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Law, Judges and Authorized Gambling in Italy: A Tale of Contradictions

NADIA COGGIOLA*

Jusqu'à présent, malgré les nombreuses études théoriques portant sur l'incidence juridique du jeu, peu d'attention a été prêtée à la relation entre le droit des contrats et l'étiquette sociale et morale négative généralement associée aux contrats de jeu dans bon nombre de pays occidentaux. L'objectif de cet article est d'étudier comment les tribunaux civils italiens ont appliqué les règlements sur les clauses abusives du *Code civil* et du *Code de la consommation* aux cas mettant en cause des contrats de jeu et de pari autorisés. Ces règlements devraient être appliqués aux contrats de jeu et de pari autorisés, qui mettent généralement en cause un joueur individuel ou une joueuse individuelle et un fournisseur de services professionnels, soit parce que le joueur ou la joueuse souscrit à un contrat type, soit parce qu'il ou elle devrait être considéré comme un consommateur. Malheureusement, les juges italiens s'abstiennent souvent d'appliquer ces règlements de protection dans les cas mettant en cause des contrats de jeu et de pari, au détriment des joueurs et des joueuses. Cet article se penche significativement sur ces cas pour découvrir comment les juges justifient ce traitement différentiel des joueurs et des joueuses à cette forme de jeu juridique, mettant en lumière les effets nocifs de ce traitement discriminatoire sur les consommateurs et la société en général.

To date, notwithstanding the large number of scholarly investigations into the legal implications of gambling, little attention has been paid to the interaction between contract law, and the negative moral or social labelling which traditionally affects gambling contracts in many Western countries. The purpose of this article is to investigate how Italian civil courts have applied *Civil code* and *Consumer code* rules on abusive clauses to cases involving authorized gambling and betting contracts. These rules should apply to authorized gambling and betting contracts, which generally involve an individual player and a professional service provider, either because the player adheres to a standard contract or because she should be considered a consumer. Unfortunately, Italian judges often refrain from applying these protective rules to cases involving gaming and betting contracts, to the detriment of players. This article critically investigates these cases to explore how judges justify this differential treatment of players of this form of legal game, highlighting the harmful effects of this discriminatory treatment on consumers and society in general.

THERE IS A COMPLICATED RELATIONSHIP BETWEEN the Italian legal provisions related to gambling and betting contracts and the decisions rendered by Italian judges in cases involving these provisions. This relationship is probably not unique to the Italian legal system, as it is a natural consequence of the uncomfortable place that gambling activities occupy in Western

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society. Legislators, courts and scholars have tried since Roman times,¹ more or less assiduously, to discipline gambling activities in an effort to protect both morality and, perhaps more often, the finances of gamblers.²

This disciplinary approach is usually paired with a much less influential, non-judicial tradition, which finds modern voice in Huizinga³ and Caillois,⁴ recognizing the centrality of play and games to human cultural and social relationships. Obviously, this latter approach was seldom appreciated or applied by Western governments, which have preferred imposing restrictions on gambling and betting activities, using arguments based in morality, religion, economics, and concerns about public order and social cohesion.

This legislative and judicial approach to the control and regulation of gambling and betting activities has for centuries balanced the interests of those calling for stricter monitoring of gambling activities for moral or economic reasons against the interests of those seeking entertainment in the game, and against the state's interest in social control, until three counteracting issues emerged, mainly in the last century. First, increasing numbers of commercial and speculative activities, based on the allocation of risk on future events, such as contracts of insurance and stock speculations, required that law provide a reasoned distinction between these latter undertakings, deemed to be worthy of protection, and gambling and betting activities which were left unprotected.⁵

Secondly, the medical and social sciences started to investigate gamblers as problematic subjects, shifting discourse about the problem of gambling from the moral and economic planes to the psychiatric and sociological fields. Psychiatrists began to develop phrases such as “compulsive gambler” and “pathological gambler” to describe individual players, while sociological studies hypothesized gambling as a reaction to social frustration (although this approach has abated more recently).⁶

¹ For a good introduction to the issue in English, see Suzanne B. Faris, “Changing Public Policy and the Evolution of Roman Civil and Criminal Law on Gambling” (2012) 3 UNLV Gaming LJ 199. See also Rodolfo Lanciani, “Gambling and Cheating in Ancient Rome” (1892) 155 (428) North American Review 97.

² For an introduction to the European scholarship, see, *inter alia* Manfred Zollinger, *Geschichte des Glückspiels*, (Wien: Böhlau, 1997); Jean Barbeyrac, *Traité du jeu: où l'on examine les principales questions de droit naturel et de morale qui ont du rapport à cette matière* (Amsterdam: Pierre Humbert, 1709); Robert Joseph Pothier, *Traité du jeu* (Paris: Montaut, 1767); André-Jean Arnaud, *Essai d'analyse structurale du code civil français: la règle du jeu dans la paix bourgeoise* (Paris: Librairie générale de droit et de jurisprudence, 1973); Antonio Cappuccio, *Rien de mauvais: i contratti di gioco e scommessa nell'età dei codici* (Torino: Giappichelli, 2011); Dino Joakim Duderstadt, *Spiel, Wette und Differenzgeschäft (§§ 762-764) in der Rechtsprechung des Reichsgerichts und in der zeitgenössischen Literatur* (Frankfurt am Main: Peter Lang, 2007); David Miers, *Regulating Commercial Gambling: Past, Present, and Future* (Oxford: Oxford University Press, 2004).

³ Johan Huizinga, *Homo ludens* (Leiden: Leiden University, 1938).

⁴ Roger Caillois, *Les jeux et les hommes: la masque et la vertigine* (Paris: Gallimard, 1958).

⁵ See Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) at 176; Marieke De Goed, *Virtue, Fortune, and Faith. A Genealogy of Finance* (Minnesota MN: University of Minnesota Press, 2005); Pat O'Malley, *Risk, Uncertainty and Government* (London: Glasshouse Press, 2004) at 95; Pat O'Malley, “Moral Uncertainties: Contract Law and Distinctions between Speculation, Gambling, and Insurance”, in Richard V. Ericson and Aaron Doyle, eds, *Risk and Morality* (Toronto: University of Toronto Press, 2003) at 231.

⁶ For an introduction to these issues, see: Gerda Reith, *The Age of Chance: Gambling in western culture*, (London, New York: Routledge, 1999); Jan McMillen, ed, *Gambling cultures: studies in history and interpretation* (London, New York: Routledge, 1999); Alan Wolfe and Eric C. Owens, eds, *Gambling: Mapping the American Moral Landscape* (Waco, Tex: Baylor University Press, 2009).

Lastly, the West saw an increasing amount of legalization of gambling activities, disciplining gambling and betting activities while offering players the opportunity to legally engage in games of chance, and allowing the state to secure revenues from gambling and betting. This places governmental authorities in charge of protecting players from the negative consequences of gambling and betting and in charge of the organization and control of those same activities. This two-faced role is not always easy to perform fairly.⁷

In this article I concentrate on the last point since the contemporary widespread legalisation of gambling activities requires legislators, judges and scholars to deal with a new reality. Gambling activities are not illegal or immoral. They are regulated and sponsored by national governments. My aim is to investigate how this new scenario is playing out in the Italian judicial system, to try to understand the path followed by Italian judges asked to apply the traditional *Civil code* rules and the latest *Consumer code* provisions to cases of authorized gambling and betting contracts.

I. THE ITALIAN GAMBLING LANDSCAPE

During the last few decades Italy has, like other Western countries, began to regulate an increasing number of gambling and betting activities. The amount of money spent in 2016 on public games and bets in Italy was an incredible 95.969 million EUR, up from 88.249 in 2015 and 84.460 in 2014.⁸ This increasing spending on gambling and betting by the Italian general population is more striking if we consider that in these years the Italian economy has been faltering, and Italian gamblers are mainly those with lower incomes and class status, poor coping skills and interaction capacities, lower cognitive abilities and a lower level of education.⁹

In Italy, all these gambling and betting activities are ruled, directly or by way of concessions, by the Italian government. In fact, the Italian government, through art. 4 D.L. n. 138 8 July 2002, is entitled to a monopoly over the organization and operation of games, betting

⁷ See, *inter alia*, Sytze F. Kingma, *Cultural perspectives on gambling organizations* (London, New York: Routledge, 2010); John Dombink, Gambling and the legalization of vice: Social movements, public health and public policy, in McMillen, ed, *supra* note 6 at 43; George Ritzer, *Enchanting a disenchanted world: Revolutionising the means of consumption* (London, New Delhi: Pine Forge Press, 2005); John Hannigan, *Fantasy city. Pleasure and profit in the postmodern metropolis* (London, New York: Routledge, 1998); Alan Littler and Cyrille Finaut, eds, *The Regulation of Gambling: European and National Perspectives* (Leiden: Martinus Nijhoff Publishers, 2007).

⁸ Agenzia Dogana e dei Monopoli, *Organizzazione, attività e statistica Anno 2016* (n.p: n.d) at 79, online <<https://www.adm.gov.it/portale/documents/20182/536133/cre-a-20170412-Libro%2Bblu%2B2016+rev05072017.pdf/be930354-13d9-46b9-958b-69eb128a1869>>[perma.cc/36WA-TH79].

⁹ For an introduction to this issue, see: Emma Casey, “Gambling and consumption: Working-class women and UK National Lottery play” (2003) 3(2) *Journal of Consumer Culture* 245; McMillen, *supra* note 6; Pauliina Raento, David G. Schwartz, eds., *Gambling, space, and time: shifting boundaries and cultures* (Reno, Las Vegas: University of Nevada Press, 2011); Per Binde, *Gambling Across Cultures: Mapping Worldwide Occurrence and Learning from Ethnographic Comparison*, (2005) 5(1) *International Gambling Studies* 1. For work describing the Italian landscape, see the essays collected in Fabio La Rosa, ed, *Il gioco d'azzardo in Italia. Contributi per un approccio interdisciplinare* (Milano: Franco Angeli, 2016), especially Michele Sabatino, *Gioco d'azzardo e crisi economica* at 45; Giuseppima M.C. Talamo and Giovanni Manuguerra, *Il settore dei giochi d'azzardo e i costi sociali* at 172; Mariano Cavataio, *Il profilo socio-demografico dei giocatori d'azzardo italiani: un'analisi basata su dati di sondaggio. L'importanza dell'approccio pragmatico della gambling social responsibility* at 211; Nicola Malizia, *Il gioco d'azzardo patologico: profili sociologici, criminologici, psicologici e vittimologici* at 255; Ugo Pace and Alessia Passanisi, *Aspetti temperamentali e di personalità dei giocatori d'azzardo* at 295.

and wagers. These activities are governed by the Agenzia delle dogane e dei monopoli, a public agency charged with awarding and supervising concessions to private enterprise.¹⁰

More gambling and betting enterprises offer a much wider array of gambling activities than they did in the past. In many cases these gambling and betting activities are dematerialized, that is to say performed online and enjoyed by the players using smartphones or computers or other similar tools. In this article, I use the phrase “public gambling and betting contracts” (in Italian “contratti di gioco e scommessa pubblici”), because one of the parties to the contract is always a legal private person entrusted by the Government with the power to stipulate gambling or betting contracts through a concession, and this term is commonly used with that meaning in Italian law.

Although the main purposes of the governmental monopoly over gambling and betting activities are said to be the prevention of criminal activities and protection of the individual gambler, the Italian government draws a relevant economic advantage from those activities and advertises them heavily on popular media. The role played by the Italian government in the development of these activities, their widespread diffusion and a changed, more tolerant, social approach toward gambling is at the root of the ontological transformation of gambling and betting activities into “common goods” or “common services”, stripped of their former negative connotation in Italian society and in the economy. In many ways, gambling and betting contracts are generally treated by the contracting parties, and by the public at large, as no different from other types of contract.

However, this attitude towards gambling and betting contracts is apparently not shared by law or by judges. As we will see in the following sections, Italian law provides special rules exclusively devoted to gambling and betting contracts, which set forth different rules from those applied to other contracts. Moreover, even when asked to apply rules aimed at the protection of the weaker party in the contract (almost always the consumer), Italian judges tend to apply different criteria to gambling and betting contracts, an approach which generally operates to the detriment of the players – players who are, as noted above, disproportionately drawn from the less privileged sectors of Italian society.

Although negative moral connotations or social labelling may play a role in the application (or non-application) of particular positive law rules to cases of gambling and betting contracts by judges in Italy, these interactions have seldom if ever been investigated by Italian legal scholars. In fact, Italian private law scholars have traditionally focused on the historical evolution of the rules concerning gambling and betting contracts under the Italian *Civil code*, and the technicalities of their application.¹¹ Only recently has interest in the area has been heightened by questions about the application of European rules devoted to consumer protection (implemented through the Italian *Consumer code*) to cases of gambling and betting contracts.

Moreover, to my knowledge, these questions have not been investigated by Italian scholars of the sociology of law. Even outside the Italian context, sociolegal scholars have tended to concentrate on the criminal law implications of gambling and on the commercial

¹⁰ For an introduction to this issue, see Cino Benelli and Enrico Vedova, *Giochi e scommesse tra diritto comunitario e diritto amministrativo nazionale* (Milano: Giuffrè, 2008); Tommaso Di Nitto, *I giochi e le scommesse*, (Milano: Giuffrè, 2003).

¹¹ For works discussing this issue, please refer to the Italian authors cited in the following footnotes.

normalization of gambling activities,¹² neglecting investigation of the application of legal rules aimed at protecting the weaker party to a contract.¹³ This article is a first effort to analyse this issue in Italian law, examining the application of the provisions of the Italian *Civil code* and of the Italian *Consumer Code* on abusive (unfair) clauses in cases involving public gambling and betting contracts.

II. THE ITALIAN LEGAL TRADITION AND GAMBLING CONTRACTS

In most Western juridical systems, the application of contractual obligations can be limited or excluded for reasons of morality or public order, where the law so provides.¹⁴ This rule also applies to gambling contracts in Italy, as provisions contained in the Italian *Civil code* of 1942 were strongly influenced by moral and public policy considerations. The Italian *Civil code* contains in fact three articles devoted to gambling and wager contracts, which provide as follows:

Article 1933. No-actionability. No action can be brought to collect claims deriving from gambling or wagers, even in the case of games or wagers which are not prohibited by law. However, a loser cannot recover what he has voluntarily paid following the outcome of a game or wager in which there is no fraud. Recovery is always allowed if the loser is a person lacking capacity.

Article 1934. Competitive sports. Games which involve training in the use of arms, races of all kinds and all other competitive sports are excepted from the provision of the first paragraph of the preceding article, even in respect to persons who do not participate in the game. The court, however, can reject or reduce the claim, when he considers the amount of the wager to be excessive.

¹² See Kingma, *supra* note 7; Dombink, *supra* note 7; *supra* note 7; Hannigan, *supra* note 7; Binde, *supra* note 9.

¹³ In this article, I use the phrase “public gambling and betting contracts” (in Italian “contratti di gioco e scommessa pubblici”) because one of the parties to the contract is always a legal private person entrusted through a Government concession with the authority to conclude gambling or betting contracts.

¹⁴ See, *inter alia*, Jean-Luc Aubert, *La répétition des prestations illicites ou immorales en droit français, en droit suisse et dans la jurisprudence belge* (Lausanne: Nouvelle Bibliothèque de droit et de jurisprudence, 1954); Charles Aubrie and Charles Rau, *Cours de droit civil français* (Bruxelles: Melin Cans et Comp., 1850) T. I, 2; Choucri. Cardahi, "L'Exécution des conventions illicite et immorales; étude de l'adage Nemo auditur d'après le droit comparé, le droit musulman et les moralistes chrétiens" (1951) 3 Rev. intern. droit comp. 385; Donato Carusi, *Contratto illecito e soluti retentio, l'art. 2035 cod. civ. tra vecchie e nuove «immoralità»* (Napoli: Jovene, 1995); Paul-André Crépeau, *La Réforme du droit civil canadien: une certaine conception de la recodification, 1965-1977* (Montreal: Editions Thémis, 2003); Dominique Fenouillet, Les bonnes mœurs sont mortes! Vive l'ordre public philanthropique!, in *Le droit privé français à la fin du XXème siècle, Mélanges offerts à P. Catala* (Paris: Litec, 2001); Richard Hare, *The language of morals* (Oxford: Oxford University Press, 1952); Pietro Rescigno, «In pari causa turpitudinis», (1966) *Rivista di diritto civile* I 1; George Ripert, *La règle morale dans les obligations civiles* (Paris: LGDJ, 1925); E. Sabbath, Denial of Restitution in Unlawful Transactions, A Study in Comparative Law with Special Reference to English and French Law (In pari delicto potior est conditione defendentis), Part I (1959) 8(3) Intern. Comp. LQ 486 and Part II (1959) 8(4) Intern. Comp. LQ 689.

Article 1935. Authorized lotteries. Lotteries, if legally authorized, can constitute a basis for legal action.¹⁵

It is easy to infer from the reading of these articles that the Italian legislator of 1942 was, like the French *Civil code* legislator, eager to distinguish gambling contracts from all the other contracts disciplined in the *Civil code*. To that purpose, gambling contracts were treated as “different” from all the other contracts, and special rules were to be applied only to such contracts.

This different treatment of gambling and wager contracts follows a long legal tradition with roots in Roman and medieval law, and which sometimes seems to still permeate legal approaches to gambling. In fact, Roman law contained a distinction between licit and illicit games, where the former category concerned sport games and games held on certain special occasions, and the latter normally comprised gambling activities. The purpose of this distinction was not to protect morality, but rather to protect the finances of players, and to address questions of social cohesion, with reference to activities that were considered a loss of time and money.¹⁶ This attitude, unaltered since the early medieval times, slowly changed under the influence of the Catholic church,¹⁷ giving rise to the often cloudy distinction elaborated by medieval scholars between prohibited and tolerated games.¹⁸ This evolved into a set of categories for games: safeguarded (*tutelati*), prohibited (*proibiti*), tolerated (*tollerati*),¹⁹ and, lastly, authorized (*autorizzati*). These distinctions are reflected in judicial and scholarly interpretations of the provisions concerning gambling and wager contracts of the Italian *Civil code* of 1865²⁰ and the subsequent Italian *Civil code* of 1942.²¹

According to article 1934 c.c., safeguarded games are those based on the result of a sports competition; such games produce full contractual effects, and the winner of the wager can legally claim the promised payment. Prohibited games are those forbidden by the Criminal Code or other laws. Tolerated games are licit games, such as card games, or wagers on events

¹⁵ All Civil code translations in this article are from Mario Beltramo, Giovanni E Longo and John Henry Merryman, *The Italian Civil Code* (New York: Oceana, 1991), from which all translations of the Italian Civil code articles in this article are drawn. As a caveat, I warn the reader that these are not perfect translations of the original Italian provisions.

¹⁶ Ugo Gualazzini, “Giochi e scommesse (storia)”, in *Enciclopedia del Diritto XIX* (Milano: Giuffrè, 1970) at 32; in English, see Faris, *supra* note 1. For a lively picture of the popularity of gambling in ancient Rome, see Lanciani, *supra* note 1.

¹⁷ On the issue of the complex relationship between religion and law, see Giovanni Ceccarelli, *Il gioco e il peccato. Economia e rischio nel tardo medioevo* (Bologna: Il Mulino, 2003).

¹⁸ Cappuccio, *supra* note 2 at 40; Renato Ferroglio, “Ricerche sul gioco e la scommessa fino al secolo XIII” (1998) *Rivista di storia del diritto italiano* 324; Alessandra Rizzi, *Ludus/ludere: giocare in Italia alla fine del medioevo* (Treviso, Roma: Viella, 1995) at 63; Zollinger, *supra* note 2 at 21.

¹⁹ Emilio Valsecchi, *Il giuoco e la scommessa. La transazione* (Milano: Giuffrè, 1986) at 75; Carlo Alberto Funaioli, *Il giuoco e la scommessa* (Torino: UTET, 1961) at 115.

²⁰ Giorgio Giorgi, *Teoria delle obbligazioni nel diritto moderno italiano* (Firenze: Cammelli, 1903) at 491; Carmelo Scuto, *Teoria generale delle obbligazioni* (Catania: Editoriale siciliana tipografica, 1927) at 146; Francesco Ferrara, *Teoria del negozio illecito nel diritto civile italiano* (Milano: Società Editrice Libreria, 1914) at 135, 286, 138 note 3; Pietro Bonfante “Le obbligazioni naturali e il debito di giuoco”, in Pietro Bonfante, ed, *Scritti giuridici vari* (Torino: UTET, 1926) at 41; Giulio Venzi, *Manuale di diritto civile* (Torino: UTET, 1932) at 529.

²¹ Another traditional distinction of Italian scholarship is that between gambling and wager (or betting), a distinction that can also be traced in other juridical systems and on whose content the opinions of Italian scholars partly disagree. For an introduction to the issue, see Massimo Paradiso, *Gioco, scommessa, rendite* (Torino: UTET, 2006) at 36 and Enrico Moscati, *Il giuoco e la scommessa* (Torino: UTET, 1985) at 153 (including references to other civil law provisions).

not related to sports which, through the provisions of article 1933 c.c., do not allow the winner to bring a lawsuit for the enforcement of the promised prize, but at the same time allow the winner to keep any money spontaneously paid out by the loser. Lastly, authorized games, such as lotteries and betting, are fully protected through the provisions of article 1935 c.c.

Although these distinctions may seem quite straightforward, they form the basis of an ongoing quarrel amongst Italian scholars over the theoretical classification of the rules in the system of the *Civil code*. In fact, some scholars argued that, because of the preeminent collocation of article 1933 c.c., the rule that prevents any action for payment of a wager should be considered a general rule for cases of gambling and betting, and all the other cases in the following articles exceptions to this general rule.²² The leading scholars held that legal obligations arising from gambling or betting are to be considered and treated as natural obligations,²³ that is to say obligations that arise from non-contractual situations, outside of a contractual relationship, enforced only through the presence of moral duties.²⁴ Sometimes they also held that the rule forbidding the payment of the prize made by the loser could also be applied to cases of prohibited or authorized games.

Some supporters of this theory held that games were useless and dangerous activities, both for the players and for society. They were a vice, a source of immorality.²⁵ Others, however, thought that games were a licit activity, providing amusement and relaxation for players.²⁶ A third group would have distinguished between illicit games and licit payment as a consequence of the illicit activity.²⁷ But all of them agreed that the adoption of the category of natural obligations for obligations arising from gambling or wagering activities, clearly implied that those relationships were not considered contractual relationships.

Only a small number of Italian scholars disagreed, arguing that the relationship between the players *is* a contractual relationship.²⁸ Some of them even emphasized that the players'

²² Luca Buttarò, "Del giuoco e della scommessa", in Antonio Scialoja e Giuseppe Branca, eds, *Commentario al Codice civile* (Roma-Bologna: Zanichelli, 1968) at 105, 209; Funaioli, *supra* note 19 at 178; Bortolo Belotti, "Giuoco" *Digesto Italiano XI* (Torino: UTET, 1904) at 410.

²³ For an introduction to natural obligations in Italian law, see: Umberto Breccia, *Le obbligazioni* (Milano: Giuffrè, 1991) at 76; Pietro Perlingieri, "Le vicende dell'obbligazione naturale", (1969) *I Rivista di diritto civile* 357; Mario Rotondi, "Alcune considerazioni sul concetto di obbligazione naturale e sulla sua evoluzione", (1977) *I Rivista di diritto commerciale* 213; Luca Nivarra, "Adempimento dell'obbligazione naturale ed effetti traslativi", in Letizia Vacca, ed, *Causa e contratto nella prospettiva storico-comparatistica* (Torino: Giappichelli, 1997) at 517; Enrico Moscati, *Le obbligazioni naturali* (Padova: CEDAM, 1999); Fulvio Gigliotti, *Del pagamento dell'indebito: obbligazioni naturali* (Milano: Giuffrè, 2014); Luigi Balestra, *Le obbligazioni naturali* (Milano: Giuffrè, 2004); Maria Antonia Ciocia, *L'obbligazione naturale: evoluzione normativa e prassi giurisprudenziale* (Milano: Giuffrè, 2000).

²⁴ Antonio Guarino, "Questioni di gioco" (1946) *Diritto e giustizia* 222; Francesco Messineo, *Manuale di diritto civile e commerciale* (Milano: Giuffrè, 1958) at 215, 225; Cesare Grassetti, "Debito di giuoco e mutuo tra giocatori" (1946) *Temi* 354; Funaioli, *supra* note 19 at 105, 178; Buttarò, *supra* note 22 at 126; Enrico Moscati, "Gioco e scommessa", in *Digesto Discipline Privatistiche, Sez. civ., IX* (Torino: UTET, 1993) at 17; Enrico Moscati, "Pagamento dell'indebito" in Antonio Scialoja e Giuseppe Branca, eds, *Commentario al Codice civile* (Roma-Bologna: Zanichelli, 1981) at 295; Domenico Riccio, "Il giuoco e la scommessa" in Giovanni Di Giandomenico, Domenico Riccio, eds., *I contratti aleatori* (Torino: Giappichelli, 2005) at 179.

²⁵ Valsecchi, *supra* note 19.

²⁶ Buttarò, *supra* note 22 at 5.

²⁷ Giorgio Oppo, *Adempimento e liberalità* (Milano: Giuffrè, 1947) at 238; Funaioli, *supra* note 19 at 178.

²⁸ Bonfante, *supra* note 20, at 66; Giovanni Pacchioni, *Diritto civile italiano II*, 1 (Padova: CEDAM, 1941) at 222; Augusto Pino, "Il giuoco scommessa e il contratto aleatorio", *Studi in onore di Francesco Santoro-Passarelli*, III, (Napoli: Jovene, 1972) at 789; Rodolfo Sacco, Giorgio De Nova, *Il contratto*, II (Torino: UTET, 1993) at 27, 53, 497-499.

juridical relationship must be stripped of every moral connotation and prejudice, which could interfere with the appropriate legal resolution of any issue.²⁹ This second approach is, in my opinion, more in line with the present Italian situation, where the Italian government holds a monopoly over all legal gambling and betting activities. This is the approach I take as I investigate the relationship between the legalization of gambling activities and the application of general contractual rules to public gambling and betting contracts.

III. APPLICATION OF THE RULES ON ABUSIVE CLAUSES TO GAMBLING CONTRACTS

A. CIVIL CODE PROVISIONS

If gambling and betting relationships are to be treated as contracts, the logical and unavoidable consequence is that general contractual rules should be applied to them. As we will see, however, such a presumption would often be wrong in Italian law. Most of the gambling contracts in Italy are today concluded between an authorized gambling services provider and an individual player. Are the Italian rules on abusive clauses, provided for by the Italian *Civil code* and by the provisions concerning consumer' protection, applied to these common contracts? The Italian *Civil code* provides, at article 1341, general rules governing contracts characterized by simple adhesion of one of the parties to the standard contract provided by the other party.³⁰ These standard contracts are mostly used by professional operators in their business activities, and there is always a presumption that the party who wrote the standard contract can take advantage of a more favourable position. For these reasons the Italian *Civil code* provides that the clauses of the standard contract are effective only if the adhering party knew of them or should have known of them by using ordinary diligence at the time of the formation of the contract. Moreover, the second paragraph of the same article renders ineffective any conditions which operate in favour of the party who wrote the contract concerning limitations on liability, the power to withdraw from the contract or suspend the performance, or the imposition of time limits involving forfeitures, limitations on the power to raise defences, restrictions on contractual freedom in relations to third parties, tacit extension or renewal of the contract, arbitration clauses, or derogation from the competence of courts, unless they are specifically approved in writing by the other party.

Italian doctrine has generally agreed that, apart from the laconic rules contained in articles 1934 and 1935, gambling or wagering contracts concluded between a professional provider of gambling services and an individual gambler are also subject to the general protective provisions of article 1341, because such contracts contain all the elements required by this article. In fact, these contracts are generally concluded between professional providers (holders of government concessions), and individual gamblers, using standard contracts written

²⁹ Giovanni Battista Ferri, "La neutralità del gioco", (1974) *I Rivista di diritto commerciale* 28; Paradiso, *supra* note 21 at 14.

³⁰ See Art. 1341 civil code. "Standard conditions of contract. Standard conditions prepared by one of the party are effective as to the other, if at the time of the formation of the contract the latter knew of them or should have known of them by using ordinary diligence. In any case conditions are ineffective, unless specifically approved in writing, which establish, in favour of him who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or of suspending the performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defences, restriction on contractual freedom in relations to third parties, tacit extension or renewal of the contract, arbitration clauses, or derogation from the competence of courts." Translation from Belatramo, *supra* note 15.

by the professional providers. Moreover, these standard contracts often contain provisions established by laws or regulations or otherwise enacted by the government.³¹

Although the application of the general provisions of article 1341 c.c. to contracts of gambling and betting may seem straightforward, Italian case law offers some interesting cases of misapplication of those rules. In the few cases where Italian judges were actually confronted with the application of article 1341 c.c. to gambling contracts, they did not deny the abstract applicability of the provisions contained in the article to the contract written by the professional service provider. But in the end, the courts did not actually apply those provisions to the case, with unjust consequences for the individual player.

Italian case law holds that laws and regulations that provide the clauses of the public gambling or wagering contracts are to be considered and treated as general conditions of the contract unilaterally written by the professional gambling operator.³² But at the same time, Italian case law suggests that those same clauses could be considered and treated as abusive clauses in a contract of gambling or betting. For example, the Italian Corte di Cassazione in its decision n° 7763 of 12 July 1991,³³ held that certain clauses in the rules of Totocalcio (a game operated by a Government concessionaire where players are asked to predict the results of soccer games) such as a 60 day limitation on complaints, were abusive. At the same time, it affirmed that those rules bound even the players who did not specifically approve them in writing, because the rules were public, publicized, and checked by the government.

The case concerned a player who complained *after* the 60-day limit provided for by the Totocalcio game rules, claiming a discrepancy between the numbers on the ticket copy registered by the service provider and those on the ticket in his hands. In the opinion of the Court, the significant publicity given to the contractual rules adequately substituted for the requirement of specific approval in writing, ensuring that players were aware of the existence of these “abusive” rules in the contract they were going to conclude.³⁴ To justify this interpretation, the Court held that the very nature of the contract and its actual performance could be paralyzed, or severely hindered, if the specific approbation in writing of the abusive clauses, required by the second paragraph of article 1341 c.c., were actually required.³⁵

Therefore, in the opinion of the judge, the clauses of the contract were written by the authority not to secure an abusive advantage, but to ensure the quick completion of game process. The players could be presumed to have accepted these rules because they play their game in local offices or authorized betting shops.³⁶ The player in this case lost the sizeable sum of 327.285.000 Italian lira (around 150.000 euro).

³¹ These laws and regulations be found online at Agenzia delle Dogane e dei Monopoli, Giochi, n.d, online at <https://www.agenziadoganemonopoli.gov.it/portale/monopoli/giochi> [perma.cc/9GV2-F3AJ].

³² Cass. 12 July 1991, n° 7763, Rep. Foro. It., 1992, voce Giuoco e scommessa, n. 3; Cass. 13 July 1961, n° 1691, in Foro it., 1961, I, 95; Cass., 10 January 2003, n. 191, in Notariato, 2003, 116; Cass., 13 July 1959, n. 2254, in Giust. Civ., 1959, I, 1915.

³³ Cass., 12 July 1991, n. 7763, in Nuova giur. civ. comm., 1992, I, 159, with note by Salvatore Patti, *Condizioni generali di contratto del C.O.N.I. e (mancata) tutela dell'aderente*.

³⁴ In support of this opinion the Court cited Cass., 9 February 1965, n. 209, in Mass. Foro it., 1965.

³⁵ In support of this opinion the Court cited Cass., 30 April 1969, n. 1424, in Mas. Foro it., 1969; Cass., 16 June 1968, n° 1992, in Foro it., 1969, I, 147.

³⁶ In support of this opinion the Court cited Cass., 28 May 1977, n. 2194.

That decision was harshly criticized by Patti, a well known Italian scholar. He underlined that both scholars³⁷ and Corte di Cassazione³⁸ case law had always held that private law provisions must be applied also to public administration. Moreover, in his opinion, publicity, even if effective, is not a valid substitute for specific approbation, in writing, of abusive clauses as required by the second paragraph of article 1341 c.c. Neither the supervision of the public authority, nor the supposed difficulties of securing written approbation or the perils for the due performance of the contracts, in Patti's view, constitute a valid reason to omit the requirement of written approbation.³⁹

This misrepresentation of the content of Italian law rules by the Corte di Cassazione where a contract of gambling or betting is involved, is not an isolated episode but one among many similar cases, all of them concerning tickets (with the player's picks) and receipts held by the player. Italian courts have dealt with many cases where players possessed a receipt for a winning ticket, but the betting shop had taken the player's money, without sending the ticket, thereby registering the bet, to the game operator. The unavoidable consequence was that the game operator did not know anything either about the bet or the win. Another example from the Corte di Cassazione in 1998 involved a disputed win of 60 million liras in Superenalotto, a popular lottery (also run by Totocalcio), when the owner of the betting shop lost the receipt.⁴⁰ While the lay judge affirmed the right of the player to compensation for the missed win (stating that there was no exceptional factor which would exclude liability for losing the copy), the Appellate court refused to affirm liability because the player had not proved gross negligence on the part of the betting shop. According to the game rules, only such negligence or malice would create liability for the betting shop manager. The Corte of Cassazione upheld the decision.

The only exception to this uniform case law of the Corte di Cassazione is an older decision, from 1976,⁴¹ where the Court affirmed the player's right to compensation, holding that she had performed her obligations when she paid the stake to the betting shop. Every other case served to protect the gambling services providers and their collaborators (namely, the betting shop owners). For example the Corte di Cassazione has determined that the contract provisions of a public gambling or betting contract were not abusive, holding that those provisions were meant to protect the players.⁴² The Corte has said clauses were not abusive because to find them abusive would fail to recognize the weaker position of the player and her urgency to conclude the contract,⁴³ because it would be impossible to require the written approval of abusive clauses given the need to speedily conclude gambling and betting contracts,⁴⁴ because the clauses were approved by the Government⁴⁵ or, lastly, because the

³⁷ Cesare Massimo Bianca, *Le autorità private* (Napoli: Jovene, 1977) at 93.

³⁸ Cass. 29 September 1984, n° 4832, in *Nuova giur. civ. comm.*, 1984, I, 123, with note by Cosimo Marco Mazzoni.

³⁹ Patti, *supra* note 33 at 159.

⁴⁰ Cass., 16 November 1998, n. 11533, in *Resp. Civ. e Prev.*, 1999, 739, with note by Francesco Macario, *Smarrimento della schedina vincente e responsabilità del ricevitore*.

⁴¹ Cass., 12 October 1976, n° 3375, in *Giust. civ.*, 1976, I, 94.

⁴² Cass. 9 November 2005, n. 21692, in *Giur. It.*, 2007, 4, with note by Andrea Bonuomo, *Nota in tema di partecipazione al concorso del totocalcio*.

⁴³ Cass., 16 June 1968, n° 1992, in *Foro it.*, 1969, I, 147; Cass. 11 luglio 1953, n° 2262, in *Giur. compl. Cass. civ.*, 1953, VI, 354, with note by Andrea Gallo, *In tema di clausole limitatrici di responsabilità contenute nel regolamento del concorso pronostici*.

⁴⁴ Cass., 30 April 1969, n. 1424, in *Mas. Foro it.*, 1965.

⁴⁵ Cass. 13 July 1961, n° 1691, in *Foro it.*, 1961, I, 95; Cass. 18 June 1968, n. 1992, in *Foro it.*, 1969, I, 147; Cass., 11 May 1953, n. 1317, in *Foro it.*, 1953, I, 1618.

Corte agreed that there was a presumption of the knowledge of those abusive clauses by the players on the basis that the rules were widely known.⁴⁶

This attitude of Italian courts was certainly approved in the past by the Italian scholars, who agreed that the provision of public gambling and betting contracts should not be treated as private contracts, subject to the general rules on contracts provided for by the *Civil code*, including article 1341, because they were enacted by a public entity and approved by the government.⁴⁷ However, more recently, this approach by scholars has shifted. Some scholars in fact now emphasize that the weaker position of the gambler requires the application of the rules on abusive clauses, recognizing objective economic and organisational disparities between gambler and gambling services providers, and the impossibility of the gambler of negotiating any of the contractual clauses. Therefore, in the opinion of these scholars, it is not essential to demonstrate that the players need to gamble was a primary need in order to prove the existence of a disparity of positions between the parties.⁴⁸

Other scholars have pointed out that the supposed need of celerity in gambling and betting contracts is more linked to the imminent announcement of the results of the sporting event that is the object of the contract than to the conclusion of the contract,⁴⁹ and that government oversight provides no actual guarantee that players will be protected, since the game is also run by the government (albeit through a concession).⁵⁰ Where contracts were enforced despite the existence of abusive clauses (think for example of contractual clauses giving the winner a very limited period of time in which to ask for the prize), scholars have argued that this approach created an “immunity zone” for the government or its concessionaires,⁵¹ in the absence of any actual public interest and therefore contrary to the principle of equality stated in article 2 of the Italian Constitution.⁵²

B. CONSUMER CODE PROVISIONS

The question of how European rules on consumers’ contracts would be applied in Italian courts adjudicating gambling and betting contracts produced a new set of complications and decisions. The *Council Directive 93/13/EEC of 5 April 1993* on unfair terms in consumer contracts was implemented in Italy by article 25 of Legge 6 February 1996 n° 52 and its rules are now contained in articles from 33 to 38 of the D.lgs. 6 September 2005, n° 206, called the *Codice*

⁴⁶ See e.g. Cass., 10 January 2003, n° 191, in Riv. dir. comm. obb., II, 2003, 15, with note by Massimo Caccavale, Ammette equipollenti la specifica approvazione per iscritto ex art. 1341, comma 2, c.c.

⁴⁷ See for example Giovanni Miele, “La pubblica amministrazione e la sfera di efficacia dell’art. 1341 del codice civile”, *Studi giuridici in memoria di Vassalli*, II (Torino: UTET, 1960) at 1123; Salvatore Patti, “Condizioni generali di contratto predisposte, approvate o imposte dalla Pubblica Amministrazione” in Cesare Massimo Bianca, ed., *Le condizioni generali di contratto*, II (Milano: Giuffrè, 1981) at 247; Ermanno Pianesi, *Le condizioni generali nei contratti degli enti pubblici* (Milano: Giuffrè, 1966) at 73.

⁴⁸ Massimo Garutti, “Condizioni generali di contratto in tema di giuoco e scommessa” in Bianca, ed., *supra* note 47 at 105.

⁴⁹ *Ibid* at 89; Rosalba Bitetti, “Concorsi pronostici e tutela collettiva degli scommettitori” (note to Trib. Roma 2 August 1997 and 22 August 1997), (1998) *Responsabilità civile e previdenza* 487.

⁵⁰ Patti, *supra* note 33 at 162 and Bitetti, *supra* note 49 at 492.

⁵¹ Giulio Napolitano, “Art. 1469 bis, 3° co.”, (1997) *I Nuove leggi civili commentate* 1150, at 1163.

⁵² *Ibid* at 1163; Garutti, *supra* note 48 at 108; Paradiso, *supra* note 21a t 206; Massimo Paradiso, “Le scommesse e le lotterie autorizzate come contratti del consumatore e le relative ricadute sulla disciplina del rapporto” (note to Cass. civ., 8 July 2015, n. 14288), (2015) *12 Nuova Giurisprudenza civile* 1116 (“Le scommesse e le lotterie”). On this issue please see Salvatore Patti, *Responsabilità precontrattuale e contratti standard* (Milano: Giuffrè, 1993) at 421; Salvatore Monticelli, “Art. 1469 ter” in Ernesto Cesaro, ed., *Clausole vessatorie e contratti del consumatore*, I (Padova: Cedam, 2001) at 550.

del consumo (Italian *Consumer code*). That is a distinct and different Code from the Italian *Civil code* and is concerned only with consumers' rights.⁵³ As we will see, these provisions could apply to each and every consumer contract, including gambling and betting contracts.

Instead, *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011* on consumer rights, implemented in Italy with D.lgs. 21 of 21 February 2014, starting from 13 June 2014, explicitly provides in Art 3c) that its provisions shall not be applied to contracts “for gambling, which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions”. This exclusion was not part of any previous European Directives on the same issues, which were modified or repealed by this one.

The exclusion provision was implemented in Italian law with article 47/I lett. c) of the *Consumer code*, leaving no doubt that Italian law now excludes gambling and betting contracts from the protection generally conferred on consumers through the imposition of pre-contractual duties on professionals and rights of withdrawal for the consumer. The exclusion of gambling and betting contracts from the protections accorded to all the other consumer contracts is a clear indication that it is not only Italian judges who have some prejudice against gambling and betting contracts. Nonetheless, for our purposes it remains important that the rules pertaining to abusive clauses provided for in the *Consumer code* articles from 33 to 38, are still applicable to cases of gambling and betting contracts, as the introduction of the new provisions did not modify those articles. Scholars agree that the introduction of the European provisions on unfair terms in consumer contracts did not in fact abolish the rules on abusive clauses provided for by article 1341 of the Italian *Civil code*. Both can apply.⁵⁴

However, Italian scholars argued that consumer protection rules should apply to gambling and betting contracts, arguing that players were properly understood to be “consumers” just like any other natural person acting for purposes which are outside his trade, business, craft or profession. The same scholars argue that public legal persons and their concessionaires were included in the definition of “professionals”: traders, sellers or suppliers,⁵⁵ and their inclusion was also provided for explicitly by the same Directives. Italian case law agreed with this interpretation, holding for example that CONI, the entity providing (at the time of the case) betting services on football championship scores, had to be considered a professional provider because it was engaged in an economic activity, while the player had

⁵³ See, e.g., Guido Alpa and Salvatore Patti, eds, *Le clausole vessatorie nei contratti con i consumatori* (Milano: Giuffrè, 1997); Andrea Barenghi, ed, *La nuova disciplina delle clausole vessatorie nel Codice civile* (Napoli: Jovene, 1996); Ernesto Cesaro, ed, *Clausole vessatorie e contratti del consumatore*, I (Padova: Cedam, 2001); Cristiano Iurilli, ed, *Manuale di diritto dei consumatori* (Torino: Giappichelli, 2005); Anna Maria Mancaloni, *I contratti con i consumatori tra diritto comunitario e diritto comune europeo* (Napoli: Jovene, 2005); Vincenzo Roppo, “Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppi di un nuovo paradigma”, (2001) *I Rivista diritto privato* 769; Nadia Zorzi Galgano, *Il contratto di consumo e la libertà del consumatore* (Padova: Cedam, 2012).

⁵⁴ Vincenzo Roppo, “La recezione della disciplina europea delle clausole abusive (“vessatorie”) nei contratti tra professionisti e consumatori: artt. 1469-bis e segg. c.c.” (1996) *Rivista di diritto privato* 107, at 140; Giorgio De Nova, “La novella sulle clausole vessatorie e la revisione dei contratti standard”, (1996) *I Rivista di diritto privato* 244; Alfonso Di Majo, “Clausole abusive e regimi protettivi” in Alpa and Patti, eds, *supra* note 53 at 795; Gianluca Romagnoli, *Clausole vessatorie e contratti di impresa* (Padova: Cedam, 1997) at 53.

⁵⁵ Rosalba Bitetti, “Lotterie, concorsi pronostici e giochi a premi” in Alpa and Patti, eds, *supra* note 53 at 1291; Roppo, *supra* note 54 at 107.

to be considered a consumer, because betting was outside of any professional or business activity.⁵⁶

Some of the gambling and betting contracts regulations which were in conflict with the provisions on unfair terms, were repealed following the introduction of the new rules. For example, regulations requiring a prior written complaint before any action in front of a court, were repealed and substituted by regulations making the prior complain optional.⁵⁷ But other unfair contractual terms were still supported in gambling and betting contract regulations, such as those providing for very short time limits to cash the prize,⁵⁸ limits on the liability of the gambling and betting services provider or owner of the betting shop for things like loss of the ticket copy except in cases of gross negligence or malice⁵⁹ and caps to the maximum amount of liability strictly proportional to the amount of the wager paid.⁶⁰

Although there are many violations of the legal provisions on consumers protection in gambling and betting contracts, only a few judicial decisions on those issues can be found. The reason for such a limited number of cases, in a country where going to law is more common than in most other European countries, is probably explained by the high costs of trial compared to the low stakes paid by players, the low value of “lost wins”, and the fact that lawyers for the players continue to invoke the application of *Civil code* rules rather than those of the *Consumer code*.

In truth, the only cases in which the provisions of the *Consumer code* on abusive contractual terms are invoked are those involving derogation from territorial jurisdiction. In one of those cases, the Corte di Cassazione held that the contractual terms of the gambling contract which derogated from territorial jurisdiction rules could not be considered unfair. The judges held there was no actual imbalance to the detriment of the consumer based on the nature of the good or service, the modest sum of the wager and the large sum at stake as a prize. In the opinion of the Court, the derogation from the rules of territorial jurisdiction did not discourage the player from taking an action against the defendant, nor did it encourage the defendant to default on obligations.⁶¹ That decision was harshly criticized by scholars, on the basis of both legal and factual considerations.⁶²

Lately the Corte di Cassazione has apparently changed its mind about the application of rules about abusive clauses in consumer contracts to gambling and betting contracts. In

⁵⁶ Trib. Roma 2 August 1997 and 22 August 1997, in Resp. civ. prev., 1998, 478, with note by Bitetti, *supra* note 49.

⁵⁷ Art. 7/V, D.M. 179 of 19 June 2003; art. 14 D.M. 111 of 1 March 2006; art. 34, D.M. 278 of 2 August 1999.

⁵⁸ For example those provided by the following regulations of different games: 8 days, art. 10 D.P.R. 169 of 8 April 1998; 60 days, art. 10 L. 528 of 2 August 1982; art. 10 L. 528 of 2 August 1982; 90 days art. 14-15 D.M. 179 of 19 June 2003.

⁵⁹ See e.g. Art. 6 and 9 L. 528 of 2 August 1982; art. 10, 11 and 14, D.P.R. 303 of 7 August 1990; art. 9 D.P.R. 169 of 8 April 1998. Previously also in art. 14 and 15 D.M. 23 March 1963; art. 12 and 13 D.M. 10 March 1993; art. 15 and 16 D.M. 278 of 2 August 1999. On this issue, see Paradiso, “Le scommesse e le lotterie” *supra* note 52 at 1116-1118.

⁶⁰ For example art. 14/V and 16/I of the former Totocalcio Regulation, in D.M. 23 March 1963 and art. 12/IV and 14/I of the previous Totogol Regulation, in D.M. 10 March 1993. Of that opinion Trib. Roma, 4 February 2002, in Foro it., 2002, I, 2830.

⁶¹ Cass. 1° giugno 2001, n° 7436, in Foro it., 2002, I, 146, with note by Alessandra Palmieri.

⁶² Matteo Spataro, “Clausole vessatorie nei concorsi pronostici,” (2002) Rivista di diritto privato 450; Ernesto Cesaro, “Azione inibitoria d’urgenza e clausole vessatorie nei concorsi pronostici” (1998) I(2) Giurisprudenza Italiana 1622; Paradiso, *supra* note 21 at 212.

decisions n° 14287 e n. 14288 of 8 July 2015,⁶³ the petitioner brought the case in front of the tribunal with jurisdiction over both his place of residence and the betting shop where he played the video lottery, as was provided by the pre-2014 formulation of article 54 of the *Consumer code*. The gambling services provider claimed that the case should be heard in its jurisdiction, as provided for in the contract. The Corte di Cassazione affirmed that the provisions of the *Consumer code* should apply, and that the rules on jurisdiction could not be derogated by a contractual clause.

The decision of the court is not only interesting for its actual consequence, but for the reasoning. The judges of the court, in dealing with the case, made some interesting comments about gambling and betting contracts and on their colocation in the Italian legal system. First, they underlined that gambling and betting contracts should no longer be considered immoral or contrary to public morality, because they are widespread, have social relevance and, especially, because they are promoted and organized by the Italian government as a source of revenue. This position towards gambling contracts is shared by other Italian and European court decisions. In the opinion of the Corte di Cassazione, ordinary rules about protection of business activities and of credit and therefore about market freedom and personal liability of the debtor, must be applied to those contracts. Following this line of reasoning, the Court held that the *Consumer code* rules must be applied to a contract for the use of a video lottery, because the contrast was concluded with the payment of a wager and automatic adhesion to the contractual standard rules, generally unknown to the player-consumer. Only where the parties in the contract actually concluded the contract after a real and serious negotiation could the application of the *Consumer code* be excluded. As a consequence, the appropriate jurisdiction was that of the consumer.

Although the practical consequences of this decision on future cases are limited, (because the application of the rules on jurisdiction were among those explicitly excluded in the case of gambling and betting contracts, as mentioned before, by D.lgs. 21 of 21 February 2014)⁶⁴ this decision probably represents a milestone in Italian case law, as it clearly mentions and critiques the traditional, morality embedded approach of Italian courts to cases concerning gambling and betting contracts.

IV. CRITICAL CONSIDERATIONS: ITALIAN CASE LAW AND GAMBLING CONTRACTS

The Italian landscape of gambling and betting contracts is clearly marked by the existence of a government monopoly. All legal gambling and betting activities are concessions of the Italian government. Moreover, the same Italian government has traditionally been very active in promoting those gambling and betting activities, with a consequent substantial increase of its share of earnings over recent years. These activities are managed like any other commercial activity. This growth and “normalisation” of legal gambling and betting activities has certainly influenced general social attitudes. Today, Italians are more likely to think that these are

⁶³ Cass. civ., 8 July 2015, n. 14287, CED Cassazione, 2015; Cass. civ., 8 July 2015, n. 14288, Nuova Giur. Civ., 2015, 12, 1106, with note by Paradiso, “Le scommesse e le lotterie” *supra* note 52.

⁶⁴ Nonetheless, where a gambling or betting contract clause provides that the exclusive jurisdiction will be that of the residence of the gambling or betting services provider, and the player did not approve that clause in writing, the provisions of article 1341 second paragraph of the *Civil code*, as well as those on unfair clauses in consumers’ contract contained in article 33, second paragraph, of the Italian *Consumer code*, will still apply.

legitimate contracts, without the old aura of immorality and sin. After all, if the Italian government advertises and sells gambling and betting games, they cannot be harmful.

The logical consequence of this situation would be that gambling and betting contracts were treated, as any other contract, as a source of obligations for the parties. Italian judges would routinely apply all the provisions which apply to other contractual relationships to gambling and betting contracts. But, as this paper documents, Italian case law on the issue offers us a different picture.

First, notwithstanding the large number of gambling and betting contracts daily stipulated in Italy, and the number of pages devoted to the issue by Italian scholars, this law seldom comes to the Courts. To give an idea of how seldom those rules are applied, consider that in 2015 the Corte di Cassazione, the third level court of Italy, pronounced around 26,000 decisions. A search on the most common databases, from 1960 to date, revealed that article 1933 c.c. was used only in 5 Corte di Cassazione cases. It is probably a winning bet that article 1933 of the Italian Civil code is one of the least used Italian *Civil code* provisions ever! Cases involving articles 1934 and 1935 are similarly rare.

Moreover, there is a sort of self-restraint amongst Italian judges, in their resistance to applying generally applicable provisions in cases involving gambling and betting contracts. In fact, as I have shown, Italian courts assert a variety of reasons for refusing to allow the plain application of the provisions of the Italian *Civil code* on abusive clauses in standard contracts, contained in article 1341, to cases of gambling and betting contracts, despite harsh criticism of this attitude by modern Italian scholars. In every contractual field, Italian case law has always held that written acceptance of an abusive clause has no substitute, because the aim of the written acceptance rule is to ensure the attention and awareness of the person who adheres to the standard contract to those clauses that entail onerous duties.⁶⁵ Gambling and betting contracts are the only exception in Italian case law to this rule. Italian judges generally presume instead that the rules of gambling contracts are somehow easily available to gamblers, such that written acceptance of the abusive clauses is not necessary for their validity. This presumption would be very difficult to support, especially prior to the widespread availability of the internet. The only field research on this question was done exactly 20 years ago, and it clearly showed that in those days the gambling rules were not as well-known as judges supposed. On the contrary, gamblers were generally not aware of the existence and content of the gambling and betting contractual regulations.⁶⁶ Today, obviously, searching for and finding such information is much easier because of the existence of websites run by the gambling and betting services providers. Nevertheless, three considerations should be advanced regarding this supposedly easier access to the contractual rules, because the situation is more complicated than it may seem.

⁶⁵ Cass., 5 December 2003, n. 18680, Foro It., 2004, I, 1459; Cass., 6 November 2000, n. 14454, Giur. It., 2001, 1113; Cass., 27 February 1998, n. 2152 Giur. It., 1999, I, 15; Cass., 14 November 1991, n. 12183, Foro It., 1992, I, 1815; Cass., 15 June 1979, n. 3373, Giur. It., 1980, I, 1, 236, with note by Vincenzo Roppo, “Una buona decisione della Corte Suprema a proposito di contratti standard e tutela dell’aderente. (In margine all’interpretazione dell’art. 1341 comma 2° codice civile.” On this issue, *inter alia*, see: Felice Blando, “Totocalcio e regole contrattuali. Esclusa l’approvazione scritta delle clausole vessatorie,” (2003) 6 Diritto e giustizia 83; Felice Blando, “Le clausole vessatorie dei concorsi a pronostici del Coni (ovvero quando il gioco si fa serio!),” (2004) I Danno e responsabilità 187; Giuseppe Chinè, “Regolamento dei concorsi a pronostici e clausole vessatorie,” (1992) I(1) Giurisprudenza Italiana 495.

⁶⁶ Bitetti, *supra* note 55 at 1304.

The first consideration is that the information is not that easy to find. The ticket receipt the player holds seldom contains all the relevant information about the contract for the player, nor does it emphasize those rules that could be considered unfair for the gambler. Searching for gambling and betting contracts regulations generally requires skills and capacities that may be beyond those of most players, who are frequently less educated and perhaps internet-illiterate. The second consideration is that the gambler is generally, like most consumers, not very interested in searching out and reading contracts. Instead gamblers often conclude contracts without reading clauses, unless they are somehow pointed out as important through, for instance, so-called “nudging by framing”.⁶⁷ The third and final consideration is that even if the player finds and reads the contractual rules, actually understanding those rules may be another problem, as they are usually highly technical and difficult to understand for all those not experts in contractual language.⁶⁸

The differential treatment judges reserve for cases of gambling contracts under article 1341 of the *Civil code* is clearly the otherwise irrational consequence of believing that these contracts are different from all the other contracts. But gambling and betting activities are today in Italy a government monopoly, exercised by concessionaires, all of them acting as professional entrepreneurs. It is therefore logical that those professional gambling and betting services providers should be subjected, like all other professional providers, to the general *Civil code* rules protecting the weaker party in the contract – including the rules on abusive clauses. Otherwise, the players, generally the weaker party in any gambling or betting contract, are deprived of any legal protection. By the same rationale, neither the fact that gambling and betting are a state monopoly, nor state enactment of gambling contract terms can justify, in my opinion, the exclusion of the application of general contractual rules. Therefore, where, as frequently happens today, the gambling or betting contractual regulations contain a clause that could be deemed abusive, such as a short limitation term to cash in the prize, or to take action in front of the competent authority, the second paragraph of article 1341 c.c. on abusive clauses should be applied by Italian judges.

I have shown that Italian judges generally refrain from applying *Consumer code* rules to cases involving gambling and betting contracts, using evaluation paradigms completely different from those applied to all the other consumer cases. In fact, contrary to the presumption contained in the law, Italian judges require the player to prove the unfairness of the clauses, instead of placing the burden on the professional. Moreover, the same judges ignore the *Consumer code* provision that holds any derogation to the rules of jurisdiction is always unfair *per se* for the consumer, as it demands the petitioner to act in front of a court which is neither that of their residence or abode. Lastly, in my opinion, a judicial decision is inconsistent when,

⁶⁷ For an introduction to the concept of “nudging by framing” please see: Amos Tversky and Daniel Kahneman, “The Framing of Decisions and the Psychology of Choice” (1981) 211 *Science* 453; Florencia Marotta-Wurgler, “Will Increased Disclosure Help? Evaluating the Recommendation of the ALI’s “Principles of the Law and Software Contracts”” (2011) 78 *University of Chicago LR* 165; Cass Robert Sunstein, “Humanizing Cost-Benefit Analysis” (2011) 1 *European Journal of Risk Regulation* 3; Oren Bar-Gill, *Seduction by contract* (Oxford: Oxford University Press, 2012).

⁶⁸ For an introduction to these problems, please see, *inter alia*: Hans W. Micklitz, Norbert Reich and Peter Rott, *Understanding EU consumer law* (Antwerp, Oxford, Portland: Intersentia, 2009); Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, eds, *EC Consumer Law Compendium: the consumer acquis and its transposition in the member states* (München: Sellier, 2008); Stephen Weatherill, *EU consumer law and policy*, 2nd ed (Cheltenham (UK): Edward Elgar, 2013); Norbert Reich, *European Consumer Law* (Cambridge: Intersentia, 2014); Geraint Howells and Reiner Schulze, eds, *Modernising and harmonising consumer contract law* (München: Sellier, 2009); Christian Twigg-Flesner, ed., *Research handbook on EU consumer and contract law* (Cheltenham (UK): Edward Elgar, 2016).

in such cases, it compares the consumer inconvenience with the limited amount of his wager and the large amount of the possible prize. This effort to balance the interests of the parties was undertaken by the legislator in the decision to enact legislation which presumed certain terms were unfair in order to protect consumers. Even in cases ruled by the *Consumer code* provisions, Italian courts' reasoning is apparently diverted by considerations which should be irrelevant to this area of law.

V. CONCLUSIONS

My aim in this paper was to investigate the way Italian judges reason and decide when applying *Civil code* and *Consumer code* provisions to cases of authorized public gambling and betting contracts. Two main conclusions follow. First, from the evidence gathered here, it is clear that judges in Italy follow different paths from those they use with all the other contracts when they adjudicate gambling and betting contracts. Notwithstanding the fact that authorized gambling and betting contracts are perfectly legal activities, from which the Italian government earns a considerable amount of money, they are not treated in the same way as other legal activities. Secondly, this discrepancy in the application of general contractual rules to cases of gambling and betting contracts by Italian judges is always made to the detriment of the players, never of the gambling and betting providers. These players are often poorer, and less educated, and certainly a weaker party compared to professional gambling and betting providers.

Players adhering to standard contracts are almost never treated by Italian judges as the adhering party should be treated under the provisions of article 1341 of the Italian Civil code. These provisions are meant to protect adhering parties to the contract in a set of situations which create a presumption that they are the weaker party. Likewise, players are almost never treated by Italian judges as consumers, and consequently protected by the application of the provisions of the *Consumer code*, even though it seems clear that players ought to be recognized as fitting the definition of "consumer" as would any other natural person who takes part in a contract for purposes outside their trade, business, craft or profession. Likewise, gambling services providers are certainly "professionals" traders, sellers or suppliers.

It is difficult to clearly understand the reasons behind this attitude of Italian judges, especially if compared to the more pragmatic approach of contemporary Italian scholars. The latter tend to consider gambling and betting contracts as similar to every other contract, and to agree that players are entitled to all the protections granted to all the other contractual parties (under the *Civil code*) or consumers (under the *Consumer code*). Despite this difficulty in discerning the reasons behind the approach of Italian judges, two speculative possibilities emerge. First, it is possible that they are still under the influence of the traditional legal and social culture, which labelled gambling and betting contracts as contracts unworthy of legal protection because they were contrary to morals or public security. Secondly, and relatedly, judges may see themselves as protecting a public interest (given the state monopoly over this lucrative business) against the interests of parties traditionally not considered worthy of any protection because of their immoral activity. Ironically these so-called immoral players are often the most deprived Italian citizens. Their gambling activities pour substantial sums of money into legal public gambling and betting contracts, thus making the Italian government wealthier.

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