

Germany: Fighting Losing Wars

By Joerg Hofmann and Martin Jarrett

Well-informed readers will know that Germany is (sometimes) accustomed to fighting wars it cannot win. True to form, it is conducting such a war currently, but this war will not be the subject of high school history classes throughout the world. This war is being fought by gaming operators across courts in Germany and before the courts of the European Union.

As with all wars it cannot win, it is anticipated that Germany will eventually surrender and deregulate its online gaming market. It will not, however, go down without a fight. This article charts this war, beginning from its proclamation of the First Interstate Treaty on Gaming until its most recent defeat before the administrative courts in Hesse. To conclude, it will surmise the possible outcomes for the battles ahead.

There is something else that we can learn from history. When Germany loses such wars, it always wins the peace. Hopefully, this will play out again and after the war has ended, gaming operators will be able to operate in ideal circumstances.

Background

On 1 January 2008, Germany declared war by proclaiming the First Interstate Treaty on Gaming. The First Interstate Treaty on Gaming provided for a highly restrictive regime for the regulation of gaming. Offering online gaming was completely prohibited and monopolies in favour of state-owned lottery operators were maintained. The First Interstate Treaty on Gaming was, however, the first major casualty in this war. In the Carmen Media decision, the European Court of Justice ruled that the First Interstate Treaty on Gaming was invalid because

of its non-compliance with European Union law.

Undeterred, Germany constructed the Second Interstate Treaty on Gaming. It broadly mirrored its predecessor, but it made online sports betting possible by offering seven (later increased to twenty) online sports betting licenses. During the construction of the Second Interstate Treaty on Gaming,

however, came a significant development: the defection of Schleswig-Holstein.

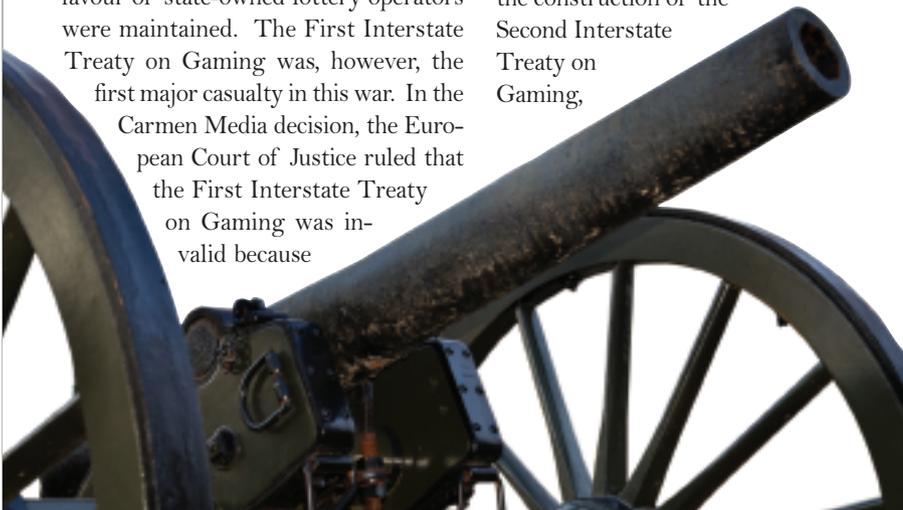
In late 2011, Schleswig-Holstein gave up on the campaign and chartered its own course by enacting the Gaming Act 2012. Modeled on its Danish equivalent, it permitted online gaming, with the exception of certain bank holder games, but this exception did not include poker or slots. In retaliation for Schleswig-Holstein's defection, the other German states raised a federal tax, overruling the sports betting tax. This sports betting tax effectively torpedoed Schleswig-Holstein's liberalisation of the online sports betting market by imposing an unprofitable 5% tax on stakes. Subsequently, Schleswig-Holstein rejoined the campaign through a change of government. Schleswig-Holstein revoked the Gaming Act 2012 and acceded to the Second Interstate Treaty on Gaming, which came into force on 1 July 2012. Although officially revoked, the Gaming Act remained exclusively applicable for those more than fifty operators who were granted a license for sports betting or casino games offers in the Internet by the government of Schleswig Holstein.

Current developments

After the German states reformed and enacted the Second Interstate Treaty on Gaming, the licensing procedure for the twenty available sports betting licenses began. It is from this licensing procedure which all current developments have sprung.

The licensing procedure is divided between three tiers, and license applicants have been eliminated as they progressed through these tiers. When it

Continued on next page



>> NEW DEVELOPMENTS IN JURISDICTIONS: GERMANY

Continued from previous page

was time to invite license applicants to Tier 3, the regulators played out a notable tactical move: they invited fewer than twenty license applicants. By doing this, the regulators curtailed the legal claims of those license applicants which were excluded from Tier 3. Had the regulators invited more than twenty license applicants to Tier 3, inevitably the regulators would have had to eliminate a certain number of surplus license applicants. These license applicants could have argued

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before the courts that they had satisfied the requirements for a license, but were not granted a license because of the limitation of the number of licenses. By admitting fewer than twenty license applicants to Tier 3, the regulators effectively announced that only this select number of license applicants had met their demanding standards, and thereby curtailed this possible legal argument.

Battles were being fought on other fronts however. Dissatisfied with the administration of the licensing procedure, a large number of license applicants initiated litigation. To date, there has been one principal outcome from these: the Victor Chandler decision.

In the Victor Chandler decision, the claimant (license applicant) had succeeded in being admitted to Tier 2, but did not succeed to be admitted to Tier 3. This exclusion from Tier 3 was partly based on the claimant's failure to submit all documents during the Tier 2 phase by the relevant deadline. Relying on German and European Union law to argue that the licensing procedure was non-transparent and generally inequitable, the claimant sought an interim order that it be admitted to Tier 3 and that its belatedly submitted Tier 2 documents be considered for its license application. The claimant partially succeeded as the court issued an interim order that the claimant be admitted to Tier 3, but it did not issue the order that the regulators consider the belatedly submitted Tier 2 documents.

The final outcome of the Victor Chandler decision is still pending however.

The Victor Chandler decision represented a significant defeat for the regulators, and their reaction to it was dramatic. First, it was announced that after a reconsideration of the license applications of the license applicants, which were admitted to Tier 2 but not invited to Tier 3, certain of these license applicants might be invited to a second round of Tier 3. It should be noted that the first round of Tier 3, involving the

license applicants initially selected, has already concluded. Second, after the conclusion of the second round of Tier 3, Tier 2 would be rerun. Those license applicants, which had successfully cleared Tier 1, would be eligible to submit documents for this second round of Tier 2.

Future developments

Although prophesy regarding the outcome of this war might be perilous, history tells us that we can make some informed predictions about Germany's fate.

First, there is the issue regarding the granting of the first licenses under the Second Interstate Treaty on Gaming. As mentioned above, all the license applicants invited to the first round of Tier 3 have completed the Tier 3 procedure. Accordingly, the licensing procedure for these license applicants has been completed, and the outstanding question is when a decision will be made on whether they are granted a license. Initially, early May 2013 was penciled in as the date by which these license applicants would be informed whether they had been granted a license, but this was postponed owing to the fallout from the Victor Chandler decision. To date, the regulators have not committed to a date when they will grant the first licenses. Plans were made to grant these later in autumn, but due to the pending court proceedings this deadline might not be reached.

Second, there is the ongoing litigation in respect of the licensing procedure of the Second Interstate Treaty on Gaming. It should be appreciated that there are many cases, of which the Victor Chandler decision is one, which have yet to be finally resolved. Accordingly, the question arises: how will these cases be finally resolved? Three possible resolutions are foreseen.

First, the courts could confirm that the licensing procedure was correctly conducted, although this is the least likely possibility. Second, the courts might effectively push the "reset button" and order that the entire licensing procedure

be restarted. Third, the courts may acknowledge that the licensing procedure was incorrectly conducted, but determine that no further action is necessary as a result of the regulators' movements to re-conduct certain aspects of the licensing procedure.

The third matter concerns the fate of the Second Interstate Treaty on Gaming. In January 2013, the Federal Court of Justice of Germany heard the Digibet case. In this case, a state-owned lottery operator, Westlotto, sought to interdict Digibet from offering its gaming products online into the state of North-Rhine Westphalia. In contesting the validity of the interdiction, the gaming operator argued that the law underpinning it, the Second Interstate Treaty on Gaming, infringed European Union law. Recognising the potential validity of its argument, the Federal Court of Justice of Germany referred the case to the European Court of Justice, which serves as the judicial arm of the European Union, for a ruling on whether the Second Interstate Treaty on Gaming infringes European Union law.

This broadly mirrors what transpired some years ago in the Carmen Media case. In that case, the gaming operator made some similar arguments before the European Court of Justice regarding the First Interstate Treaty on Gaming and its lack of coherence with European law, and it was successful. It remains to be seen whether the Digibet case will produce the same outcome, but it is not expected that the outcome will be known until later in 2014 at the earliest.

There is a possibility, however, that events on the home front might overtake those in Luxembourg, where the European Court of Justice sits. It is known that the prime ministers of the German states have been discussing the regulation of online gaming in recent months. Because of the flood of litigation and the recent victories for the gaming operators, the prime ministers have become concerned – these might be the first steps on the path to raising the white flag. ♣



Joerg Hofmann

Dr. Joerg Hofmann is senior partner of MELCHERS law firm in Germany with offices in Heidelberg, Berlin and Frankfurt. He is the current Vice-President of the International Masters of Gaming Law (IMGL) and the group leader of the Gaming Law Practice Group of MELCHERS. Joerg has been ranked as a "Leading Individual" in Gaming & Gambling by Chambers Global in 2011, 2012 and 2013. He acts regularly as speaker or moderator in international gaming law conferences domestic and abroad. Joerg frequently publishes articles in international experts' magazines and periodicals and lectures at the University of Heidelberg. He also serves as a member of the editorial board of "Gaming Law Review and Economics."

Martin A. Jarrett, B.A. LL.B (1:1), Solicitor and Barrister (New South Wales, Australia) is an Associate



Martin A. Jarrett

Member of the Gaming Law Practice Group of MELCHERS. He is experienced in cross-border gaming related matters. Martin contributes frequently scholarly articles to technical publications on gaming law. He is also experienced in international transactions and disputes, including banking and arbitration. Martin currently lectures at the University of Mannheim, Germany, on International Trade Law.

They can be contacted at j.hofmann@melchers-law.com and m.jarrett@melchers-law.com, respectively.

MEMBERS IN THE NEWS

Robert Faiss and Ellen Whittemore named "Super Lawyers"



Robert Faiss



Ellen Whittemore

Lionel Sawyer & Collins attorneys and IMGL members Robert Faiss and Ellen Whittemore were selected for inclusion in the 2013 edition of *Super Lawyers* for the Mountain States region, a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Lionel Sawyer & Collins' recognition extends across nine practice areas.

Firm founder Sam Lionel and Gaming Department Chair Bob Faiss have been honored by the Nevada Board of Regents

for their significant contributions to the state's system of higher education.

Tony Cabot release new book on i-gaming



Anthony Cabot

The UNLV Gaming Press announces the forthcoming publication of "Regulating Internet Gaming: Challenges and Opportunities," a comprehensive book addressing the various regulatory considerations necessary for proper regulation of internet gambling.

Anthony Cabot, a coeditor and a partner at Lewis and Roca, noted that "Internet gaming is an emerging field, especially in the U.S., and government officials accustomed to regulating land based casinos will find regulating the Internet to be far different and more challenging." To bridge this gap, contributors to this book provide regulatory examples and lessons that will be helpful to lawyers, policy makers, gaming operators and others interested in this burgeoning industry.

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