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## Gambling and the Law®: Is Proxy Play Legal?

In a Very Important Person suite in a casino in Macau, a scene similar to the following is probably taking place at this very moment. The game, of course, is bacarrat.

Junket operator into a telephone head set: “O.K. How much do you want me to bet on this hand?”

High roller, from somewhere on the Chinese Mainland: “\$100,000.”

Junket operator: “O.K. I’ve bet \$100,000 Hong Kong dollars for you.”

Junket operator: “You got a six of diamonds and the two of clubs.”

Junket operator: “The dealer got the three of diamonds and the six of hearts.”

Junket operator: “Sorry, you lost. How much do you want to bet on the next hand?”

This is called proxy play or telebetting, and it is very big money.<sup>1</sup> Is it also legal?

Proxy play was little known outside of VIP rooms until Tony Tong, who works with junkets through Pacific Financial Services, spoke about it at Global Gaming Expo Asia in May 2014. The comment that made the news was his estimate, as a knowledgeable insider, that 10% of Macau’s VIP revenue came from proxy play. This amounts to at least US\$3 billion a year. To generate that much revenue, players, who are almost always not physically present in Macau, let alone in the VIP room, are betting tens of billions of dollars by phone.<sup>2</sup>

Players are not allowed to have cameras or video recorders in Macau’s casinos. So proxies have to talk into their cell phones, with the video off.

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<sup>1</sup> [Http://www.asiagamblingbrief.com/sample-north/1985-macau-proxy-vote-market-expanding?utm\\_source=Asia+Gambling+Brief&utm\\_campaign=cb3fa7a1f1-AGB%2300076-23May14&utm\\_medium=email&utm\\_term=0\\_51950b5d21-cb3fa7a1f1-60696105](http://www.asiagamblingbrief.com/sample-north/1985-macau-proxy-vote-market-expanding?utm_source=Asia+Gambling+Brief&utm_campaign=cb3fa7a1f1-AGB%2300076-23May14&utm_medium=email&utm_term=0_51950b5d21-cb3fa7a1f1-60696105).

<sup>2</sup> Muhammad Cohen, “Macau Casinos Allow High Rollers To Bet By Phone, With Plenty Of Hang-Ups,” *Forbes* (July 24, 2014), <http://www.forbes.com/sites/muhammadcohen/2014/07/27/macau-casinos-allow-high-rollers-to-bet-by-phone-with-plenty-of-hang-ups/>.

Since other players would be annoyed at this constant chatter, proxies arrange to have their own, private table. Junket operators, in fact anyone, can get their own table in a VIP room. All you have to do is put up a minimum of HK\$3 million (US\$385,000) for the gambling session.

There are obviously two practical problems: How can the gamblers make sure the cards are dealt as his proxy said they were; and, how does the casino and junket operator collect if the gambler loses?

The first issue depends upon trust. Some Macau VIP rooms have printers and faxes, but that does not really work as a substitute for a live, streaming video. There is some security in knowing that the proxy is saying what the cards are out loud, in a licensed casino and within the hearing of the dealer. Of course, this assumes the junket operator is actually in a casino and actually playing baccarat.

Proxy play has caught on in the Philippines. Because video cameras are not always forbidden, so there is online streaming of the actual games. Proxy players often have a television on behind them, set to a channel like CNN, so the remote bettors can see the cards being dealt in real time. There is probably no more chance of a dealer and proxy colluding to cheat the remote gambler than there would be of a dealer cheating a live and present player. The video gambler also eliminates the possibility of the casino being nothing more than a TV set.<sup>3</sup>

The second issue is actually quite common in China. Of the 28 million visitors to Macau each year, more than half come from the Mainland.<sup>4</sup> The Peoples Republic of China has put severe restrictions on the exportation of cash from the Mainland, even to Macau and Hong Kong, which are legally part of the PRC. It is against the law for anyone from the Mainland to take out more than 20,000 yuan renminbi, or about US\$3,200, in cash. That's less than \$25,000 in Hong Kong dollars; a typical bet in the VIP rooms in Macau casinos.

Because casinos are mostly a cash business, the junket operator has to make real bets at the high roller tables. Sometime there is a complicated system of rolling or dead chips. But in almost all cases the casino operator is paid immediately. The casino does not ever directly lend money to the remote gambler. But the junket operator does, by putting up the cash on his behalf. So, somehow, the proxy has to find a way to deliver money to his principal if the remote gambler wins, and collect the money he has lent if the gambler loses.

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<sup>3</sup> High rollers can be fooled by phony casinos: Katie Barlowe, "VIP Room Hoax Henchmen Sentenced in Macau," April 12, 2013, <http://www.casino.org/news/fake-vip-room-hoax-henchmen-sentenced-in-macau>.

<sup>4</sup> [http://www.dsec.gov.mo/getAttachment/eb632e59-4789-4abc-a0ee-83ae35810568/E\\_MV\\_FR\\_2013\\_M05.aspx](http://www.dsec.gov.mo/getAttachment/eb632e59-4789-4abc-a0ee-83ae35810568/E_MV_FR_2013_M05.aspx) .

Mainland players who visit Macau in person do have to contrive ways to get actual cash to the casinos. Due to the PRC's restrictions, when players and junket operators want to get cash out of the Mainland they have to resort to smuggling;<sup>5</sup> taking expensive jewelry for sale; pretending to buy jewelry from a store in Macau;<sup>6</sup> going to stores in Zhuhai and other border cities to arrange, for a fee, for an agent in Hong Kong or Macau to meet the Mainland visitor with any amount of cash the visitor wants.

But junket operators involved in proxy play do not need to transfer cash. Although "junket operator" is the generally accepted term used in the Western English language press, the title is misleading. They are actually called "VIP gaming promoters." Because all such operators, whether involved in proxy play or not, do far more than simply arrange for players to make bets in Macau's licensed casinos. They lend the players the money to make those wagers.

Gambling debts are not legally enforceable on the Mainland. So how does any junket operator collect, if he cannot go to court? The overwhelming majority of players pay up, often by negotiating a settlement for less than the total owed. But organized crime syndicates, known as triads, appear to sometimes become involved, when Mainland residents do not, or cannot, pay off their gambling debts.

In a 2008 study by Macao Polytechnic of 99 high rolling Mainlanders who made the Chinese newspapers for excessive gambling, seven died "extra-judicially," meaning they committed suicide or were murdered.<sup>7</sup>

But the major problem proxy play creates for licensed casinos in Macau is not whether triads are involved with collecting gambling debts. Casino operators can say, quite truthfully, that they do not know what junket operators are doing in specific cases of casino related debt collection.

But the same cannot be said about proxy play. Here, the casino sets up the private table for the proxy, allows the proxy to talk on a phone and describe every card dealt, and does anything else the junket operator wants, within the rules, to facilitate the gambling.

Is proxy play legal?

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<sup>5</sup> Of the 28 million visitors who entered Macau in 2013, there were only 141 seizures of cash at the PRC border. Macau case tops cash seizures, *Asian Gambling Brief*, <http://www.asiagamblingbrief.com/intelligence/latest-headlines/623-macau-case-tops-cash-seizures.html> (July 19, 2013).

<sup>6</sup> Some of the jewelry stores are actually located on the floors of Macau's casinos; they don't sell jewelry but rather cash. [Http://graphics.thomsonreuters.com/14/03/CHINA-UNIONPAY.pdf](http://graphics.thomsonreuters.com/14/03/CHINA-UNIONPAY.pdf) .

<sup>7</sup> Another 15 were sentenced to death, usually for embezzlement. Zhonglu Zeng and David Forrest, "High Rollers from Mainland China: A Profile Based on 99 Cases," <http://digitalscholarship.unlv.edu/grrj/vol13/iss1/3/>.

Casinos first have to be in compliance with local statutes and regulations. Macau's basic law creating the framework for casino gambling does have language designed to prohibit true interactive gaming. No one thought of proxy play at the time, so the only activity expressly banned is "entering in and participating in a game using a telecommunications device."<sup>8</sup> Proxy operators, and sometimes casinos, argue that this language does not apply, because the remote gambler is not physically participating in the game.<sup>9</sup> It is an interesting argument, since proxies' relationship with the remote gambler is expressly one of being a mere agent for a principal. Imagine what would happen if a proxy bet on Banker when the remote gambler had instructed him to bet on Player.

Companies that hold licenses from other jurisdictions have to be concerned with those laws and regulations as well. Las Vegas Sands, Wynn and MGM<sup>10</sup> are all licensed by the state of Nevada, and often by other states and nations. Because regulators have the death penalty – they can suspend or even revoke a multi-billion-dollar license – operators have to follow the directions of their regulators, even when those regulators are wrong. (Of course, if there is enough at stake, the licensees will appeal a regulator's decision, first inside the administrative agency and, for big money cases, to the courts). Casinos have learned to listen to regulators even when the discussion is informal. In this highly regulated industry, gaming operators often put their own restrictions on their activities, even when not required to do so by law.<sup>11</sup>

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<sup>8</sup> Law 16/2001.

<sup>9</sup> "At least one Macau casino op restarts phone bets: Daiwa," *GGR Asia* (Feb. 27, 2015), <http://www.ggrasia.com/at-least-one-macau-casino-op-restarts-phone-bets-daiwa/>.

<sup>10</sup> According to their annual reports, the concessions (in the cases of MGM and LVS, actually subconcessions) are technically held by MGM Grand Paradise, S.A. (incorporated in Macau), which has a holding company, MGM China Holdings Limited (registered in the Cayman Islands), whose controlling shareholder is MGM Resorts International and large minority shareholder is Pansy Ho (hereinafter "MGM"); Wynn Macau Limited, which also has a holding company, WM Cayman Holdings Limited I owner of 72.29% of Wynn Macau Limited (incorporated in the Cayman Islands), and the ultimate parent company, Wynn Resorts, Limited (hereinafter "Wynn"); and Venetian Macau, S.A. (also known as Venetian Macau Limited) a subsidiary of Sands China Ltd. (registered in the Cayman Islands), which is itself a subsidiary of the parent company, Las Vegas Sands Corp.

<sup>11</sup> Some casinos put in limits, when not required by law, for reasons of public policy and public relations, such as restricting smoking or the presence of minors. But many do self-censor. The author was involved in the 1980s and '90s with the rights of casinos to advertise. Even though there was no applicable statute or regulation, many if not most legal gaming operators would not advertise in California that gambling was available at their resorts.

At least two of the American casino companies operating in Macau have decided to not allow proxy play.<sup>12</sup> Las Vegas Sands had allowed phone-bets to its VIP rooms, but changed its mind last year. In October 2014 LVS that it would no longer accept proxy play. The reason given? “. . . it’s a continuation of Las Vegas Sands and Sands China expanding their leadership role on compliance-related matters in general.”<sup>13</sup> It is unclear exactly which rule or regulation Sands thought made proxy betting problematic. There is some indication it may have been the Macau law prohibiting electronic devices. In fact, the law is written so broadly, covering any instruments that can record images, it would apply to almost all cell phones.

Even if proxy play does not violate any Macanese law, what about the laws of Mainland China, or wherever the real bettor was located when he made the wagers?

Why would anyone make proxy bets?

Proxy play apparently developed in 2003 to allow Chinese VIPs to bet in Macau during the Severe Acute Respiratory Syndrome (SARS) epidemic, without having to expose themselves to the dangers of traveling. In November 2002 through July 2003 the outbreak of SARS, a fatal disease, in China created almost a panic atmosphere throughout southeast Asia. Telebetting appears to have been a temporary measure. There is no evidence it was meant to be a permanent and significant part of casinos’ VIP room gambling.

The convenience factor still exists. There are bullet trains to Macau from Southeastern China, but not from Beijing. So, it is a long trip from Beijing and the western part of China. But Internet casinos in the United States have shown that convenience is not everything.

Beyond convenience is pure impossibility, or at least the price would be too high to risk violating a rule. The PRC and Macau have laws restricting large numbers of people from gambling. I have been told that Government employees, all of them, are not allowed to even enter Macau’s casinos. Because I was a Visiting Professor at the University of Macau, where I teach Gaming Law, during the summers, this would mean that I was technically prohibited from walking across a Macau gaming floor to eat in a casino restaurant.

Telephone betting is discrete. The PRC puts severe restrictions on government officials and others from even traveling to Macau. Individuals who obtained their fortunes illegally would not want to be seen taking frequent trips to Macau casinos.

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<sup>12</sup> Id.; “Sands China tells junkets no more proxy betting: source,” *GGR Asia* (Oct. 29, 2014), <http://www.ggrasia.com/sands-china-tells-junkets-no-more-proxy-betting-source/>.

<sup>13</sup> Id.

Even if the remote bettors are not violating any special laws, they are undoubtedly violating Chinese general laws. The PRC has strict prohibitions on gambling and promoting.<sup>14</sup> Baccarat is a banking game, meaning the casino itself is accepting the wager of its patrons, even when that gambler is on the Mainland and the chips are being placed by the player's agent.

There are no statistics, of course, on who the players are. Junket operators target not only Mainland gamblers, but also VIPs in Hong Kong, Thailand and Taiwan. So to know for sure whether the bettors – and for that matter the casinos – are violating the law of those jurisdictions it would be necessary to research these foreign laws.

And that is why it is not usually a crime in America to violate the laws of a foreign jurisdiction. It may even be unconstitutional, because people, including corporations, have to be warned in advance that doing a certain act is a crime.<sup>15</sup>

Even if all local laws and the applicable gaming laws allow an activity, American companies have to comply with the growing number of federal restrictions on U.S. businesses' activities around the world. But is there actually a law in place that would make proxy play illegal?

American law, with very few exceptions, requires that there be an act of a legislature before an activity may be declared a crime. Legislatures may pass on some of their power to make crimes to administrative agencies. But the ultimate power resides with the lawmakers.

There does not appear to be any statute making proxy play a federal crime. Few laws, federal or state, apply outside their borders. Fewer still expressly say that violating a foreign government's laws is a crime here.<sup>16</sup> The most feared is the Foreign Corrupt Practices Act<sup>17</sup>, which would not apply. The federal organized crime statutes are limited to violations of state or federal laws, with no mention of the laws of any other jurisdictions.

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<sup>14</sup> Article 303 of the Criminal Law of the People's Republic of China.

<sup>15</sup> Paul Larken, "The Injustice of Imposing Domestic Criminal Liability for a Violation of Foreign Law," <http://www.heritage.org/research/reports/2013/06/the-injustice-of-imposing-domestic-criminal-liability-for-a-violation-of-foreign-law>.

<sup>16</sup> The Lacey Act, for example, expressly outlaws the importation of fish, wildlife and plants in violation of a foreign nation's laws.

<sup>17</sup> 15 U.S.C. § 78dd-1, et seq. The FCPA requires U.S. companies to follow its rules for transparency in accounting. But it also makes it a crime for Americans and U.S. corporations to make a payment to a foreign official for the purpose of influencing the official's government action.

Under American law, there are basically only three ways for a person, including corporations, to be criminally liable for actions taken by another person. The rarest are the few statutes expressly statute making everyone in a criminal enterprise liable. The most important of these is the Illegal Gambling Business Act, which makes it a federal crime for five or more individuals to violate state anti-gambling laws under some circumstances.<sup>18</sup> There may, or may not, be similar laws in the countries where the proxy or remote bettor are located.

Intentionally assisting – in the law we call it aiding and abetting – another person commit a crime makes the accomplice guilty of that crime. Does Macau have a similar theory of criminal liability? For that matter, does Hong Kong, Thailand, Taiwan or Mainland China? If it is a crime for the remote gambler to make the bet, say, from the Mainland, would Chinese law also make the proxy, and the casino, guilty as well, of making a bet under this theory of complicity liability.

Conspiracy is a separate crime, because criminal packs are more dangerous than lone wolves. Conspiracy to commit a misdemeanor is a felony. Junket play creates a law school hypothetical about Wharton’s Rule. That is the “Takes Two to Tango” rule of statutory construction that says that if a crime always requires two people, and if only two individuals are involved in that crime, they cannot also be charged with conspiracy to commit that crime. Dueling is the classic example: It would be unfair to charge two men with dueling and with the additional crime of conspiracy to duel.

But if the duelists each have a second, there are now four people involved in the forbidden act, which could be done by two alone. So Wharton’s Rule would not apply.

It only takes two to make and accept a bet. But, with proxy betting there are at least three people involved with each wager. If American law applied, and if that law made making the bet a crime, the bettor, junket operator and casino would be guilty of conspiracy to violate that law.

The real danger for casinos comes from state gaming statutes and regulations. Gaming agencies have broad power to punish licensees for actions that will bring disrepute upon the industry. Some go further. Nevada’s statute expressly provides:

A licensee shall not, in a foreign gaming operation, knowingly:

1. Violate a foreign, federal, tribal, state, county, city or township law, regulation, ordinance or rule, or any equivalent thereof, concerning the conduct of gaming;
2. Fail to conduct the operation in accordance with the standards of honesty and integrity required for gaming in this state;

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<sup>18</sup> 18 U.S.C. § 1955.

3. Engage in an activity or enter into an association that is unsuitable for a licensee because it:

- (a) Poses an unreasonable threat to the control of gaming in this state;
- (b) Reflects or tends to reflect discredit or disrepute upon this state or gaming in this state; or
- (c) Is contrary to the public policy of this state concerning gaming . . .<sup>19</sup>

It is difficult to see how a Nevada-licensed casino could knowingly allow a person on the Chinese Mainland, who is not allowed to gamble, to place a bet through a proxy. The casino cannot use the excuse that it did not know -- because it did not want to ask -- where the real bettor was located. In criminal law, we call that “wilful blindness,” which is the same as knowing.<sup>20</sup>

Even without such a law, casino regulators should not allow proxy betting without supporting laws. A decision to allow remote wagering should be made by the legislature. Most won’t even approve Internet gambling, where there is a perfect computer record of all transactions. Rules should first be put in place by regulators, in consultations with casinos and proxies, to ensure honesty and less the risks of disputes.

Without statutes and regulations, proxy wagering looks like old-fashioned, illegal phone betting.

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<sup>19</sup> Nev. Rev. Stat. § 463.720.

<sup>20</sup> *Global Tech Appliances v. SEB*, 131 S. Ct. 2060, 179 L. Ed. 2d 1167 (2011).