

CONTRACTUAL RELATIONSHIP ARISING FROM GAMBLING AND BETTING UNDER THE CIVIL AND COMERCIAL CODE AND THE GAMBLING ACT OF B.E. 2478 (AD 1935)

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ABSTRACT

This independent study aims to study the problems of legal consequences of gambling contractual relationship, under Thai Civil and Commercial Code and the Gambling Act of B.E. 2478 (A.D. 1935) compared to English law, French law, Singapore law, and Swiss law. The study adopted qualitative research method through analysis of documents.

The study founded the gambling in Thailand is governed by the Civil and Commercial Code and the Gambling Act of B.E. 2478 (A.D. 1935). However, both of legal and illegal gambling cannot be enforced by courts as Section 853 of the Code prohibits the recovery of any money or valuable objects lost in a wager or their placement in the hands of anybody to abide by the outcome of the wager, so if a gambler refuses to pay the stakes after losing a bet, or if the bookmaker refuses to deliver the reward to the winning gambler, the gambler and the bookmaker have no legal right to recover their stakes or prizes. The study also indicated that the foreign law provides exceptional provisions to allow to enforce any gambling contractual relationship based on legal principle of good faith.

The study recommends Thailand's Legislative Organization to add a provision of safeguard lawful gamblers into the Gambling Act of B.E. 2478 (A.D. 1935), by writing the conditions of gambling contracts that can be enforced through judicial proceedings.

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1. Introduction

Gambling is the act of putting money ("the stakes") on an event with an unknown result in the hopes of winning something valuable. Gambling thus necessitates the presence of three elements: consideration (a stake), risk (a chance), and a prize. Gambling has been popular in Thailand since the Sukhothai periods. Thai local culture, such as Muay Thai, boat racing, bullfighting, and cockfighting, as well as foreign cultures, such as the lottery, which was introduced by Chinese immigration¹, horse racing, which started in Europe, and billiards, which originated in England². It is well known that gambling necessitates the presence of a stake or property, which is the amount of money or property risked on a gamble for the possibility of monetary benefit. When a gambler makes a bet, the gambler must pay the stake to the bookmakers; conversely, if the gambler wins the bet, the bookmakers must pay the prize; gambling therefore results in a mutual agreement between two gamblers or a gambler and a bookmaker.

In Thailand, gambling and betting are specific contracts under Civil and Commercial Code, Book III, Specific Contracts, Title XVIII: Gambling and Betting. The Code states about consequences of gambling contracts, as well as the exception of type of gambling in not subject to general provisions of gambling and betting. The provisions of gambling and betting in the Code were influenced by the French Civil Code, the German Civil Code, and the Obligation Code of Swiss, which the intent of law to not encourage people gamble because gambling is socially dangerous activity. It is necessary to legislate the law for control of civil consequences of gambling contracts. which later, the government promulgates the Gambling Act of B.E. 2478, the Act's objective is to specify the types of gambling that are legal in Thailand, as well as the requirements for seeking gambling permission and the penalties for illegal gambling but civil regulation remains unchanged.

¹Archives, Krung Siam Lottery, <http://catholichaab.com/main/index.php /research and-study/research-and-study/1181-2016-05-13-02-21-03>, (accessed February 10, 2021).

² Billiard sports association of Thailand, History of the Billiards Association of Thailand, http://www.thailandsnooker.org/bsat_history.php, (accessed February 10, 2021).

Although gambling creates a mutual agreement between the players, but according to Section 853 of the Civil and Commercial Code does not allow to create legal relationship between the parties. To apply Section 853, all gambling contracts, whether legal or illegal, create no obligation and hence cannot be enforced by a court. As a result, gambling contracts, can only be enforced between the parties not by court proceeding. Moreover, the section 853 prohibits the recovery of any money or valuable objects lost in a wager or their placement in the hands of anybody to abide by the outcome of the wager. Section 853 also covers legal gambling and betting. Based on Section 853 if a gambler refuses to pay the stakes after losing a bet, or if the bookmaker refuses to deliver the reward to the winning gambler, the gambler and the bookmaker have no legal right to recover their stakes or prizes. Moreover, in the situation of a gambling game winner engaged in cheating, fraud, foul play, or other impropriety in order to exploit the loser of the game, the loser has no right to present facts or make a case for the truth in court.

Notably, according to section 854, it prescribes exception of the types of gambling contracts that are permissible to be enforced by court are limited to only government lottery or a raffle that has been approved by the government. Gamblers who win a government lottery or a government-approved raffle can claim their prizes. In addition, any issue involving a government lottery, such as a gambler claiming ownership of a stolen lottery ticket³, can be settled through the justice process⁴. To put it in other words, a gambling contract related to a government lottery or a raffle that has been approved by the government can be enforced by a court. In contrast, other legal gambling, such as horse racing, Muay Thai, Boat racing, Bullfighting, and Cockfighting, which are permitted to be played and thus create a mutual agreement between the parties in Thailand by the Gambling Act B.E. 2478, are still not permitted to be settled, enforced, or recovered debts arising from such gambling contracts through the court

³ Thairath Online, 30 million lottery cases, <https://www.thairath.co.th/news/local/central/1583236>, (accessed February 10, 2021).

⁴ Daily news, Lottery cheat case, <https://www.dailynews.co.th/crime/705104>, (accessed February 10, 2021).

system resulting in the Bookmaker or gambler in gambling is permitted by the Gambling Act B.E. 2478 (A.D. 1935) cannot claim their stake or prizes.

To recover the loss, the party of gambling contract may resort to aggressive self-help, resulting in a variety of issues such as informal debt problems, bodily injury, or death to a debtor as a result of an unlawful debt collector's acts, and so on. And when the government has a policy in place to build a casino or allow remote gambling in the future. The regulation of gambling contracts is an impediment to doing so because the legal system will be unable to settle any issues resulting from the operation of the casino or remote gambling enterprise. As a result, firms may fail or turn to illegitimate dispute settlement methods.

There are two main approaches to resolve problems of gambling contractual relationship: legislative approach and judicial approach. England enacted the Gambling Act 2005, Singapore added an exceptional provision, as Section 5, into the Civil Code reading all forms of gambling, and a gambling contract is treated as a regular contract that can be legally enforced, with the exception of gambling contracts that are subject to any rule of law prohibiting the enforcement of a contract on the grounds of unlawfulness Article 5 of Singapore's Civil Code governs all gambling contracts. The legislation expressly states that all gambling contracts are null and invalid, and that no action in court may be taken to collect a stake or valued item. Those provisions, however, do not apply to gambling conducted under the control or supervision of a permitted by another legislation operator or promoted by the operator of such a permitted by another legislation. As a result, any issue arising from legal gambling in both countries, such as gambling debt non-payment or gambling cheating, can be settled by legal action. Switzerland, any legal gambling contract is governed by Title XXI: Gambling and Betting of Obligation Code, which stipulates that no obligation in gambling contract but gambling in casinos gives rise to claims if it occurs in a casino that has been licensed by the competent authorities. The legislation also protects gamblers from cheating by enabling the loser of a gambling bet to reclaim his or her stake or property if the loser can prove that the winner cheated.

French courts use judicial approach through principles of good faith. In this regard, the courts accept contractual relationship in case gambling contracts, casinos, sports betting, and the lottery, are authorized by Government. Title XII of Aleatory

Contracts, Chapter I of play and betting of the Napoleon Code govern legal gambling contracts. Moreover, despite the fact that the law states do not allow an action for debt at play or for the payment of wager, the Highest Court of ordinary jurisdiction in France has defined an exception to this provision if a gambling contract arises from a gambling operator who is licensed by the law and ruled by the government. As a result of the administrative approval, a gambling obligation becomes a fully enforceable civil obligation. Furthermore, the judgment states no circumstance may the loser reclaim what he has willingly paid, unless there has been foul play, fraud, or cheating on the side of the winner and this provision protects the gambler from being cheated.

This study aims to analysis of efficiency of gambling contractual relationship under legislative and judicial approach based on legal comparison study to recommend the efficient approach to Thailand. The writer assumes that the problem of gambling contractual relationship brings about problem of legal enforcement in the current circumstance of country.

2. Objective of the study

1. To study the historical background and general concept of gambling.
2. To study the law related to gambling in Thailand, England, Singapore, France, and Switzerland in relation to the enforcement of gambling debt.
3. To analyze the problem of gambling debt and the possibility of adopting the regulation of acceptance of gambling debt into Thai legislation.
4. To explore recommendations to Thailand Legislative Branch to revise the Gambling Act of B.E. 2478 (A.D.1935) to cope with gambling contractual relationship.

3. Methodology.

This independent study adopted qualitative research methodology. The study focuses on analysis of documents through origin of civil regulation related to gambling and the theory of contract and compiling includes document research, academic writing, journal, legal textbook, provisions. The study aims to compare tween legislative and judicial approach used by Thailand, England, Singapore, France, and Switzerland. The

study aims to examine data collecting from documents, including books, textbooks, law books, research papers, academic and research articles.

4. Research Result

The Gambling Act BE 2478 (1935) now defines the types of legal gambling as well as the conditions under which they can be played. The Government Lottery Office Act, B.E. 2517 (1974), is another statute that regulates only government lotteries. However, legal gambling, with the exception of government lotteries, still remains a non-binding contract.

As a result, when a party intentionally makes a false statement in order to persuade others to enter into a gambling contract, such as when a gambler refuses to pay the stakes after losing a bet, or when bookmakers refuse to award the prize to the victorious gambler, those disputes cannot be resolved through judicial approach or court procedures.

In other countries, the mechanism for accepting gambling debt are roughly classified into two categories: legislative and judicial approaches.

The first is the legislative method, which may be found in gambling laws in England, Singapore, and Switzerland. Because the law explicitly states that gambling debt is permitted, gambling contracts can be lawfully enforced. The establishment of a written provision accepting a gambling debt provides legal certainty and allows courts to make decisions based on the same standards. One downside is that the forms of legal gambling that are permitted change over time. Because written law may be unable to keep up with the fast-changing environment, courts cannot intervene in the legal system by adopting broad interpretations that apply to so many types of gambling contracts.

The second is a judicial approach, as evidenced by a judgment of France's Highest Court of Ordinary Jurisdiction. The court's decision to make a gambling contract enforceable is based on ensuring justice and prudence for both gamblers and bookmakers, as well as promoting the gambling industry in France. A gambling contract's drawback is that it creates obligations that are reliant on a judicial decision. Even though gambling is legal, if the court supports the idea of no obligation in gambling contracts, lawful gamblers are not secured.

To conclude, despite the fact that the judicial method has benefits such as being more flexible, speedier, more responsive, as well as being able to cover more instances, facts, and circumstances but a judicial decision is not binding on subsequent cases; it simply has a persuasive impact on dispute settlement; and there is no statute in force requiring a judge to follow precedents established by earlier decisions. In contrast, legislative approach is more appropriate in Thai law to settle issues with gambling contractual relationships because the court must study the important elements, the legislation will be understood in the same manner by the court, and it is dependable and confidence for gamblers and bookmakers because it is guaranteed by written law.

5. Conclusion

5.1 Civil and Commercial Code and the Gambling Act B.E.2478 (A.D. 1935)

The principle of a gambling contract starts with Section 853 of the civil and commercial code, which states that gambling is a non-obligation contract because gambling is a socially harmful and humiliating activity, the state does not promote those who engage in gambling, and the state believes that gambling is inappropriate and should not be encouraged, and that the law should not protect the gambler to discourage gambling. Section 854 further states that the only types of gambling contracts that can be enforced in court are government lottery and raffle tickets.

Section 853 creates a contractual relationship issue in legal gambling contracts because presently, the Gambling Act BE 2478 regulates gambling, and some gambling is a legal service business with regulations in place to regulate and oversee it. However, both legal and illegal gambling agreements are still governed by Section 853 of the Civil and Commercial Codes. Gambling contracts, as a result, can only be enforced between the parties. In the situation that a gambling game winner participates in cheating, fraud, foul play, or other impropriety in order to take advantage of the loser, the loser has no right to present facts or make a case for the truth since the law does not allow the loser to reclaim any stakes or property or file lawsuits regarding the gambling contract. Additionally, Thailand's court system does not protect legitimate gamblers since judges must use a strict interpretation of gambling legislation.

To recover the loss, the party to the gambling contract may turn to aggressive self-help remedy, which may result in a number of issues, such as informal debt problems, bodily harm or death to a debtor as a consequence of an unlawful debt collector's actions, and so on.

The researcher was researching the definition, evolution, and progression of gambling, with a particular focus on foreign law. According to the findings, the two fundamental approaches in foreign law to resolve issues of gambling contractual relationships are legislative and judicial approaches.

The first approach is to fix the problem through legislative means, which would entail updating gambling laws to reflect current circumstances. The existing regulation may be amended/cancelled/modified by the legislature, which may change a gambling legislation in both the civil and commercial codes as well as the Gambling Act. For example, England, Singapore, and Switzerland are among the countries that recognize gambling debt in their laws.

The second is the judicial method of conflict resolution is based on the rulings of courts of justice. In the Thai legal system, Supreme Court judgements are used to establish the norm of gambling provision. In foreign countries, France recognizes gambling debt in judgment.

5.2 Efficiency of legislative and judicial approach

The effectiveness of legislative approaches may be seen in the gambling laws of England, Singapore, and Switzerland. Because the law explicitly states that gambling debt is permitted, gambling contracts can be lawfully enforced. The establishment of a written provision accepting a gambling debt provides legal certainty and allows courts to make decisions based on the same standards.

The effectiveness of the judicial approach is demonstrated in the France judgment. The court's decision to make a gambling contract enforceable is based on ensuring justice and prudence for both gamblers and bookmakers, as well as boosting the gambling business in France in a fast-changing environment.

5.3 Appropriate method for Thai law

In Thailand, the situation-appropriate approach is a legislative strategy to resolving issues with gambling contractual agreements since establishing a written provision recognizing a gambling debt offers legal clarity and allows courts to make decisions based on the same principles. In contrast, in the Thai legal system, Supreme Court judgements can set the norm for gambling rules in practice; nevertheless, court standards might change based on the setting and circumstances. As can be seen, the legislative process is a more long-term answer than the judicial method.

6. Recommendations

6.1 Amendment of the Gambling Act B.E. 2478 (A.D. 1935)

The researcher proposes amending the Gambling Act BE 2478 to provide provisions to protect lawful gamblers from being exploited by the winner and accepting gambling debt occur from legal gambling to create clear and standard conditions for gambling debt acceptance based on the study of foreign law.

To protect lawful gamblers from being exploited by the winner, a prohibition on reclaiming stakes or property, as well as a provision stating that gambling debt does not give rise to a claim, should not apply to gambling permitted under the Gambling Act BE 2478. An imposition should also be changed to make it more appropriate.

The Gambling Act BE 2478 should be amended by adding the new Section in case of gambling contract such as "The section 853 of the civil and commercial code shall not apply in case: the winner has engaged in cheating, fraud, foul play, or committed an impropriety in gambling is permitted by this law."

6.2 Appropriate exceptional provisions for gambling contractual Enforcement

The researcher proposes adding the requirements for the acceptance of gambling debt by adapt from the foreign law. The Gambling Act BE 2478 should be amended by adding the new Section about " The section 853 of the civil and commercial code shall not apply in case: gambling is permitted by this law and such gambling operated by bookmaker, if bookmaker licensed by competent authority or by legislation, such as Government Lottery, Horse racing, Casino, or other gambling of the same

description." And adding paragraph two about "The provisions of paragraph one not including the contract of advances or loans knowingly made for the purposes of gambling or betting" to protect a gambler from additional financial hardship.

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