

Shuffling the Decks of India's Gaming Laws

2017's Roller Coaster Policy & Legislative Changes—Recapped & Decoded

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When the lens of the law makers pan on you, be sure that the time has arrived for everyone to sit up and take notice of the industry's potential. The year of 2017 has been ridden with some seismic shifts and developments in India, especially on the legislative and policy fronts.

Online Rummy operators faced a blow in the month of June 2017 when the Government of Telangana took an aggressive step, seeking to outlaw any kind of gaming activity in the state.¹ At the same time, poker clubs in Gujarat were stumped by a reported² notification referring to poker as a prohibited gambling activity. While the industry mulls over the possibility of a domino effect in other Indian states following Telangana and Gujarat, the complex Goods and Service Tax regime was rolled out on July 1, 2017, which, amongst other things, consolidates the tax treatment of gaming products pan- India.

On a positive note, the Law Commission has been actively inviting stakeholder comments and discussing the possibility of legalizing sports betting in India.

This article sets out the key updates of 2017 in the background of the

existing Indian gaming laws and reflects on the effects of these developments on the industry.

Indian Gambling Laws: Ace in the Sleeves of State Governments

The archaic, fragmented state laws governing betting and gambling activities in India have their genesis in an entry under the Constitution of India, 1950 ("Constitution") which makes 'betting

and gambling' an *exclusive* state-regulated activity³. Despite this, the pre-partition Public Gambling Act, 1867 ("Central Act") has been adopted by certain states in India. Other states have enacted their own legislations to regulate gaming and gambling activities, including online gaming activities ("State Enactments").

The Central Act and most of the State Enactments were enacted much prior to the advent of virtual/online gambling and therefore primarily prohibit activities in relation to games preponderantly of chance which take place within physical premises defined as "common gaming houses." However, the State Enactments of Assam and Orissa are more stringent and deem the act of gambling itself an offence. Until recently, the laws of most States in India exempted games of mere skill or preponderantly of skill from the prohibitions under their State Enactments. Some States had also been progressive and adopted legislation to bring online skill gaming⁴ and online gaming/sports betting⁵ within licensing regimes.

With the improvement in the infrastructure and Internet speeds even



in rural areas, mobile and online gaming models have become very popular in India. Post demonetization, the digital online payment systems also received a boon with a larger part of the population being incentivized and becoming tech-savvy. These factors collectively add to the huge potential of the market in India and have led to a surge in the number of online gaming sites over the last few years.

All Bets Off in Telangana as Government Outlaws Skill Games

Seemingly overnight, the State Government of Telangana promulgated two ordinances which wreaked havoc on the businesses of Telangana-based operators or those offering games to players in Telangana.

The Telangana State Gaming (Amendment) Ordinance, 2017 (“Ordinance I”) was promulgated by the Governor of the state of Telangana (“Telangana”). Ordinance I clarified that games of skill which had part-elements of chance could not be termed “skill games.” Ordinance I furthermore specifically stated that Rummy was not a skill game as it involved elements of chance. In addition, while the Telangana State Enactment only made gaming within “common gaming houses” an offence, Ordinance I amended the law to specifically make online gaming an offence in the state as well.

Ordinance I was challenged before the High Court of Hyderabad (“Hyderabad HC”) in *Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr vs. Chief Secy, State of Telangana, Hyderabad & 3 Ors*⁶ (“Telangana Proceedings”) by several rummy operators (“Rummy Operators”).

The Rummy Operators have challenged State’s legislative competence to enact Ordinance I. The Supreme Court (“SC”) had ruled in *R.M.D Chamarbaugwala v Union of India*⁷ (“Chamarbaugwala Case”) that the business of offering skill games did amount to gambling and fell within the fundamental right to carry out trade or business, a guaranteed protection under the Constitution⁸. Hence, the State legislature did not have the authority to prohibit skill games (including games preponderantly of skill). Separately, Rummy has previously been held to be a game of skill by the SC in *State of Andhra*

*Pradesh v K. Satyanarayan*⁹ (“Satyanarayan Case”). It was not up to Telangana to contradict the SC’s finding of fact.

Telangana rebutted the Rummy Operators’ contentions stating that on the basis of the SC’s observations in the Satyanarayan Case, Rummy, *when played for stakes*, amounted to gambling and was not protected as a fundamental right under the Constitution. Even if playing Rummy were considered to be protected under the Constitution, Telangana could impose reasonable restrictions¹⁰ on the right in the interest of the general public. The State also alleged increase in manipulation by online gaming companies.

Pending final outcome of the proceedings before the Hyderabad HC, the State suddenly passed another Ordinance¹¹ (“Ordinance II”) to amend the Telangana State Enactment further. Unsurprisingly, Ordinance II came into effect immediately.

Ordinance II removed the skill-games exception in its entirety from the State Enactment of Telangana. Furthermore, the acts of risking money or otherwise on an unknown result of any event including on a game of skill were specifically included in the definition of “betting and wagering.” The question of whether a skill game can be considered a gambling activity when a State Enactment does not specifically provide for a skill-games exemption remains open.

Providing marginal respite to the Rummy Operators, on July 13, 2017, the judge in the Telangana Proceedings restricted Telangana from taking action against the conduct of any operator’s business outside the boundaries of the State of Telangana for a period of four weeks. However, effectively, until the decision of the Hyderabad HC is given, the uncertainties will continue even in relation to skill games. The operators located within Telangana should be able to offer games to players outside India.

Indian Poker Association Puts Its Cards on the Judiciary’s Table; Argues Poker is Game of Skill

The Indian Poker Association (“IPA”) along with several poker clubs in Gujarat have initiated proceedings before the High Court of Gujarat

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("Gujarat HC") in the wake of coercive action taken against them by the police in the state. The challenge follows several similar, successful actions by the IPA before the High Courts of Karnataka¹² and Kolkata.¹³

The IPA sought clearances from the Gujarat State Government ("Gujarat") to conduct poker games in poker rooms set up in the State, stating that poker was a game of skill and hence entirely exempt from the State Enactment of Gujarat.¹⁴ Gujarat state denied the IPA this exemption, effectively green-lighting more raids and arrests. The Police Commissioner of Gujarat has reportedly issued a notification stating that poker is a game of chance and thus fell within the prohibitions under the State Enactment of Gujarat ("Notification").¹⁵

In July in the petitioner poker clubs ("Poker Clubs") initiated a challenge to the Notification (in the matter of *Rollers Training Institute of Cards Pvt. Ltd. and Ors v State of Gujarat and Ors*)¹⁶.

Akin to the argument advanced in the Telangana Proceedings, the Poker Clubs have relied on the argument that offering games of skill like poker fell within their fundamental right to carry on business protected under the Constitution. Such a fundamental right could only be curtailed within the limits of the reasonable restrictions prescribed under the Constitution¹⁷ which had been transgressed by the Notification. The State Enactments of West Bengal¹⁸ and Nagaland¹⁹ already clear poker as a non-gambling game. The Poker Clubs have also relied on the principles laid down by the SC in the Satyanaryana case for Rummy to show how poker satisfies the criteria



of being a game of skill. To support their legal arguments, the Poker Clubs also engaged in the equivalent of an in-court poker primer for the judge to demonstrate how the element of skill outweighed the chance factors in poker. The Poker Clubs outlined that poker involved a significant amount of strategic decision making such as how to wager, when to fold, how to read a player's "poker face," and when to bluff. Moreover, poker players could influence the evolution of the game as it progressed, a feat that was impossible in chance-based games. The Poker Clubs relied on various expert views to this end as well.

In response to the contentions by the Poker Clubs, the counsel for Gujarat has raised grounds of morality and how playing poker is detrimental to the interest of the society. The other arguments advanced seem to be on similar lines as that of the State of Telangana.

The findings in this case would be important for the poker businesses in India. At present there is no adverse order against poker.²⁰ It will also be interesting to see if the Gujarat HC treats the element of skill in poker to be different when the game is played on an online medium as opposed to within physical premises.

Law Commission Rolls the Dice on Legalizing Sports Betting in India

Following some highly-publicized match fixing scandals in India, the SC appointed a three-member committee ("Lodha

Committee") to, among other things, make recommendations necessary to prevent sports frauds and conflicts of interests in the game. The Lodha Committee recommended the legalization of betting in cricket in their report.

Following this, recently the Law Commission of India was mandated to make recommendations on the possibilities of legalization of sports betting in India. The Law Commission has already set the ball rolling inviting comments and active discussions with all stakeholders.

Strong legal and business cases have been submitted in support of a regime to legalise the already burgeoning illegal sports betting market.

Let the Chips Fall Where They May: Uncertainty Unfolds over Gaming Tax Rates during GST Roll-Out

Until recently, indirect taxes were imposed at the federal and state level on gaming related transactions. Most indirect taxes have now been consolidated into a Goods and Services Tax ("GST") with effect from July 1, 2017. GST is a harmonized system of tax which is levied on supply of goods and services in India. It comprises of a three tier structure: Central GST ("CGST") (levied by the Central Government) and State GST ("SGST") (levied by respective State Governments) which are levied on *intra-state* supply, and an Integrated GST ("IGST") (levied by the Central Government) levied on *inter-state* supply.

A typical gambling transaction can



be categorized as an actionable claim²¹. The SC in *Sunrise Associates v Government of NCT of Delhi*²² has categorized lottery tickets as actionable claims, reasoning that a lottery ticket represented a chance or a right to claim prize money, not currently in the possession of the purchaser. The same reasoning may be applied to transactions involving betting and gambling.

While actionable claims were specifically left out of the tax net under the erstwhile indirect tax regime in India, they now fall within the definition of “goods” under the CGST Act.²³ The CGST Act classifies certain transactions as neither being a supply of goods nor a supply of services. While actionable claims are included in this classification, an exception has been provided with

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respect to lottery, betting and gambling. Hence, these can effectively be treated as taxable actionable claims, i.e. goods.

Despite this clear categorization as goods under the CGST Act, no specific rates have been prescribed thus far for

the supply of goods. Moreover, “gambling” has also been identified as a service under the GST rates schedule for services (“Services Schedule”), taxable at 28%. Hence, there is an inconsistency resulting from the categorization of “betting and gambling” as both a “good” under the CGST Act and a service under the Services Schedule. Since legally the rates Schedule cannot be read in direct conflict with the CGST Act, it becomes necessary to reconcile this inconsistency through a harmonious interpretation of the two. Hence, it may be required to potentially segregate the service element associated with gambling from a typical gambling transaction for the purpose of levy of GST.

Services by offshore service

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¹ The preamble to Ordinance II (as defined hereinabove) articulated that due to the ease of access of online rummy, several people, including young people, were becoming addicted to online rummy played with real money. The addiction had affected the stability of family life, and the careers of students, and thus become a threat to public order.

² <http://www.ndtv.com/india-news/poker-gambling-or-a-game-of-skill-gujarat-high-court-seeks-governments-stand-1692014>

³ List II, Entry 34, Seventh Schedule of Constitution of India

⁴ The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act 2015 brings online skill gaming within a licensing regime

⁵ The Sikkim Online Gaming (Regulation) Act, 2008 brings online gambling and sports betting within a licensing regime

⁶ Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr vs. Chief Secy, State of Telangana, Hyderabad & 3 Ors WPMP 24819/2017

⁷ AIR 1957 SC 628

⁸ Article 19(1)(g) of the Constitution

⁹ State of Andhra Pradesh v. K. Satyanarayan 1968 AIR 825

¹⁰ Article 19(6) of the Constitution

¹¹ Telangana Gaming (Second Amendment) Ordinance, 2017

¹² Indian Poker Association v State of Karnataka & Ors, WP No. 39167-39169 of 2013

¹³ Shri Kizhakke Naduvath Suresh, Indian Poker Association v The State of West Bengal & Ors, WP 13728 of 2015

¹⁴ Section 13 of the Gujarat Prevention of Gambling Act, 1887 states that nothing in the Act applies to games of mere skill

¹⁵ <http://www.ndtv.com/india-news/poker-gambling-or-a-game-of-skill-gujarat-high-court-seeks-governments-stand-1692014>

¹⁶ Rollers Training Institute of Cards Pvt. Ltd. and Ors v State of Gujarat and Ors, Special Civil Application 11174/2017

¹⁷ Article 19(6)

¹⁸ The proviso to Section 2 (1) (b) of the West Bengal Gambling and Prize Competitions Act, 1957 excludes poker from the definition of “gambling”

¹⁹ The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016 contemplates the issuance of online gaming licenses for skill games. Poker has specifically been identified as a skill game under Schedule A to the aforesaid Act.

²⁰ Earlier in the case of *Gaussian Networks (M/s Gaussian Networks Pvt Ltd. v. Monica Lakhanpal and State of NCT, Suit No 32/2012, Delhi District Court)*, district court of Delhi had opined that the degree of skill in games played in a physical form cannot be equated with those played online as the chances of manipulation are higher. The court had not considered that building adequate fraud control checks in the systems adopting internationally prevalent game integrity technologies and practices, this issue could be resolved. However, this matter was ultimately allowed to be withdrawn by the Court following a request by the parties thereto and these observations no longer survive.

²¹ Section 3 of the Transfer of Property Act, defines actionable claims as “a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent

²² AIR 2006 SC 1908

²³ Section 2(17), CGST Act

²⁴ The IGST Act defines OIDAR services as services whose delivery is mediated by informational technology, and the nature of which renders their supply essentially ‘automated’ and ‘involving minimal human intervention’ and ‘impossible to ensure in the absence of information technology.’

²⁵ Online gaming in India: Reaching a new pinnacle- A study by KPMG India and Google; accessible at: <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf>

²⁶ *ibid*

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relative to changes in current law, rules and regulations which, among other things, would (1) generate and promote continued economic development by riverboat gaming licensees; (2) provide for greater safety for visitors and employees of riverboat casinos, (3) encourage increased capital reinvestment by riverboat gaming licensees, (4) improve and enhance the regulation of riverboat gaming licensees, and (5) make Louisiana riverboat casinos more competitive. This is a significant undertaking about which Ronnie Jones is passionate. He refers to this experience as his “greatest achievement as a regulator...”

J. Kelly Duncan of Jones Walker LLP states, “After a long and distinguished career with the Louisiana State Police and other positions in State government, Ronnie seamlessly transitioned to the position of Chairman of the Louisiana Gaming Control Board where he has proven to be very well-prepared, knowledgeable and fair in his treatment of Louisiana gaming licensees. His interest in working with the casino industry for the benefit of both the industry and the State is readily seen in his concurrent leadership of the Riverboat Economic Development and Gaming Task Force which has been charged with making recommendations to the State legislature regarding ways to make Louisiana riverboat casinos more competitive.”

Ronnie Jones has also successfully gathered some of the most powerful industry professionals to come testify in front of his committee in an effort to make Louisiana a better gaming state. Although gaming in Louisiana started off rocky, under Ronnie’s guidance, Louisiana is now considered a strong, stable, business friendly gaming market. Allen Godfrey, Executive Director of the Mississippi Gaming Commission states, “I have had the pleasure of knowing and working with Ronnie for the last four or five years and there is no one more passionate about his job than Ronnie. He is truly deserving of this award, and I have the utmost respect for his knowledge and integrity as a gaming regulator and a person.”

Finally, it is noteworthy that Chairman Jones has participated as a speaker at G2E and the Southern Gaming Summit, among other conferences, where his comments have always been well-received. He summarizes his view of the future of gaming in Louisiana commenting, “I think Louisiana, having endured those detestable early years, is a better place. It’s a better place for its citizens and it’s a better place for gaming to do business.” He brings the perfect balance of good business sense and impeccable ethics to the industry in Louisiana.

Based on his many years of public service as a member of the State Police and the many task forces he has been appointed to and personal accomplishments as an adjunct professor, Chairman Ronnie Jones is indeed a worthy recipient of this award. ♣

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providers are exempt from service tax under the GST regime unless they qualify as Online Information and Database Access or Retrieval (“OIDAR”) services.²⁴ Online gaming services are included within the ambit of OIDAR services. The tax rate for each OIDAR service must be ascertained based on entries in the Services Schedule. While these entries are skeptical with regard to the mode of delivery of the service, each entry must be read to encompass its online counterpart. Therefore, the entry of “gambling” taxable at 28% under the Services Schedule also covers online gambling. In contrast, since no such entry exists to cover skill-based gaming, online gaming (not being gambling or betting) would fall under the

residuary category of the Services Schedule taxable at 18%.

Notably, the Services Schedule also provides a separate entry taxable at 28% for services by way of admission to entertainment events or access to amusement facilities, including, among other things, casinos and race courses or sporting events. This category would encompass entry fees charged by casinos, race courses, etc. This entry could also potentially impact online gaming and betting where there is a fee charged for access to a game or a betting event.

Finding Method to the Madness: India’s steps towards a stable gaming regime

While the first few months of the year saw a checkered pattern of developments, there is method to the madness and a semblance that India is ready to move

toward a more stable and clearer framework of laws for the gaming industry.

Ignoring the potential of the revenues any employment that this industry can generate is no longer prudent. The online gaming market in India is expected to grow at a staggering rate of 20% between now and 2021, from USD 360 million in 2016 to USD 1 billion in 2021.²⁵ The sharp projected increment has been accredited to a young population, high Internet volumes, improved paying propensity and engaged online users,²⁶ all of which make India a choice investment opportunity. The various industry bodies are playing a keen part by proactively lobbying with the Government of India to introduce clearer regulatory framework and pave the way for business stability. In the long run, such a framework will ensure that situations in Telangana and Gujarat are few and far between. ♣