Law and disorder

Douglas Mishkin, senior vice president for legal affairs and business operations at Metric Gaming, looks at some recent US legal challenges – and some surprising outcomes

AS a former commercial litigator, I have participated first-hand in the ugliest side of contractual agreements – that point of no return where the relationship is deemed so beyond repair, and the damages so great, that expensive law firms and protracted litigation somehow become a rational choice.

If carefully negotiated agreements between parties that presumably once enjoyed a professional working relationship can and frequently do derail, it is perhaps no surprise that gaming laws occasionally fare no better. Statutes and regulations are, in effect, just contractual relationships in a vacuum – attempts to dictate and circumscribe behaviour without the benefit of ongoing and informal dialogue with the very parties who are bound to comply.

Recent examples under US gaming law expose the potential inefficiency of this system. Back in 2011, New Jersey decided to test the constitutionality of the federal law preventing it from legalising sports betting (known as PASPA). With no mechanism in place to engage the federal government informally on the issue, New Jersey simply legalised sports betting in flagrant violation of PASPA, intending to defend itself by claiming that the law is unconstitutional. Years later, following a hearing and eventual appeal, New Jersey lost.

With confirmation that New Jersey could not violate PASPA outright, the state's next move was to try to circumvent it. Because PASPA makes it unlawful for states (other than those already doing so as of the date the law was enacted) to "sponsor, operate, advertise, promote, license or authorise" sports betting, New Jersey simply repealed its anti-sports betting laws altogether as they applied to casinos and racetracks, thus effectively allowing sports betting to occur at those venues – albeit unlicensed and unregulated.

The parties returned to court, this time arguing over whether New Jersey's new legislative regime still qualified as "sponsoring, operating, advertising, promoting, licensing or authorising" sports betting. Over a year later, following another hearing and eventual appeal, New Jersey lost again. But in a recent twist, the appellate court agreed to vacate that decision and re-hear the case (a rarity for appellate courts), signalling a belief that the matter requires further consideration.

After this re-hearing, the losing side could appeal to the US Supreme Court (potentially adding another year or more to the process if the Supreme Court agrees to hear it). And when all is said and done, New Jersey will either lose – returning it to the same position it was in back in 2011 - or win, enabling unlicensed and unregulated sports betting at its casinos and racetracks, a result that is probably not sustainable long term.

In short, while many see this litigation as a potential breakthrough for regulated sports betting in the US, it could actually hurt the cause. If New Jersey wins, PASPA will have directly inspired unlicensed, unregulated sports betting at the state level – arguably the worst possible form of the very activity the law was enacted to prevent. And in all likelihood, a New Jersey victory would yield a sports betting regime vulnerable to scandal – an eventuality that could, ironically, set the US back on its path towards nationwide legalisation.

This unfortunate consequence (i.e. massive resources spent on litigation that may prove counterproductive) is fundamentally the result of legal drafting ill equipped to address unforeseen circumstances, which is typically the very recipe for contract disputes. When it comes to the law, however, an informal, amicable resolution is all but impossible.

The recent scourge against US daily fantasy sports offers another apt case study in this regard. The entire industry was effectively built on a provision of federal law - the Unlawful Internet Gambling Enforcement Act - that, contrary to popular belief, does not actually legalise fantasy sports. In fact, although UIGEA carves out fantasy sports from its definition of a "bet or wager," it also expressly states that it does not affect any other state or federal gaming law (meaning that, ironically, the very statute relied on by most of the industry to claim that daily fantasy is "100 per cent legal" technically has no bearing on the legality of fantasy sports at all). Now attorneys general across the country are launching investigations into the industry, with those in the states of Nevada and New York both having recently declared that daily fantasy sports are, in fact, illegal in their respective states.

The inefficiencies underscored by this controversy are astounding. Indeed, due to apparent legal uncertainty, an entire industry was, in essence, founded on assumptions regarding legislative intent, how courts might interpret certain statutes, or how motivated a government agency might be to enforce alleged infractions, all in connection with an activity that legislators never imagined – let alone considered – when drafting the applicable laws.

In such an unstable environment, where whole industries are born and billions of dollars exchange hands pursuant to laws unsuited to govern activities that weren't contemplated by the legislators who enacted them – something is bound to give. From that perspective, the fall-out we are witnessing today was arguably long overdue.

The global gaming regulatory landscape shares some of the same inefficiencies, as many gaming laws and regulations outside the US are also yielding unintended consequences. Ostensibly, the primary objective of any regulatory regime is to protect consumers – a goal that is generally uncontroversial in the gambling sector given the potential for operator abuse. Accordingly, few would dispute that implementing strict controls to ensure that money is safe, sensitive personal information is kept confidential and secure, and gambling games themselves are conducted fairly, is a worthwhile endeavour.

But consumer protection would ideally extend beyond those basic mandates, and consider not only preventing harm to consumers, but also encouraging consumer benefits. Regulations should therefore be sufficiently flexible to promote beneficial market forces – namely innovation and competition – which can yield richer, enhanced user experiences but can also be easily stifled by heavy regulatory burdens.

This unsuccessful balancing act is perhaps the biggest shortfall of today's gaming regulatory landscape. A regime that favours rigid, overly burdensome regulation inevitably minimises competition (or worse, incentivises a black market), thus, ironically, harming consumers in the long run. But a slight shift in perspective – where licensees are also deemed by regulators to be partners working towards a mutual goal – could ultimately pay dividends for all parties. In recognition of the fact that previously unforeseen products, services, innovation and business models will always outpace legislation, that mutual goal should be to engage in open, ongoing dialogue to ensure that, in each case, gaming regulations promote – not hinder – the industry's best interests.

While there is of course no easy answer, as governmental agencies are themselves limited by resources that would make it impractical to engage with every licensee to tailor regulations on a case-by-case basis, the industry as a whole could nevertheless benefit from a lighter touch. A more flexible, pragmatic, minimum-necessary approach could ensure gambling integrity without unduly sacrificing the product differentiation and innovation that is critical to the industry's evolution, and which is often more likely to be found in lean and nimble young companies than in their more established, complacent counterparts.