

THE GAMBLING LAW
REVIEW

FOURTH EDITION

Editor
Carl Rohsler

THE LAWREVIEWS

THE
GAMBLING LAW
REVIEW

FOURTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Carl Rohsler

THE LAWREVIEWS

ISRAEL

Liran Barak¹

I OVERVIEW

i Definitions

Israel's approach towards gambling has traditionally been restrictive. The Israeli Penal Law 5737-1977 (the Penal Law) places a general ban on gambling activity, including all forms of lotteries, betting and games of chance. Further restrictions under the Penal Law outlaw ancillary services pertaining to gambling, such as the operation of venues where such gaming activity takes place. Chapter 12 of the Penal Law defines the types of activities that constitute gambling and betting under Israeli law, divided into the following three categories:²

'Prohibited game' – a game at which a person may win money, valuable consideration or a benefit according to the result of a game, those results depending more on chance than on understanding or ability;

'Lottery' – any arrangement under which it is possible – by drawing lots or in another manner – to win money, valuable consideration or a benefit, more by chance than by understanding or ability;

'Betting' – any arrangement under which it is possible to win money, valuable consideration or benefit, by guessing something, including lotteries based on the results of sports matches and contests.

Drafting of the definitions was made intentionally broad and, consequently, their implementations overlap. When examining the Israeli legislator's intention behind the current wording, we find that the purpose was to distinguish between two types of activities: on the one hand, activities based on arrangements agreed between parties - such as lotteries and betting; and on the other, activities defined by their underlying game's predetermined rules - prohibited games.

Although the Penal Law does not use the terms 'games of chance' and 'games of skill', the legal definitions of the three categories of gambling are predicated on what is being referred to as the 'predominance test' (as captured by the phrase 'more by chance than by understanding or ability'). In other words, activities in which skill or knowledge outweigh chance or randomness in determining the outcome will be excluded from the scope of 'prohibited game' and 'lottery' under Israeli law. This test was also used by Israel's courts when deciding how to apply the prohibitions set in the Penal Law.

1 Liran Barak is a partner at Herzog Fox & Neeman Law Office.

2 There is currently no official translation of the Israeli Penal Law available. The translated text used in this chapter is from 'Penal Law 5737-1977' Aryeh Greenfield, 1996.

Nevertheless, the aforementioned predominance test was adapted somewhat by the Israeli courts in 2011. In its ruling, the District Court of Tel Aviv determined that where a particular betting game consists of both skill and chance, the ‘social interest and utility’ of the game in question should also be taken into account before considering its legality.³ In the matter at hand, the court ruled that the hybrid activity was, in fact, a form of prohibited gaming (rejecting an expert opinion stipulating the predominance of skill in determining the outcome of the activity).

Furthermore, in a ruling issued in May 2017,⁴ the Tel Aviv Magistrate’s Court ruled that when determining whether a particular game is one of chance or skill, the game must be assessed in relation to an amateur player playing a single hand. This ruling does not itself constitute a binding precedent but it is demonstrative of the restrictive view Israeli courts take towards gambling. Nonetheless, in October 2018, the Supreme Court of Israel presided over a tax appeal⁵ relating to winnings generated by a poker player in tournaments outside Israel. In its ruling, the majority of the court was of the opinion that poker may not be a game of chance, especially when looking at poker tournaments as opposed to a single hand being played. However, these comments were made only in *obiter dictum*, and are not legally binding.

Against that backdrop, and although the matter has not been addressed to date by Israeli courts, it is the author’s view that Israeli courts are likely to consider activities such as ‘fantasy sports’ as a form of prohibited gambling. While Israeli authorities tolerate true competitions of skill played for prizes, an activity with monetary prizes predicated on the outcome of an external sporting event (or multiple events) is likely to be considered within the definition of betting by Israeli courts, an area exclusively reserved under Israeli law to Israel’s sports-betting monopoly.

The Israeli Ministry of Finance has issued a blanket permit for the conduct of promotional draws and sweepstakes, conditional on these being free to enter. Businesses may conduct a promotional draw no more than twice per calendar year, and at least 120 days apart. Other conditions (such as oversight by a lawyer or accountant) apply as well.⁶ Starting September 2017, notification of any intention to run promotional draws must be submitted to the Ministry of Finance, along with supporting information, via a designated online system, using a smart identification card.

Binary options, contracts for differences, spread betting and other speculative activities related to financial instruments, currencies, securities and the like, are not considered a form of gambling under Israeli law. These activities are regulated under Securities Law 5728-1968. The Tel Aviv District Court ruled in 2016 that trading in binary options does not constitute a form of prohibited gambling.⁷ However, the Israeli Securities Authority (the Authority) has prohibited Israeli licensed trading platforms to offer binary options to Israeli retail customers.⁸ A 2017 amendment to the Securities Law severely restricts the involvement of

3 Class Action (Tel Aviv) 30284-01-10 *Simon Davush v. Connective Group Ltd.*

4 Criminal Case (Tel Aviv) 34939-07-15 *The State of Israel v. Nir Lashowitz et al.*

5 Civil Appeal (Supreme Court) 476/17 *Amit Amishvili Rafi v. Assessing Officer Tel Aviv 4.*

6 Announcement Regarding General Permit for the Conduct of Lotteries for Commercial Promotion Under the Penal Law 5737-1977 (in effect as of 1 January 2010).

7 Class Action 25717-10-13 *Bar-Or et al v. ETrader Ltd et al.*

8 Announcement dated 22 March 2016 – ‘Israeli Securities Authority Has Decided Not to Allow Trading in Binary Options on Trading Platforms’ (available in Hebrew at <http://goo.gl/PKOvbO>).

Israelis in binary options trading (either with Israeli end users or elsewhere). The explanatory notes accompanying the amendment made reference to the Authority's position regarding the 'gambling-like' characteristics of binary options trading.

Under the general ban on betting in Israel, betting on the results of lottery draws (as opposed to entering the draw) is also prohibited.

ii Gambling policy

Israel is notoriously conservative with respect to gambling. An intersection of religious and socialist values has resulted in Israel banning most forms of gambling.

While the laws related to gambling have scarcely changed in recent years, the existing law contains a relatively broad prohibition. The Penal Law prohibits organising 'lotteries, betting and prohibited games' (Section 225) and participation in prohibited games (Section 226). Section 225 provides that a person organising or conducting a prohibited game, lottery or betting is liable to a penalty of up to three years' imprisonment or a fine of up to 452,200 shekels. Section 226 provides that a person playing a prohibited game is liable to a penalty of up to one year's imprisonment or a fine of up to 29,200 shekels. Oddly, Section 226 does not refer to betting or lotteries. In other words, the sanctions on participation are triggered only by playing a 'prohibited game'.

Israeli courts have expanded upon the language of the Penal Law, most notably by ruling that online gambling and betting available to Israeli consumers violates Israeli law (despite the fact that the law predates the internet). The Israel Police has taken enforcement action against online gaming (focusing primarily, but not exclusively, on operations with an Israeli nexus). After an Israeli court refused to uphold a police order requiring internet service providers (ISPs) to ban access to foreign online betting sites, members of Israel's parliament tabled a bill to introduce such measures into the Penal Law (the bill did not, eventually, become law). In 2017 however, a new law was passed, entitled the 'Powers to Prevent the Commission of Offenses by Means of an Internet Website Act, 5767 – 2017'. The law empowered district court judges to issue warrants to ISPs to block illegal gambling websites, at the request of the police or the State Attorney's office. Such ISP blocking warrants were issued for the first time in October 2018, blocking access to three illegal gambling websites. The Bank of Israel has prohibited the transmission of funds related to gambling by Israeli financial institutions, and the State Comptroller has called on all Israeli authorities to take action to curtail the availability of internet gambling in Israel. In short, Israel's authorities are actively seeking to uphold the gambling ban, both offline and online.

Various Israeli governments have considered a limited liberalisation of the blanket ban on bricks-and-mortar gambling, by allowing the construction of a small number of casino resorts in Eilat, a resort destination on the Red Sea. No such initiatives have achieved any meaningful traction.

In 2017, the Israeli Minister of Finance revoked the permit granted to the National Lottery to operate a limited number of video lottery terminals (VLTs). This revocation has been judicially challenged by Lottery concessionaires before the High Court of Justice, but the challenge was rescinded later in 2017.⁹ In late 2017, the Ministry of Finance revoked the permission previously granted to the Israel Sports Betting Board to conduct horse-race wagering – a decision which came into force in January 2018.

9 HCJ 239/17 *Haim Tal et al v. Minister of Finance*.

iii State control and private enterprise

The only forms of legal gambling in Israel (other than a very limited exemption for purely social gambling activities) are the national lottery and a limited sports betting service operated by the state.

These services are regulated as follows:

- a The National Lottery was established in 1951. It offers several weekly draws, scratch cards, a weekly subscription lottery, and various other lotteries and raffles. The operations of the National Lottery are supervised and regulated by the Ministry of Finance.
- b The Israel Sports Betting Board (ISBB) was established in 1967 under the Law for the Regularisation of Sports Betting 5727-1967. The ISBB has the exclusive right to organise and regulate sports betting in Israel. It offers betting on football and basketball games, after its limited horse race wagering offering was disallowed by the Ministry of Finance as of 2018.

iv Territorial issues

The regulation of gambling in Israel is entirely on the national level (local authorities have no jurisdiction on gambling-related matters). Notwithstanding, there have been proposals (none of which have progressed) to carve out Israel's prime resort location, the city of Eilat, from the general prohibition on terrestrial gambling.

v Offshore gambling

With respect to online gambling, Israeli courts have ruled that Israeli law applies to online gambling conducted by foreign operators, when it is made available to Israeli players. In other words, when a party to the gambling transaction is located in Israel, the entire activity would be viewed as a violation of the prohibition on gambling. Enforcement has focused on operators specifically targeting the Israeli market (i.e., advertising to Israelis, using the Hebrew language, etc.).¹⁰ To date, Israeli authorities have never taken enforcement action against foreign operators with no presence in Israel, who have not specifically targeted the Israeli market.

As noted, in 2012, the police attempted to order Israeli ISPs to block access to a specific list of online gambling sites and, following the ISPs' appeal, the blocking orders were struck down by the Israeli Supreme Court in 2013 for lack of explicit legal authority.¹¹ A law empowering district court judges to issue orders aimed at preventing those in Israel from accessing websites offering online gambling services at the request of the police was passed in 2017. In 2018, the law was relied on for the first time by the Israeli courts in order to issue ISP blocking warrants against three offshore, online gambling websites.

10 Regarding the classification of foreign entities offering services in Israel see, Class Action (Tel Aviv) 30284-01-10 *Simon Davush v. Connective Group Ltd and Special Requests* (Tel Aviv), 908617/107 *Carlton v. The National Unit for the Investigation of Fraud*.

11 Administrative Appeal (Supreme Court) 3782/12 *The Commander of the Tel Aviv-Jaffa District Israel Police Israel v. The Israel Internet Association*.

To foil financial transactions related to online gambling, as well as other illegal online activities, the Bank of Israel (which regulates financial and credit institutions in Israel) has issued regulations imposing certain restrictions on financial transactions involving online gambling.¹²

Furthermore, in 2010 the Israeli State Comptroller published a comprehensive analysis of the illegal online gambling market in Israel. The report covered a broad spectrum of governmental agencies. The State Comptroller has urged Israeli enforcement authorities to implement the necessary measures to disrupt gambling-related transactions and block access to illegal gambling websites from within Israel.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The primary piece of legislation regulating gambling in Israel (i.e., the prohibition on gambling) is Chapter 12 of the Penal Law. The Penal Law defines the types of activities that constitute gambling and betting, the prohibitions applicable to such activities, and the limited exemptions available under law.

Additionally, the Law for the Regularisation of Sports Betting 5727-1967 governs the activities of the ISBB.

ii The regulator

The only forms of regulated gambling in Israel are the National Lottery, regulated by the Ministry of Finance, and the ISBB (which is a self-regulating statutory corporation).

iii Remote and land-based gambling

Israeli law does not separately regulate remote and terrestrial gambling. In fact, the law does not specifically refer to remote gambling. The application of the Penal Law to remote gambling was the result of a judicial interpretation of the scope of the law.

iv Land-based gambling

Land-based gambling (other than the National Lottery and the national sports betting offering) is illegal under Israeli law.

v Remote gambling

With the exception of the online betting services offered by the ISBB, online gambling is illegal under Israeli law.

vi Ancillary matters

As commercial gambling is illegal in Israel, there are no set requirements for licensing or approval of individuals holding particular positions within a gambling operator.

¹² Bank of Israel, Supervision of Banks Division, Conduct of Banking Business Procedure No. 411.

vii Financial payment mechanisms

Both the National Lottery and the ISBB only accept fiat money as a payment method for their services, and do not allow payment to be made in cryptocurrencies.

III THE LICENSING PROCESS

Commercial gambling is illegal in Israel, such that this section is not applicable.

IV WRONGDOING

Israeli law enforcement agencies have taken action against unlawful gambling operations. The police have raided unlawful gambling houses and venues used for gambling, and have also taken action against individuals and businesses involved in unlawful online gambling. To date, direct enforcement action has focused primarily on gambling operations conducted by organised crime or from within Israel itself.

Gambling offences are considered source offences under the Prevention of Money Laundering Law 5760-2000. Therefore, unlawful gambling activity may also constitute a money laundering offence. Indeed, individuals involved in unlawful gambling activity have been indicted and convicted of money laundering offences in addition to primary convictions for unlawful gambling offences.

V TAXATION

Since commercial gambling is unlawful in Israel, and the only lawful forms of gambling are conducted by the state, the main relevant tax is the tax on gambling winnings.

The winners of prizes (including prizes from lotteries and betting organised by the ISBB) may be subject to taxation.

Following a reform in 2018, which came in to force in January 2019, the previous tax exemption of gambling prizes up to 50,000 shekels was reduced, and the exemption now applies to prizes of up to 30,500 shekels only.

Prizes in excess of 30,500 shekels are subject to withholding tax at source. Tax rates are incremental for prizes between 30,500 and 61,000 shekels, and are set at 35 percent for prizes above 61,000 shekels.

Nonetheless, there have been several court cases in 2018 that dealt with the taxation of profits generated from gambling outside of Israel by Israeli residents. In a case from October 2018,¹³ the Israeli Supreme Court presided over a tax appeal filed by a poker player deemed by the court to be a professional player. Consequently, the court ruled that his winnings generated from participation in poker tournaments abroad would be subject to income tax, and not the tax on gambling winnings (which would have resulted in lower taxation). In a later court case from 2018,¹⁴ also dealing with tax to be levied on poker tournament winnings abroad, the Tel Aviv District Court took the Supreme Court ruling a step further. The district court followed the precedent set by the Supreme Court whereby winnings would be subject

13 Civil Appeal (Supreme Court) 476/17 *Amit Amishvili Rafi v. Assessing Officer Tel Aviv 4*.

14 Tax Appeal (Tel Aviv) 45369-02-17 *Miller Ori v. Assessing Officer Tel Aviv 3*.

to income tax, but also allowed for the deduction of certain expenses incurred by the poker player in earning his poker winnings (such as flight and accommodation costs, tournament registration fees, etc.).

VI ADVERTISING AND MARKETING

Section 227 of the Penal Law specifically prohibits the advertising of illegal gambling and betting. It reads:

If a person offers, sells or distributes tickets or anything else that attests to a right to participate in any lottery or betting, or if he prints or publishes an announcement of a lottery or betting, he is liable to one year imprisonment or a fine of 150,600 NIS.

The law does not distinguish online advertising from traditional advertising, nor does it distinguish advertising for foreign gambling operations from advertising of local operations. Historically, the police have taken action against advertisers specifically targeting Israeli customers, both online and offline.

In 2017, the Ministry of Finance imposed strict limitations on the advertising of gambling activities by the National Lottery.

In addition, the Consumer Protection Regulations (Advertising and Methods of Marketing Directed to Minors), 5751-1991, prohibits any advertisement or marketing intended to encourage minors to participate in gambling, or promotional prize draws, except for non-commercial prize draws.

VII THE YEAR IN REVIEW

The last year saw some conflicting developments in the field of gambling in Israel.

On the one hand, we saw additional restrictions imposed on gambling. One such restriction came in the form of a decision by the Ministry of Finance to disallow the offering of horse race wagering by the ISBB in early 2018. The ISP blocking of offshore gambling websites was successfully implemented via the courts for the first time in late 2018. In addition, starting January 2019, the tax exemption on winnings generated from gambling was reduced from 50,000 to 30,500 shekels.

Conversely, there have been a number of relatively minor developments, which benefitted the gambling industry in Israel. The most notable was probably the Supreme Court ruling pertaining to the game of poker,¹⁵ whereby the court ruled that a professional poker player's winnings from his participation in poker tournaments abroad would be taxed as income and not as gambling winnings. Even more interesting was the court's majority opinion, that poker is not to be considered a game of chance, especially when looking at poker tournaments, as opposed to a single hand or game. However, unfortunately, these comments were *obiter dicta* and are not legally binding.

Finally, in November 2018, a private member's bill was introduced to the Israeli parliament, with the aim of regulating real money poker tournaments in Israel. The bill seeks to exclude certain types of games, under certain circumstances and subject to a permit issued

15 Civil Appeal (Supreme Court) 476/17 *Amit Amishvili Rafi v. Assessing Officer Tel Aviv 4*.

by the Minister of Finance, from the definition of a 'prohibited game'. The bill is pending the Knesset's decision either to have it removed from the agenda or to forward it to the relevant House Committee for preparation for first reading.

VIII OUTLOOK

As previously noted, Israel is notoriously conservative with respect to gambling. Therefore, it is unlikely that the coming year will bring any liberalisation to the market. In fact, it is more likely that the coming year will see the introduction of bills intended to further restrict the availability and proliferation of online gaming rather than the progression of bills aimed at market liberalisation. It is also likely that we will see an increase in enforcement against illegal gambling by police and the Attorney General's office, for example, by use of their ISP blocking powers.

It is also more likely that government bodies will seek to place additional restrictions on the activities of the National Lottery and ISBB, as well as promotional draws in general.

That said, the latest developments in court cases pertaining to poker may give rise to future court cases that will take up the review of the legal classification of poker in a more in-depth and professional matter, and possibly take it outside the scope of a 'prohibited game' under Penal Law.

ABOUT THE AUTHORS

LIRAN BARAK

Herzog Fox & Neeman Law Office

Liran is a partner in HFN's Gaming Law department, advising clients on a wide range of issues related to the laws of online gaming, concentrating primarily on matters pertaining to regulation, licensing, lobbying and litigation. In addition, Liran advises clients with respect to e-commerce regulation and licensing.

Following his extensive service in the IDF's Military Advocate General's Corp (MAG) as both legal adviser and military prosecutor, Liran also advises clients on issues pertaining to public international law.

HERZOG FOX & NEEMAN LAW OFFICE

Asia House

4 Weizmann Street

Tel Aviv 6423904

Israel

Tel: +972 3 692 5575

Fax: +972 3 696 6464

barakl@hfn.co.il

www.hfn.co.il



ISBN 978-1-83862-028-8