LIQUIDITY POOLING CRITICAL TO THE SUCCESS OF ONLINE POKER

Ifrah Law was recruited by the Delaware State Lottery to help draft the groundbreaking liquidity sharing agreement with Nevada. Attorney **Sarah Koch** explains how it was done and how it could be applied elsewhere

AS A PLAYER-VERSUS-PLAYER game, poker poses a unique challenge for online gaming operators. No matter how sophisticated the platform or how well-designed the user experience, the game will only be successful if there is a critical mass of players online at any given time. And poker rooms need a range of skill levels and buy-in levels. The best way to ensure 24/7 liquidity is to offer the game to a large number of players across time zones through international liquidity sharing.

The challenge, of course, comes from jurisdictional restrictions implemented on a national and sub-national level. Understandably, jurisdictions seek to protect their players through licensure protocols for operators and suppliers, strict standards for financial transactions and player protections to guard against everything from identity theft to gambling addiction. These laws and regulations may be passed on a national level or on a state or provincial level, and no two sets of rules are exactly alike.

Given the differences in gambling standards among states and nations, there are great difficulties in enabling cross-border play. A state with stricter standards cannot allow an out-of-jurisdiction operator to offer a game to its citizens that does not meet its own standards. A state that conducts in-depth investigations into gaming operator applicants will not want to rely on another jurisdiction's assessment of the operators' qualifications. Furthermore, a state may be concerned that it will lose revenue if an operator is licensed, registered, and located in another jurisdiction but is nonetheless collecting money from players in its own jurisdiction.

Delaware and Nevada lead the way

Despite these difficulties, the US states of Delaware and Nevada have recently demonstrated that the obstacles in cross-border liquidity sharing can be overcome – and must be, in order to create a healthy and robust online poker market. Pooled liquidity between these states has just gone live.

After the federal government shut down the big three online poker sites operating in the US on 15 April 2011, it became clear that with no federal legislation legalising it across the country internet poker would have to be approved on a state-by-state basis.

Both Nevada and Delaware passed laws legalising and regulating online poker, and went live with the games in 2013. From the outset, the states understood that their relatively small populations – 2.8 million in Nevada, just under one million in Delaware – could not sustain a player base large enough to keep a wide variety of tables going any time a player logged on day or night. In anticipation of the need to expand liquidity, both states incorporated provisions into their laws to allow for interstate pooling agreements.

In February 2014, the governors of Delaware and Nevada signed the Multi-State Internet Gaming Agreement (MSIGA), which allows for operators licensed in both states to pool players on their Nevada and Delaware platforms.

The MSIGA enshrined minimum standards for each member state's online gaming laws, covering licensure of gaming operators, technical capabilities and player protections. The MSIGA also requires that the operators divide the rake based on each player's weighted contribution to the pot, so that the funds can be properly allocated for tax purposes in the state where the player is located.

Delaware and Nevada worked keenly together to establish this framework. There were few obstacles in the way and working as partners they were able to reach mutually agreeable terms fairly swiftly. By requiring operators to be licensed in both states in order to pool their own players across state lines, the MSIGA ensures that no member state is subject to another state's laws or licensing determinations.

Delaware and Nevada agreed that the MSIGA should be framed to allow other states to join the agreement, including Native American tribes and other nations. The MSIGA also contemplates pooling players in non-poker games, although the agreement currently applies only to poker because Nevada does not offer other games online.

Notably, the problems that Delaware and Nevada have encountered in actually launch-

Poker and tax on commingled liquidity

BY ARCHIE WATT, KPMG

One of the big issues with fragmented regulation is that individual single country pools of players are too small to allow operators to make a profit. However, it has also been said that the tax implications of commingling players from multiple jurisdictions is too difficult to solve this problem.

If PoC tax has achieved anything, it has at least focussed the minds of operators and software providers on this issue. Profit has to be attributed to UK customers and so it is clearly possible to do this for other countries. This could well be helpful to operators, though it would obviously require larger countries to be as open minded as, for example, Denmark, but a brave move by one country could well have a positive impact on competition in the poker market.

ing cross-border play have been technological rather than legal.

888 is the only company licensed to operate in both states. It has been working to reconcile its Nevada and Delaware platforms so that players can log on to their own state's platform but still play against a user in another state, who is viewing a different platform. Because 888 designed the platforms separately to meet each state's technical specifications, it has taken considerable effort to work backwards to reconcile the two. As a result, pooled play has only just gone live between the states.

Inviting international cooperation

Even with pooled liquidity, Delaware and Nevada will still share a relatively small player base, drawn from a population of under four million people. New Jersey, with its population of nearly nine million, is the only other US state to offer online gaming, but it has not indicated whether it plans to join the MSIGA.

New Jersey's hesitancy could be because it has a larger population and therefore a lesser need for pooling, or because only one of its operators would currently benefit from membership, or because New Jersey has a constitutional provision requiring gaming to occur in Atlantic City and therefore has restricted the location of gaming servers to Atlantic City by law.

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Interestingly, Nevada regulations also require that "core components of an interactive gaming system, including servers" must be located "in the State of Nevada except as otherwise permitted by the chairman" of the State Gaming Control Board. Because Nevada has more flexibility built into its laws and regulations, it can adapt to allow for cross-border agreements. Other jurisdictions might consider incorporating similar flexibility into their own laws to allow for pooled liquidity.

In order to grow the MSIGA player pool, foreign states may need to sign the agreement. MSIGA contemplates "national and sub-national" member states joining the agreement. However, any agreement with a foreign nation must not violate the Compact Clause of the US Constitution, which prohibits states from entering into a compact with another state or nation without the consent of Congress.

The Supreme Court has narrowly interpreted the Compact Clause to apply only to agreements which would tend to increase a state's political power at the expense of the federal government. Since the MSIGA is carefully designed to facilitate commerce between states while retaining each state's political autonomy, states may safely make agreements with one another and foreign nations to pool liquidity.

Whether other nations choose to join the MSIGA or to create their own agreements, we are sure to see further efforts to pool players in the regulated iGaming space. Delaware and Nevada's experience in implementing the MSIGA has demonstrated that states and nations can share liquidity without relinquishing control over gaming operators acting within their jurisdiction, and can allocate profits so that money generated in state stays in the state.

The technological hurdles that they have encountered should be instructive to operators who might wish to design platforms that can more easily be adapted to cross-border play. As additional states adopt and implement online poker, they can plan ahead to implement a framework conducive to interstate agreements. Ultimately, especially in smaller states, liquidity pooling will be necessary both for the enjoyment of the players and the long-term viability of the online poker industry. ■