furthermore, doubts have been raised regarding what the assent covers, notably whether is it only for terms about which the user had knowledge or awareness, or does it extend to terms and conditions the user had not read or understood.

[8] D. ROWLAND, U. KOHL, A. CHARLESWORTH, *Information Technology Law*, Routledge, London, 2012, 239.

[9] Entitling the service provider to block the customer from playing if he is located in a jurisdiction where gambling or betting is illegal, and so forth.

[10] D. ROWLAND, U. KOHL, A. CHARLESWORTH, *Information Technology Law*, Routledge, London, 2012, 238.

The click-wrap agreements appear legally "safer"[11], considering that from one side, they technically permit the entire agreement to be read before requiring the user to register assent; from the other side, websites are engineered so that the user may not continue and finalize any kind of transactions, unless they have actually clicked the required assent[12].

Nevertheless, online gambling operators still mostly opt for browse-wrap agreements, maybe because they are both visually and practically less intrusive, or maybe because they allow a direct access to the gaming electronic platform without any intermediate steps.

The question whether a passive link to terms and conditions (contained on another page)[13] is or is not sufficient to incorporate these terms into the contract has been debated either in literature or in the case law[14]: courts

[11] Nevertheless, click-wrap contracts may have difficulties fulfilling signature requirements: in fact, unlike emails, where acceptance is usually accompanied by the signing of the name, with web contracts the customers accept by clicking a button. While actions like clicking a button can signify acceptance, they clearly do not satisfy a signature's definition of being a name or identifying mark. Thus, when people sign a document they understand that it represents a more serious legal step and consequently may proceed with greater caution. Based on how the general public currently views on-line "clicks", click-wrap contracts offer few of the ceremonial elements found in signed documents. Consequently, click-wrap contract are far less effective in communicating the danger or legal implications of the situation.

[12] N. S. KINSELLA, A. F. SIMPSON (eds), *Online contract formation*, Oceana Publications, Inc., New York, 2004, 419.

[13] A. H. RAYMOND, *Yeah, but did you see the gorilla? Creating and protecting an informed consumer in cross-border online dispute resolution*, 19 *Harv. Negot. L. Rev.* 129, at 143: "Despite having a greater opportunity in the online world to fully understand the terms and the impact of the terms upon the contractual relationship, the consumer does not use the information to his benefit and instead moves quickly through the contracting process. (...). A consumer interacting with a website must have the item or the information he is seeking, he is in a rush to obtain it, and he trusts the website or regulators to protect him if any information gathered or agreement terms are outside the bounds of the law. (...). In addition, many commentators argue that a consumer's "must and rush" behavior is amplified for contracts of adhesion because the customer has a sense of demoralization and helplessness against companies' form contracts. In the situation where a customer feels powerless, his limited time and resources are better allocated to activities in which he has a level of input and/or control. Hence, the information pop-up window is considered an inconvenience to the consumer, who has already made the decision to purchase the item and knows full well that he has no control over the terms of sale, even if one of the terms is an arbitration clause. A must and rush consumer passively accepts terms contained within contracts of adhesion, including arbitration clauses, because he: (1) has limited resources in terms of time, (2) has no control over the terms, and (3) is not an active participant in the contracting process. Since the consumer likely does not read the contract, this passive acceptance is true even if the terms are contrary to standard industry practice, impact their legal rights, or are otherwise contrary to legal defaults".

[14] For a comprehensive legal analysis of click-wrap, shrink-wrap and browse-wrap contract from a USA perspective, see M. L. RUSTAD, M. V. ONUFRIO, *Reconceptualizing consumer terms of use for a globalized knowledge economy*, 14 *U. Pa. J. Bus. L.* 1085 2011-2012.

generally will decline to enforce and uphold such kind of contracts, striking down anti-consumer onerous clauses[15]; nevertheless, the court in *Hubbert v. Dell Corp.* ruled that the mere posting of browse-wrap terms was enough to bind the consumer[16].

This leaves two final questions of contract formation. When, precisely, is acceptance effectively communicated to the offeror, and how the online gambling contract is subscribed.

Unlike email-system, in the HTML-based contracts the communication between web clients and servers is instantaneous. Therefore, it is reasonable sustaining that click-wrap or browse-wrap agreements are more similar to a telephone conversation rather than a mail massage[17]. Hence, the traditional debate regarding ecommerce transactions about the application of the postal rule over the receipt rule or vice-versa seems to loose its relevance.

Nevertheless, it has to be underlined that some gambling contracts provide for a legal mechanism that connects the moment of the contract' conclusion or to the completion of successful registration by the customer,

> *(u)pon the successful registration of each player, the Player is bound by and agrees to the acceptance of the terms and conditions of this agreement (and their amendments), and the rules of the Casino games*[18]

or to the direct exercise of the gaming activity,

> *By playing at any of the Desert Nights (the "Casino"), you represent and warrant that you fully understand and agree to comply with these Terms and Conditions*[19]

Web-based contracts, either click-wrap or browse-wrap agreements, may have serious difficulties fulfilling signature requirements: while actions like clicking a button can signify acceptance, they clearly do not satisfy a signature's definition of being a name or identifying mark, incorporating into the contract the *subscribed* terms and make aware the contractual party of the seriousness of legal implications. The situation is even worst with

[15] Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 974 (E.D. of Cal. 2000), DeFontes v. Dell Computers Corp., No. C.A. PC 03-2636, 2004 WL 253560, (R.I. Super. Ct., Jan. 29, 2004).

[16] Hubbert v. Dell Corp., 835 N.E.2d 113, 121-22 (111. App. Ct. 2005).

[17] A. D. MURRAY, *Entering into contracts electronically: The real W.W.W.*, in L. EDWARDS & C. WAELDE, *Law & the Internet – a framework for electronic commerce*, Hart Publishing, Oxford, 2000, 17-35, at 25-26.

[18] *Lucky Red Casino* online contract, availabale at www.luckyredcasino.com.

[19] *Desert Night Casino* online contract, article 1, available at www.desertnightcasino.im.

regard to browse-wrap contract, in which contractual terms are hidden by providing an hyperlink reference.

Thus, recognizing click-wrap or browse-wrap contracts as signed contracts may create a system whereby people are totally unknowingly bound to serious contracts.

Once again, some elements of reflection come from few interesting common law leading cases that apply the doctrine of "reasonable notice", according to which terms in unsigned contracts are incorporated provided that reasonable steps were taken to bring them to the attention to the other party before the conclusion of the contract[20]. Thus, in the case *Register.com Inc. v. Verio Inc*[21] in which Verio argued, inter alia, that it was not bound by the terms of use, because it had not clicked on "I Accept" icon, the New York court reasoned (rejecting this submission) that because the terms stated that, by using the site, the user agrees to abide by the terms, Verio implicitly manifested its absent to be bound by Register.com's terms of use.

3. *Notes on content of Internet gambling contract*

The online gambling contracts are typically standard-terms contracts in which all the clauses, also referred as *boilerplate* clauses[22], not negotiated by the parties, are unilaterally predisposed by the business/online gambling provider.

The general scheme of electronic contracts for gambling services strongly remind, either in the drafting style or in the clauses' contents, more an international commercial contract than a contract between business and consumer.

Indeed, a general view of the templates taken in consideration reveals different sets of standard clauses: those incorporated in the most

[20] Thompson v. London, Midland and Scottish Railway Co (1930) 1 KB 41; Henderson v. Stevenson (1875) 1 *All ER* 172, Sugar v. London, Midland and Scottish Railway Co (1941) 1 *All ER* 172; Interfoto Picture Library Ltd v. Stiletto Visual Programmes (1989) QB 433, 439 (CA); British Crane Hite Corp. V. Ipswich Plant Hire Ltd (1975) *QB* 303; Olley v. Malborough Court Ltd (1949) 1 *K.B.* 532; Parker v. South Eastern Railway Co. (1877) 2 *C.P.D.* 416; Thorton v. Shoe Lane Parking (1971) 2 Q.B. 163 at 170; McCutcheon v. David MacBrayne Ltd (1964) 1 *W.L.R* 125 at 129.

[21] *126 F Supp 2d 238, at 248 (SDNY, 2000).*

[22] Edwin Peel, The common law tradition: application of boilerplate clauses under English law, in G. CORDERO-MOSS (ed.), *Boilerplate Clauses, International Commercial Contracts and the applicable law*, Cambridge, Cambridge University Press, 2011, 129-178, 131: "The term "boilerplate" is understood to be derived from the metal plates on which syndicated or ready for print copy was supplied to newspapers. The point of such plates was that they could not be modified before printing, hence the borrowing of the term to refer to clauses in a contract which are not intended to be subject to any negotiation".

part of international commercial contracts; those regulating some common aspects of contracts concluded through electronic means (such as cookies treatment, intellectual property, software license, etc.) and finally those pertaining the Internet gambling (such as those concerning the dormant electronic account, the promotion/bonus, the banking fees for electronic payment, publicity, responsible game, the scratch-card refund and so forth).

An impressive transnational exercise of "cut and paste", which gives back an image of a *global standardization* of these kind of contractual relations.

Although a complete review of these clauses is far beyond the scope of this short essay, they warrant at least some general comments for a better understanding of the phenomenon.

Notably, the above mentioned first group of clauses contain terms regarding the interpretation of the international contract (such as entire agreement clauses, language clauses, non-waiver clauses, severability clauses and so forth), the limitation of parties' liability, the assignment and termination rights, the applicable law and forum choice.

Some of these clauses appear pretty inconsistent with the general scheme and *ratio* of the online gambling contracts: this seems the case of the *entire agreement* clause.

In fact, if the main function of this clause (also referred as previous agreements, former agreements, entire contract, or whole agreement) is to "freeze" the contract as it is in its written form (excluding from the scope of the parties' contractual obligations pre-contractual documents and written or oral representations), one could wonder the sense of this term in a contractual scheme where there is not any kind of pre-contractual negotiation between the parties.

On the other hand, some clauses appear extremely problematic from the perspective of consumer protection, specially with regards to the European unfair terms regime, causing a significant imbalance in the parties' rights and obligations. It is the case of clauses, such as those concerning liability limitation,

In no circumstances whatsoever shall the Sportsbook, its directors, officers, employees, shareholders, agents and affiliates, the ultimate parent and parent companies of the Sportsbook and any of its subsidiaries be liable to you in contract, tort, negligence or otherwise, for any loss or damage howsoever arising from any cause whatsoever, whether direct or indirect, or for any amounts whatsoever (even where we have been notified by you of the possibility of such loss or damage)[23], or

[23] *Canbet* online contract, article 4.2 available at www.canbet.com.

BingoFest specifically disclaims any liability (whether based in contract, tort, strict liability or otherwise) for any direct, indirect, incidental, consequential, or special damages arising out of or in any way connected with access to or use of the Site, (even if BingoFest. has been advised of the possibility of such damages) including liability associated with any viruses which may infect a user's computer equipment[24],

unilateral modification to terms,

9.1.1 The Casino may, without notice to you, amend, alter, delete, interlineate or add to ("Changes") these Terms and Conditions, the promotion or competition-specific Terms and Conditions or Rules of Play at any time whatsoever.

9.1.2. These Changes shall become effective, and you shall be bound by these Changes, immediately upon their posting on the Casino Website.

9.1.3. You agree to regularly review these Terms and Conditions, promotion or competition-specific Terms and Conditions and the Rules of Play regularly in order to assess whether any Changes have been made[25],

exculpatory,

We are not liable for the failure of any equipment or software howsoever caused, wherever located or administered, or whether under our direct control or not, that may prevent the operation of the Services, impede the placing of offers for bets or the matching of bets, or prevent you from being able to contact us[26],

limitation of assignment,

We reserve the right to transfer, assign, sub-license or pledge, in whole or in part, any of the rights and obligations granted to or imposed upon us by these Terms and Conditions. You may not transfer, assign, sub-license or pledge any of the rights and obligations granted to or imposed upon you by these Terms and Conditions[27],

Interestingly, along the indication of applicable law and forum choice, most part of the gambling contracts are provided with *amiable composition* clauses,

[24] *Bingo Fest* online contract, article 4, available at www.bingofest.com.
[25] *7 Sultans* online contract, article 9, available at www.sultancasino.com.
[26] *Betfair* online contract, article 12, available at www.betfair.com.
[27] *Platinum Play Casino* contract, article 9.6, available www.platinumcasinoplay.com.

Player must submit their complaint to Vegas Partner Lounge in writing within fourteen (14) days (...) If any complaint is not resolved to the Player's satisfaction he/she has the right to refer such complaint to the Lotteries and Gaming Authority of Malta[28],

or

16.3 If you have any complaints or concerns arising from your use of the Website, including any concerns about material which appears on the Website, please in the first instance contact service@bovada.lv, where a dedicated member of our team of Customer Service Representatives will handle your complaint. If your complaint cannot be resolved to your satisfaction by our Customer Service Representative, you may request in writing to service@bovada.lv that the complaint be escalated to a Customer Service Supervisor. If your complaint cannot be resolved to your satisfaction by our Customer Service Supervisor, you may request in writing to service@bovada.lv that the complaint be further escalated to our General Manager.

16.4. We prefer to deal with disputes internally in accordance with the above procedures, you can also direct your complaint to our regulator the Kahnawake Gaming Commission (KGC). Complaints must be submitted not less than seven days and not more than six months after the date on which the subject matter of the complaint first arose[29].

This appears an attempt to package a "rough justice" proceeding[30], without any formalities and with the intent of saving time and costs, in which the gambler present his problem to a person whom he feels is likely to have a sufficient knowledge and judgment. Who has the power and role to take a decision in this short and inquisitorial proceeding does not need to give detailed reason and to follow particular legal rules: evident problems concerning the claimant' procedural guarantees (as well as his access to justice rights) dramatically do arise.

4. *Conflict of laws and laws in conflict*

a. From a broad perspective, it seems reasonable sustaining that the ordinary rules on conflict of laws not work properly in consumer contracts: the party autonomy – that represents one of the foundational principles of the modern private international law – has challenged by the profound in-

[28] *Crazy Vegas* online contract, article 7, available at www.crazyvegas.com.
[29] *Bovada* online contract, article 16, availabale at www.poker.bovada.lv.
[30] R. CHRISTOU, *Boilerplate: practical clauses*, Sweet&Maxwell, London, 2010, 299.

equality of bargaining power of parties[31]. The applicable law clause as well as the forum clause are unilaterally inserted by the business who, willing or not to take advantage of consumers, simply imposes a series of standard clauses.

From an EU perspective, consumers' contract are within the scope of the Brussels Regulation (2000-2012)[32] for what regards jurisdiction matters, and within the scope of Regulation no. 593/2008 on applicable law to contractual obligations (Roma I)[33], that substituted the Rome Convention of 1980[34].

Differently from the basic jurisdiction rules founded on the doctrine of *actor sequitur forum rei*, the European Union gives consumers special protection by means of jurisdictional and applicable law rules more favourable than those generally applicable, since consumers are regarded as being in a weak position with regard the other party (the supplier).

Two sets of dispositions come into consideration.

Firstly, for what does regard the jurisdictional matters, symmetrically with what provided by EU Regulation no. 44/2001[35], the new EU instrument (Regulation, no. 1215/2012) provides that while a consumer may bring proceedings against business either in the courts of the Member State in which that counterparty is domiciled or in the courts for the place where the consumer is domiciled[36]; if the consumer is the defendant, he can be summoned by the business only in the courts of the Member State in which the consumer is domiciled[37].

On the side of the applicable law to a cross-border consumer transactions, the EU law states contracts shall be governed by the law of the country where the consumer has his habitual residence[38].

However, problematic aspects will arise in the case of the consumer or the business, in the quality of claimant or defendant, is domiciled outside

[31] Z. S. TANG, *Electronic Consumer contracts in the conflict of laws*, Oxford and Portland, Hart Publishing, 2009, 8-9.
[32] Council Regulation, no. 44/2001 of 22 December 2000 on *jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, articles 15 and 16; European Parliament and Council Regulation, no. 1215/2012, 12 December 2012, *on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*, articles 17-19. See in literature, M. BOGDAN, *Concise introduction to EU private international law*, Europa Law Publishing, Amsterdam, 2012, 53-58 with regards to Brussels Regulations, and pp. 130-134 with regards to Rome I Regulation.
[33] European Parliament and Council Regulation, no. 593/2008, 17 June 2008, *on the law applicable to contractual obligation* (Rome I).
[34] Convention on the law applicable to contractual obligation, 19 June 1980 (the Rome Convention).
[35] See Regulation, no. 44/2001, article article 16, par. (1) and (2).
[36] See Regulation, no. 1215/2012, article 18, par. (1).
[37] See Regulation, no. 1215/2012, article 18, par. (2).
[38] See Regulation, no. 593/2008, article 6, par. (1).

of the EU[39]. More precisely, considering firstly the hypothesis in which the online gambling provider is the claimant, he will be able to sue the consumer *only* in the courts of the Member States in which the latter is domiciled[40]; by contrast, where the business is the defendant, serious problems will arise since the special protective regime apply only if the defendant is domiciled in the EU area. International private law rules of the Member States would apply and this might be less favourable to the consumer.

On the other side, if the defendant is a gambler (consumer) domiciled outside of the EU area, the special rules on jurisdiction (including the rules limiting choice-of-courts agreement)[41] do not apply. Similarly to what happens where the defendant is an online gambling operator not domiciled in Europe, Member state law applies, so that gamblers have to look to national law for protection when they are defendants.

For the same *ratio*, where the gambler is the claimant, the rule allowing him to bring proceedings in the courts *for the place where he is domiciled* cannot apply.

b. Generally speaking, identification and localisation of parties and activities are essential to private international law. As evident, where a peculiar protective regime for consumers does exist, it is crucial identifying both parties in order to classify or not the contract as a consumer contract. Furthermore, the precise localization of activities (place of contracting and of performance, the place of breach of the contract, the place of advertising, etc.) is a crucial connecting factor for deciding jurisdiction and applicable law (in the absence of an agreement between the parties).

Identification and localization is problematic in the ambit of traditional commerce, electronic commerce makes it worse.

Having said that, it has to be precised that the above-mentioned European mechanisms remain rather unclear on many significant points relating to e-commerce and thus also to online gambling transactions.

Indeed, as provided by article 17 (1)(c) of Regulation 1215/2008 in order to the conditions for applying the specific jurisdiction rules for consumer, the professional who deals with the consumer has *to pursue* commercial and professional activities in the consumer's domicile, or, in alternative, the business has *to direct by any means* such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

[39] Foundamental for understanding these profiles the reading of T. HARTLEY, *Choice-of-court agreements under the European and International Instruments*, Oxford University Press, Oxford, 2013, 267-268.

[40] A choice of court agreement will be able to affect this rule only to the limited extent of article 19, Regulation, no. 1215/2012.

[41] See Regulation, no. 1215/2012, article 19.

Identical conditions are provided by article 6 of the Regulation Rome I on the applicable law to consumer contracts[42].

Here, the hermeneutic point is about the exact meaning of the expressions "pursuing commercial activities in the consumer domicile" and "directing commercial activities" in a digital environment as online gambling webpage is[43].

The "pursue... in" condition appears rather uncertain in its meaning, maybe it should be understood as a planned, deliberate and continuous commercial activity with the intent of gaining commercial benefits from consumers domiciled in a certain country.

Even more blurred it seems the expression "direct... to", implying a wide range of activities not necessarily strictly connected with the territorial context.

One could wonder if the construction and maintenance of an online gambling website, available in different languages, and accessible from different countries, could be assessed as a commercial activities "purse... in" the consumer domicile or "direct... to" a Member State.

Several tests and theories have been employed for answering to this question: from the *accessibility* test (which considers relevant the technical possibility to access a commercial website from the consumer's domicile), to the *existence of Country-specific indicia* such as the registration in a particular domain, the language used, the currency accepted and so forth[44].

[42] See Regulation, no. 593/2008, article 6 (1): "(...) a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities".

[43] Z. S. TANG, *Electronic Consumer contracts in the conflict of laws*, Oxford and Portland, Hart Publishing, 2009, 50-52.

[44] A. BRIGGS, *The conflict of Laws*, Oxford, Oxford University Press, 2013, 246: "First, the contract must be concluded within the framework of this targeting, which seems to mean that there must be a connection rather than a bare coincidence of targeting and contracting, though it is not necessary that the consumer respond specifically to an individual targeting. Second, the accessibility of an Internet site will not by itself establish targeting (...). It has also been said that the language of the website or currency referred to does not constitute a relevant factor. No doubt this reflects pressure by internet sellers, ever anxious to avoid laws they dislike. (...) If a website has a page in Portuguese, who apart from Portuguese residents can it credibly be said to be directed at? (...)".

J.-J. KUIPERS, *EU law and private international law*, Martinus Nijhoff Publishers, 2011,103: "In particular as regards E-Commerce, the targeting criterion does not resolve all problems. Instead of providing specific rules on e-commerce it was preferred to generalise the protective connecting factor so as to include e-contracts. It is not precisely clear when a website directs its activities to a certain market. Is the fact that a website is accessible from a Member State and the professional is willing to receive orders from the Member State suffi-

Some interesting data have been emerging from a first screening of the online gambling contracts' templates. All contracts examined do present either applicable law clauses or forum clauses: the most chosen European jurisdictions (and applicable laws) are Malta, United Kingdom and Cyprus; nevertheless, the great part of the templates indicate offshore countries (such as Curacao, Isle of Man, Antigua, Panama, Territories of Kahnawake, Alderney and Netherland Antilles), with the consequent referred problematic aspects linked to the applicability of the European regime of consumers' protection.

c. Another very sensitive point is worthwhile noting: in the absence of any judicial precedents, one could wonder whether such kind of contracts are effectively enforceable in those jurisdictions, as the most part of European Member States are, that have more or less strict legal regimes for gambling in terms of prohibition, public licenses or monopolies; yet, one could legitimately argue about the compatibility of these international contracts with the principle of public policy.

Speculating on this is really far beyond the purpose of this humble and introductory work on the field, maybe a good starting point for a fruitful discussion could be represented by those leading cases dealing with the recovery of gambling debts in those jurisdictions in which gambling was (and still is) forbidden.

Thus, for example in 1965, the owner of a licensed Puerto Rican gambling casino sought to recover gambling debts incurred by the defendant (a New Yorker citizen) in Puerto Rico, where this type of contractual debt was both plainly valid and enforceable.

The Court of Appeal of New York, reversing the thesis of unenforceability of this right because in violation of the public policy, *held* that such kind contract was neither morally unacceptable *per se*, nor objectionable under the prevailing standards of social conduct in the state[45].

5. *Conclusion*

Despite these *snapshots* on online gambling contracts, the complexity of such kind of transactions dramatically does arise.

The electronic environment, the cross-border dimension of the activities, the consumers' protection matters make these contracts a bundle of problems uneasy to solve.

cient? Factors such as language and currency are not decisive. The professional would suffer severe burdens if he were to operate on a global level and be subject and be subject to the different consumer laws of every jurisdiction. However since the professional can limit on his website the jurisdictions to whom is willing to sell (ring-facing), he is in the best position to avoid the conflict of laws risk".

[45] *Hotels Corp. v. Golden,* 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964).

Comparative law method does represent the best viable approach for dealing with crucial questions such as those regarding the assessment of the limits and the enforceability of clauses contained in international standard contracts, as online gambling agreements are, with respect to local legislations, to mandatory rules or to fundamental principles of the governing law.