



Gaming Law 2022

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India

Law and Practice

Trends and Developments

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Nishith Desai Associates is an India-centric global law firm with offices in Mumbai, Bengaluru, Delhi, Silicon Valley, Singapore, Munich and New York. The gaming practice comprises four leaders and 11 qualified lawyers. The team has been a pioneer in the industry, and the gaming practice has existed almost as long as the online gaming industry in India. The team has worked on multiple innovative and out-of-the-box transactions in the gaming space, particularly cross-jurisdictional investments and entry strategies for foreign clients. The firm's focus on research and academic work in this area enables it to provide cutting-edge solutions for clients. Nishith Desai Associates has also been instrumental in industry-wide efforts and policy advocacy – for example, leading various meetings with regulators and the Law Commission of India to advocate for the introduction of a licensing regime for skill games in India and making recommendations with respect to the taxation of gaming transactions.

Introduction

The forthcoming year (2022–23) looks set to be a key turning point in the evolution of the Indian online gaming industry. Currently estimated to be worth USD2.2 billion, it is expected to be worth approximately USD7 billion by 2026.

The Indian government has begun contemplating measures to enhance the growth of the online gaming industry through a number of regulatory measures aimed at boosting exports, increasing investment, providing economic incentives, and developing skills. India, therefore, offers a number of lucrative opportunities in this burgeoning industry for operators and developers (as well as players).

A federal law is also likely to be introduced that may supplement or replace the largely archaic existing statewide regulations. In addition, several grey areas in law – such as the application of goods and service tax (GST) on online gaming transactions – are likely to get clarified.

Some of the key developments, measures and opportunities are discussed here.

For Operators

Most Indian states prohibit offering games of chance and permit games of skill. At least in the short term, this distinction is likely to continue. Esports looks set to become an independent category of games.

This section outlines imminent developments in respect of each type of game.

Games of skill

Certainty over skill

Since games of skill are constitutionally recognised as a permissible activity, it is important to establish which games are games of skill in order to give operators business certainty. At present there is no overarching mechanism to determine this.

Courts have recognised some games (eg, rummy, fantasy sports, poker and horse race betting) as games of skill. So far only a few states, including Nagaland, West Bengal and Kerala, have identified certain games as games of skill.

Given that the online gaming industry is constantly creating new game formats, providing regulatory certainty has become important and urgent. Otherwise operators will always be exposed to the threat of litigation. Some operators, however, appear to be offering games of chance under the guise of games of skill! This needs to be avoided, especially in the interests of player protection.

Some self-regulatory bodies have a certification process whereby a committee certifies whether a game is a game of skill based on legal and expert opinions furnished by the operator. However, this is a voluntary process. Although courts

and regulators may take such certifications into account, they are not bound by it.

Therefore, the need to establish parameters or a single test to determine games of skill across India is currently a high priority.

News reports suggest that the inter-ministerial panel (“IM Panel”) set up in May 2022 has recommended the creation of a regulatory body that will determine whether a game qualifies as a game of skill and certify it as such. If such a mechanism is introduced, it will result in significant certainty and give skill gaming operators the opportunity to create edgy and unique game formats.

Certainty over GST

A group of ministers (GoM) has been created to come up with a GST regime for lotteries, casinos and online gaming. In order to promote the ease of doing business in the industry, a business-friendly tax policy must be a priority.

GST currently applies at a rate of 28% on games of chance, whereas the skill gaming industry has been 18% on the commission or the gross gaming revenue (GGR). The GoM is contemplating:

- at what rate GST should be charged (28% or 18%);
- whether GST should be charged both on skill gaming and games of chance; and
- whether the tax should apply to the entire amount that a player deposits for a game.

Ideally, the existing GST framework (ie, 18% GST on the GGR) for skill games should continue. This is in line with global best practices in countries such as the US, the UK, Germany and Australia.

According to the latest news reports, the GoM has not reached a consensus on this issue and has sought legal opinions. In the interim, some domestic skill gaming operators have received notices for GST evasion as a result of not paying GST on the deposit amount. These notices have been challenged before the High Courts.

Foreign direct investment in skill gaming

Under the Foreign Direct Investment Policy (“FDI Policy”) of India, as codified into law by the Foreign Exchange Management Act 1999 (FEMA) and the Foreign Exchange Management (Non-Debt Instruments) Rules 2019 (“Non-Debt Rules”), foreign direct investment (FDI) in “gambling and betting including casinos, etc” is prohibited.

The FDI Policy does not define “gambling and betting”. Indian banks have also sought clarity on this matter in order to process FDI in skill gaming companies.

Clarity on which game formats qualify as games of skill at a federal level will also make bankers feel more at ease about FDI in entities offering other games of skill.

In addition, a task force has been set up to enhance industry potential in animation, visual effects, gaming and comics (AVGC). One of the terms of reference of the AVGC Task Force is to boost exports and recommend incentives to attract FDI in the AVGC sector. However, the recommendations may be more along the lines of enhancing investment in game development outsourcing activities.

Player protection

It is of paramount importance to have robust player protection measures for the long-term sustainability of the industry. Reports concerning the IM Panel's recommendations indicate that consumer protection will be at the heart of the new federal legislation, as such recommendations include:

- limits on the amount users can spend in the game;
- mandatory responsible gaming measures, such as periodic warnings and withdrawal limits; and
- a three-tier dispute resolution mechanism that involves:
 - the gaming operator;
 - a self-regulatory organisation of which the gaming operator is a member; and
 - an oversight body led by the government.

There are already a number of laws (eg, the Consumer Protection Act 2019) and self-regulatory measures that may be enforced to address player protection concerns.

KYC obligations

The current Prevention of Money Laundering Act 2022 does not impose KYC or reporting obligations on skill gaming operators. Only entities carrying out “games of chance for cash or kind (including casinos)” are classified as “reporting entities” under the law and required to comply with reporting obligations, which include verifying clients’ identity, maintaining records and reporting suspicious transactions.

In April 2022, certain news reports suggested that KYC obligations were likely to be introduced for online skill gaming operators in order to curb money laundering.

Most recent news reports from October 2022 suggest the IM Panel has recommended that online gaming operators use facial recognition technologies to verify the age of players as a means of addressing online gambling addiction in minors. It has also recommended mandatory reporting of suspicious transactions to the Indian government's Financial Intelligence Unit.

Games of chance

As discussed earlier, games of chance are treated as prohibited gambling activities in most Indian states. Therefore, there are limited opportunities for real money gambling operators in India at present.

Scrutiny of offshore gambling websites offering sports betting and casino games has also increased significantly in 2022, with the government taking steps to curb their activities. The control of such offshore websites and apps has been a thorny issue for the Indian government, which has been mulling over how to control them.

Website blocking

In October 2022, the Ministry of Electronics and Information Technology ("the MeitY") directed telecommunications service providers (TSPs) to block access to various offshore gambling websites in India. Under the Information Technology Act 2000 ("IT Act"), the MeitY is authorised to instruct intermediary platforms (eg, TSPs and ISPs) that host third party content to block access to content on certain grounds. The grounds on which the MeitY has ordered the blocking of these websites are not clear

In November 2020, the MeitY exercised its powers to order the blocking of several Chinese apps, in the interests of the sovereignty and integrity of India, defence of India, state security and public order. This was in response to

security concerns about Indian user data that were raised by the Ministry of Home Affairs during a border conflict.

News reports suggest that GST violations raised by GST authorities, and violations of exchange control regulations raised by the Enforcement Directorate, were factors contributing to the MeitY's decision to block these websites. The advertising of offshore betting platforms both online and on TV has also come under scrutiny by the Ministry of Information and Broadcasting (MIB) and the Department of Consumer Affairs.

Therefore, it is possible that the order was issued by the MeitY as a holistic response to varying issues raised by several different ministries.

According to further news reports, the IM Panel has also recommended vesting the Indian government with the power to block websites that offer prohibited games.

Scrutiny of advertisements

Direct and surrogate advertisement of foreign sports betting platforms in India has come under significant scrutiny by the MIB and the Department of Consumer Affairs recently.

In October 2022, the MIB – in consultation with the Department of Consumer Affairs – issued separate advisories to:

- TV channels; and
- digital news publishers and OTT platforms.

The respective advisories strongly advised them against:

- showing advertisements of online sports betting platforms;

- showing surrogate ads for offshore sports betting platforms in the guise of sports news websites; and
- targeting such advertisements toward Indian audiences.

The advisories contained examples of such advertisements online and on television that specifically featured several prominent offshore sports betting platforms.

Following this, there were reports that the Central Consumer Protection Authority (CCPA) had issued a show cause notice to six offshore betting applications over such surrogate advertisements.

GST notices

As per news reports, GST authorities have been issuing GST notices to overseas gambling operators offering their games remotely in India.

Scope in certain states

“Betting and gambling” is ultimately a state subject under the Indian Constitution and, accordingly, the decision of whether to permit or prohibit gambling activities lies with the state in question.

Reports concerning the IM Panel’s recommendations suggest that, although a central law may classify online gambling as a “harm”, the states will be left to determine their approach to games of chance. Therefore, some states may allow such games to an extent. How things will develop remains unclear.

Esports

Historically, esports were erroneously considered part of the real money gaming industry in India. However, esports’ distinction as a virtual sporting activity – rather than a gaming activity – is likely to be underscored in the next few years.

This was evidenced in the IM Panel's recommendations, which propose that:

- the MeitY act as the federal regulator for the online gaming industry; and
- esports are regulated by the Sports Ministry.

There are currently multiple voluntary associations/federations that regulate esports in India, including the Esports Federation of India, the All India Gaming Federation, the National Esports Federation and the Esports Development Association of India. All are self-regulatory bodies without any legislative backing or government sanction or recognition.

It is unclear whether the Sports Ministry will introduce regulations for this industry in the coming months or years.

For Creators and Developers

The Indian Prime Minister has recognised the contribution of Indian app developers and Indian innovators to the global gaming industry. Other Indian ministers have also emphasised the need to incentivise Indian app developers to create gaming content that reflects India's culture. Interestingly, the MIB has teamed up with a prominent Indian app developer to launch an educational game about India's independence struggle.

Given that the terms of reference of the AVGC's Task Force include facilitating promotional and market development activities to extend the global reach of the Indian AVCG industry, enhancing exports and recommending incentives to attract FDI in the AVCG sector, it is possible that the government will introduce some economic incentives to boost content creation and development in India.

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