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**Legal, Regulatory and Tax Issues
in India's Gaming Industry**

October 2022

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Introduction

The Indian gaming industry has witnessed a paradigm shift with the evolution of digital and online gaming. The industry will further evolve with AR/VR and AI, NFTs, rollout of 5G networks, blockchain technology, cryptocurrencies as well as the Web 3.0 and Metaverse in the coming years.

In India, the online gaming industry is one of the fastest growing sunrise industries.¹ The growth of the industry into a 136-billion-dollar industry in 2021², was propelled by various factors such as innovative skill games, availability of cheap data, increased smartphone penetration, adoption of digital payment methods, and significant youth population.³

Over the last few years, we have seen a surge in the number of online gaming sites and apps, offering card games like Poker and Rummy, fantasy sports, esports, casual games and social games. The industry drew investments worth USD 544 million between August 2020 – January 2021⁴, and is likely to continue to attract further investments in 2022-2023 following its steep growth.⁵ Indian gaming startups have also achieved unicorn status.⁶

Therefore, the Indian gaming industry is gaining increasing significance as a driver of investment, employment opportunities, and revenue in India. The Government of India has also recognized its contribution to the economy. The Prime Minister has encouraged India to tap into the industry's potential, and develop games inspired from Indian culture.⁷ The Ministry of Information and Broadcasting (“**MIB**”) has in fact launched an educational mobile game around India's freedom struggle.⁸

There are some welcome indications that 2022-2023 will bring this industry its long-awaited regulatory certainty. The Indian Government has constituted various panels to realize the industry's potential, and boost its growth. An inter-ministerial Government panel⁹ (“**IM Panel**”) comprising of various Ministries¹⁰ was constituted to contemplate central regulations for the online gaming industry.¹¹ Separately, a Group of Ministers (“**GOM**”)¹² has been constituted to consider goods and service tax (“**GST**”) for casinos, race courses, and online gaming. The recommendations of the GoM to the GST Council will have a significant business impact on the industry as a whole.

1 <https://www.ibef.org/blogs/india-s-nascent-gaming-industry-on-the-rise>

2 <https://economictimes.indiatimes.com/industry/media/entertainment/online-gaming-to-cross-rs-290-billion-mark-in-fy25-with-over-657-million-users-kpmg/articleshow/83598631.cms?from=mdr>

3 <https://www.ibef.org/blogs/india-s-nascent-gaming-industry-on-the-rise>

4 <https://home.kpmg/in/en/home/insights/2021/05/indian-online-gaming-market-mantra.html>

5 <https://home.kpmg/in/en/home/insights/2021/05/indian-online-gaming-market-mantra.html>

6 <https://www.livemint.com/companies/start-ups/dream11-enters-unicorn-club-with-investment-from-steadview-capital-1554793159840.html>

7 <https://economictimes.indiatimes.com/news/politics-and-nation/india-should-lead-digital-gaming-sector-develop-games-inspired-from-its-culture-folk-tales-pm-modi/articleshow/77697377.cms?from=mdr>

8 <https://www.adgully.com/zynga-partners-with-mib-for-educational-games-around-india-s-independence-121861.html>

9 <https://timesofindia.indiatimes.com/business/india-business/govt-forms-inter-ministerial-panel-to-regulate-online-gaming/articleshow/91821159.cms>

10 Comprising of the Niti Aayog's CEO, the secretaries of the Ministry of Home Affairs, Revenue, Department for the Promotion of Industry and Internal Trade (“**DPIIT**”), as well as Ministry of Electronics and Information Technology (“**MeiTY**”), Ministry of Information and Broadcasting (“**MIB**”), and the Sports Ministry,

11 <https://timesofindia.indiatimes.com/business/india-business/govt-forms-inter-ministerial-panel-to-regulate-online-gaming/articleshow/91821159.cms>

12 https://gstcouncil.gov.in/sites/default/files/committees-dynamic/OM-for-GoM-online_gaming24052021.pdf and <https://gstcouncil.gov.in/sites/default/files/GoM-Dynamic/OM%20dated%2011.06.2021GoM%20Casinos.pdf>

1. Introduction

In addition, an Animation, Visual Effects, Gaming and Comics (AVCG) Promotion Task Force was announced in the Union Budget 2022 to further realize the industry potential, and promote skilling and boost employment opportunities in the industry.¹³

The Ministry of Electronics and Information Technology has indicated¹⁴ that a Central law is being considered, which would reduce State-wise uncertainties under the current regulatory framework.

Conducive regulations for the industry, which will safeguard consumer interest without stifling business, is the need of the hour.

There have also been some recent favorable court judgments re-iterating that offering games of skill is a constitutionally protected business activity and hence they cannot be completely banned.¹⁵ Now, the issue of whether skill games can be prohibited by States is before the Supreme Court, as it considers Karnataka and Tamil Nadu States' appeals against their High Court rulings striking down such bans.

In this paper, we will discuss the laws applicable to gaming businesses in India, interpretation of the laws by the Indian courts, as well as reflect on policy changes which may shape future regulation.

13 https://www.business-standard.com/article/economy-policy/govt-creates-task-force-to-boost-capacity-in-animation-and-gaming-sector-122040800909_1.html

14 In August 2021, the Minister of Electronics and Information Technology, in response to a letter through which the blocking of gambling/betting websites was sought by the Chief Minister of Andhra Pradesh, indicated that the central government is considering a single central law to regulate online gaming.

15 *Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors* WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, *All India Gaming Federation vs The State of Karnataka & Ors*, WP 18703/2021, *Head Digital Works Pvt. Ltd. v State of Kerala & Ors*, WP (C) No. 7785/2021

Overview of the Legal Framework Regulating the Indian Gaming Industry

Under the Constitution of India, certain subjects are regulated by States, and certain subjects are regulated by the Central Government. The state legislatures have the power to frame state specific laws on 'betting and gambling'.¹ It has been suggested by recent judicial precedents² that states may also legislate on games of skill.

The Public Gambling Act, 1867 (**'Public Gambling Act'**) has been adopted by several states including Uttar Pradesh, Madhya Pradesh, Punjab & Haryana. The other states in India have enacted their own legislation to regulate gaming / gambling activities within their territories (**"Gaming Enactments"**). Most of these Gaming Enactments are in the nature of prohibitory legislation. i.e. prohibiting games of chance, and exempting games of skill from such prohibition. But they do not regulate games of skill under a licensing regime or otherwise.

The initial Gaming Enactments were enacted prior to the advent of virtual / online gambling and therefore primarily refer to gambling activities taking place in physical premises, defined under most Gaming Enactments as "gaming or common gaming houses". On analysis of the definition of "common gaming house" in general under the Gaming Enactments, it seems that the intention of the legislature is to impose restrictions on the use of a physically enclosed premises for the purposes of making "profit or gain" from the use of such premises for gambling. Certain High Courts³ have recognized that gambling in private premises does not amount to a 'common gaming house.'

Certain States have updated their laws to prohibit online gaming (both skill and chance), while some have created a licensing regime for online games of skill and /or chance. In case of States which do not expressly refer to online gaming, and prohibit activities in 'common gaming houses', there are arguments which can be made for and against whether such laws apply to online gaming.

An argument can be made that when a person is accessing online gambling websites from his house, arguably, it may not be a "common gaming house". On the one hand, it can be argued that penal statutes such as the Gaming Enactments, must be strictly/narrowly construed⁴ to only cover physical premises. Certain High Courts have also held that the relevant Gaming Enactment of the State would need to be expressly amended to include online gaming.⁵ However, other High Courts⁶ have applied the Gaming Enactment to an online fantasy sport operator, without dealing with the issue whether they even apply to an online medium.

We have summarized some of the key provisions and penalties under the Gaming Enactments, as well as these interpretational issues, in **Annexure A** to this paper.

1 Entry 34, List II, Constitution of India

2 Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors, WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021, Refer to NDA's Hotline available at: <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/45/FEMAHotline/4771/1.html>

3 Punjab and Haryana (Kanwardeep Singh v Union Territory of Chandigarh, Crl. MP No. 54959 of 2006 dated 24.12.2008), Madras (D.Siluvai Venance v State rep by The Inspector of Police Crl.OP(MD) No. 6568 of 2020 and Crl.MP.(MD) No. 3340 of 2020) and Kerala (Joy alias Itty Abraham & Anr. V State of Kerala & Ors 1991 72 CompCas 57 Ker.)

4 D. Krishna Kumar And Anr. vs State Of A.P., 2003 CriLJ143, PN Krishna Lal v Govt of Kerala 1995 Supp 2 SCC 187

5 Pauly Vadakkan v. State of Kerala, WP(C). 2096/2021, Amit M. Nair v. State of Gujarat Writ Petition (PIL) No. 146 of 2020.

6 Shri Varun Gumber v. Union Territory of Chandigarh and others, CWP No. 7559 of 2017,

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

1. Meaning of Gambling under the Gaming Enactments

'Gambling' /'gaming' as per most Gaming Enactments is understood to mean "the act of wagering or betting"⁷, and excludes (i) wagering or betting upon a horse-race/dog-race, when such wagering or betting takes place in certain circumstances, (ii) games of "mere skill" and (iii) lotteries (which is regulated under Lottery Laws).

In the case of *Dr. K.R. Lakshmanan v State of Tamil Nadu & Anr.*⁸, ("**Lakshmanan Case**"), the Supreme Court ("**SC**") referred to various dictionary meanings of the term 'gambling' and held that gambling consisted of 1) consideration, 2) an element of chance and 3) a reward. The court held that gambling, in a nut-shell was a payment of a price for a chance to win a prize.

I. Exemption for Horse Racing

In most states, betting on horse races is excluded from the purview of "gaming/gambling" only when such wagering or betting takes place in certain conditions⁹, such as, that the wagering or betting take place:

- On the day on which such race is to run;
- In an enclosure which the licensee of the race-course (i.e., the Turf Clubs), has set apart for this purpose;
- With a licensed bookmaker/totalisator (in certain States)

The Turf Clubs where the horse races are held operate under a license from the respective State governments, under the States' respective race-course licensing Acts, such as the Bombay Race Course Licensing Act, 1912, or the Karnataka Race Courses Licensing Act, 1952 ("**Horse Racing Licensing Legislations**").

The Gaming Enactments of some states read with relevant Horse Racing Licensing Legislations, viz. Maharashtra, West Bengal, Andhra Pradesh, Karnataka and Tamil Nadu require licensees to seek prior approval of the state governments to set up enclosures where horse-racing takes place in the Turf Clubs.

During the Covid – 19 pandemic, two Indian horse racing clubs (the Mumbai and Calcutta Turf Clubs) received permission from the state governments of Maharashtra and West Bengal, respectively, to offer online betting on horse racing conducted in these clubs. It appears the Hyderabad Race Club has also started accepting bets online with the HRC Totalizer only.¹⁰

7 For instance, the Delhi Public Gambling Act 1955 defines 'gaming' as: (i) "Gaming" includes wagering or betting except wagering or betting upon a horse race when such wagering or betting takes place on the day on which such race is to be run and in an enclosure which the stewards controlling such race have with the sanction of the State Government set apart for the purpose, but does not include a lottery;

8 1996 AIR 1153

9 For instance, under Section 3 of the BOMBAY PREVENTION OF GAMBLING ACT, 1887 – "Gaming" defined: In this Act "gaming" includes wagering or betting except wagering or betting upon 2 [a horse-race, or dog race] when such wagering or betting takes place-

a) on the day on which such race is to run, and

b) in an enclosure which the licensee of the race-course, on which such race is to be run, has set apart for the purpose under the terms of the licence issued under section 4 of the Bombay Race-Courses Licensing Act, 1912(Bom. III of 1912)3, 4[or as the case may be, of the Maharashtra Dog Race-Courses Licensing Act, 1976 (Mah. XX-XIII of 1976.)] in respect of such race-course 5[or in any other place approved by the State Government in this behalf,] and

c) between any individual in person, being present in the enclosure or approved place on the one hand,, and such licensee or other person licensed by such licensee in terms of the aforesaid licence on the other hand or between any number of individuals in person in such manner and by such contrivance as may be permitted by such licence;

10 <https://hydraces.com/Pages/SU6017>

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

In case of online betting on horse racing, the above conditions (for instance, that such wagering/betting take place in designated enclosures), may not be met. Therefore, in the context of online betting on horse racing, it becomes important to evaluate whether betting on horse racing is a game of skill, to determine if it is permissible.

In the Lakshmanan Case, the SC has held horseracing to be a game of skill, and therefore, betting on horseracing does not amount to 'gaming'.¹¹

The court relied upon factors such as the form, fitness and inherent capacity of the horse, the ability of the jockey, the weight carried and the distance of the race, all of which were objective facts capable of being assessed by persons placing the bets, to hold that it was a game of skill.

In recent times, there have been innovative models of betting on virtual/simulated horse racing which have become popular in India and overseas. These models digress from classic formats of horse racing, and accordingly would need to be evaluated to determine if they adhere to the factors above in the Lakshmanan Case, and qualify as games of skill.

II. Exception for Games of Skill

As stated above, most Gaming Enactments exclude games of "mere skill" from the gambling-related prohibitions.

The SC has interpreted the words "mere skill" to include games which are preponderantly of skill¹² and have laid down that (i) the competitions where success depends on substantial degree of skill will not fall into category of 'gambling'; and (ii) despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of "mere skill".¹³ Whether a game is of chance or skill is a question of fact to be decided on the facts and circumstances of each case.¹⁴

Thus, games which satisfy the test of "skill versus chance" are not prohibited under most of the Gaming Enactments and may be legally offered through the physical as well as virtual mediums (including internet and mobile) in most Indian States.

The Supreme Court and certain High Courts have recognized that offering games of skill are protected under freedom of trade and business guarantees under the Constitution of India¹⁵. Recently, the High Court of Karnataka¹⁶ also recognized that playing games of skill are protected as freedom of speech and expression¹⁷ and life and liberty¹⁸ under the Constitution.

11 Paragraph 30 and 31 of the Lakshmanan Case are extracted below:

30. We have no hesitation in reaching the conclusion that the horse-racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning-post.

31. In view of the discussion and the authorities referred to by us, we hold that the horse-racing is a game where the winning depends substantially and preponderantly on skill.

12 State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699.

13 ibid

14 Manoranjithan Manamyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261.

15 AIR 1957 SC, All India Gaming Federation vs The State of Karnataka & Ors, WP 18703/2021

16 All India Gaming Federation vs The State of Karnataka & Ors, WP 18703/2021

17 Article 19(1)(a), Constitution of India

18 Article 21, Constitution of India

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

In the next section, we have discussed the treatment of some games by Indian courts and regulators as games of skill/chance. Innovative games formats are also getting launched, which satisfy the preponderance of skill test based on the principles laid down in various court judgements.

2. Games of Skill or Chance under the Gaming Enactments?

I. Rummy

In the case of *State of Andhra Pradesh v. K. Satyanarayana & Ors.* (“**Satyanarayana Judgment**”), the SC specifically tested the game of rummy on the principle of skill versus chance and held that Rummy was not a game entirely based on chance like the ‘three-card’ game (i.e. ‘flush’, ‘brag’ etc.). It was held that Rummy was a game involving a preponderance of skill rather than chance. The SC based its conclusion on the reasoning that Rummy requires a certain amount of skill as the fall of the cards needs to be memorized, and the building up of Rummy requires considerable skill in holding and discarding cards. The chance element in Rummy is of the same level as that involved in a deal in a game of bridge. In all games in which cards are shuffled and dealt out, there exists an element of chance, because the distribution of the cards is not according to a predetermined pattern, but is dependent upon how the cards find their place in the shuffled pack. In this judgment the SC also appears to have passingly observed that bridge is a game of skill, and Teen Patti, a popular Indian three-card game, is a game of chance.

Following the Satyanarayana Judgment, several High Courts have also recognized Rummy as a game of skill¹⁹. In a recent interesting case, the Kerala High Court, in the case of *Head Digital Works Pvt. Ltd. v State of Kerala & Ors.*²⁰, struck down a notification²¹ seeking to exclude ‘online Rummy when played for stakes’ from the exclusion for games of skill (i.e., essentially seeking to prohibit online Rummy when played for stakes). The court held that:

- The game of Rummy was a game of skill, based on the judgments of the Supreme Court in the Satyanarayana (supra) case and the Lakshmanan Case (supra), and accordingly even ‘online Rummy’ was a game of skill.
- Skill in playing a game was not in any manner dependent on stakes. Playing for stakes or not playing for stakes was not a criterion to determine if a game is a game of skill.

The Meghalaya Regulation of Gaming Act, 2021 (“**Meghalaya Act**”)²² and Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016 (“**Nagaland Act**”)²³ have also categorized Rummy as a game of skill. However, the Meghalaya Act is likely to be repealed soon²⁴.

19 G.S. Ananthaswamy Iyer and Ors v. State of Karnataka 1982CriLJ2121, Twin Cities Cultural Cinema Cultural Centre v. Commissioner of Police and Ors MANU/AP/1603/2002, D. Krishna Kumar And Anr. vs State Of A.P. 2002 (5) ALT 806 Executive club formed by Lalitha Real Estates Pvt. Ltd., Vijayawada and Ors 1998 (2) ALT (Cri) 207

20 WP (C) No. 7785/2021

21 G.O (P) No.26/2021/HOME, Government of Kerala

22 Section 1(k) read with Schedule B of the Meghalaya Act

23 Section 2(3) read with Schedule A of the Nagaland Act

24 <https://www.eastmojo.com/meghalaya/2022/10/13/meghalaya-govt-scraps-act-promoting-casinos-gaming-parlours/>

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

II. Horse Racing

As stated above, 'wagering or betting on horse racing' is also excluded from the definition of 'gambling' under most Gaming Enactments, subject to certain conditions. It has also been recognized as a game of skill in the Lakshmanan Case.

III. Fantasy Sport

The High Courts of Punjab and Haryana²⁵, Bombay²⁶, and Rajasthan²⁷, have held Dream 11's format of fantasy sport to be a game of skill. The Supreme Court has also dismissed²⁸ several special leave petitions²⁹ ("SLP") (i.e., petitions seeking permission to appeal against High Court orders), arising from the High Court orders.

However, one bench of the Supreme Court, while hearing the SLP, has issued a stay order³⁰, on the judgment of the High Court of Bombay in the case of Gurdeep Singh Sachar v. Union of India³¹ ("Gurdeep Singh Case").

While dismissing another SLPs against the High Court orders, a bench of the Supreme Court observed³² that the question of whether fantasy sports are a game of skill in India is no longer pending judicial determination. However, the SC caveated this observation by acknowledging that the Supreme Court was still considering the matter arising from the Gurdeep Singh Case. Accordingly, the Supreme Court may take up the question of whether fantasy sports qualify as games of skill in due course in the Gurdeep Singh Case.

A summary of the High Court rulings is set out in **Annexure B**.

The Nagaland Act³³ and Meghalaya Act³⁴ expressly recognizes virtual team selection games and virtual sport fantasy league games as games of skill. If such games are sought to be offered in the State of Nagaland, a license would be required. As stated above, the Meghalaya Act is likely to be repealed soon.

IV. Poker

The treatment of Poker is not consistent across Indian States. In the State of Gujarat, in the case of Dominance Games Pvt. Ltd. vs State of Gujarat & 2 Ors.³⁵ ("Gujarat Case") a single judge of the Gujarat High Court has held that: (i) poker is a game of chance; and (ii) accordingly, conducting poker games falls within the prohibitions

25 Shri Varun Gumber v Union Territory of Chandigarh and others CWP No. 7559 of 2017

26 Gurdeep Singh Sachar v. Union of India, Bombay High Court, Criminal Public Interest Litigation Stamp No.22 Of 2019.

27 Chandresh Sankhla S/o Jagdish Singh v. The State of Rajasthan D.B. Civil Writ Petition No.6653/2019
Ravindra Singh Chaudhary v Union of India & Ors D.B. Civil Writ Petition (PIL) No. 20779/2019, Mohan Lal Nama W/o Late Shri Murlidhar Nama v Union of India & Ors DB Civil Writ Petition No. 11122/2020, Saahil Nalwaya v. State of Rajasthan DB Civil Writ Petition No. 2026/2021

28 Special Leave Petition (Civil) Diary No. 18478/2020,, SLP (Cri) No, 0009295/2019, SLP (C) No, 015791/2022

29 A petition seeking leave/permission to appeal. A dismissal of a SLP does not mean the Supreme Court has dismissed the appeal, but has dismissed the special leave petition (i.e., has not granted the petitioner the special leave to file the appeal). In other words, the Supreme Court has not permitted the petitioner to enter the appellate arena. Accordingly, the Supreme Court's order of dismissal would not attract the doctrine of merger, i.e., the order passed by the Supreme Court would not 'merge' with the High Court, thereby putting an end to the proceedings. The High Court order therefore continues to be operational, without any modification by the SC.

30 The State of Maharashtra & Ors v Gurdeep Singh Sachar & Ors. Special Leave Petition (Criminal) Diary No(s). 42282/2019

31 Bombay High Court, Criminal Public Interest Litigation Stamp No.22 Of 2019.

32 Special Leave Petition (Civil) Diary No. 18478/2020

33 Section 2(3)(i) read with Schedule A to the Nagaland Act

34 Section 2(k) read with Schedule B, Meghalaya Act

35 Special Civil Application No. 6903 of 2017

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

under the Gujarat Prevention of Gambling Act, 1885 (“**Gujarat Act**”). Importantly, the Court held that any game, even if it involves skill but is played with stakes, would fall within the ambit of gambling. This judgment by the Single Judge of the Gujarat High Court has been challenged³⁶ before the Division Bench, and has been pending since 2018.

The High Courts of Karnataka³⁷ and Kolkata³⁸, in various matters, have stated that there was no objection to Poker games being organized in situations where Poker is played as a game of skill, and have prevented the local police from harassing individuals who conducted Poker tournaments.

Recently, while striking down certain amendments introduced by the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 as unconstitutional³⁹ the High Court of Madras held that there “*appears to be a little doubt that both rummy and poker are games of skill as they involve considerable memory, working out of percentages, the ability to follow the cards on the table and constantly adjust to the changing possibilities of the unseen cards*”.⁴⁰

Poker had been recognized as a game of skill by other state legislatures. The State of West Bengal⁴¹ has carved out an exception for poker from the ambit of gambling, while the State of Nagaland⁴² and Meghalaya⁴³ have deemed poker to be a skill-based game.

V. Sports Betting

The question of whether sports betting is a game of skill or not is pending before the Supreme Court in the case of *Geeta Rani v Union of India & Ors.*⁴⁴ If the court concludes that it is a game of skill, it would be exempt from the prohibitions under most Gaming Enactments, and may be offered in most Indian States.

Relying upon the Lakshmanan Case, and the jurisprudence recognizing fantasy sport games as games of skill, it can be argued that sports betting too, is a game of skill.

The State of Meghalaya recognizes

“the prediction of results of the sporting events and placing a bet on the outcome, in part or in whole, of sports or sporting events such as football, cricket, lawn tennis, chess, golf, a horse race and such other sports games”

as a game of skill in the Meghalaya Act.⁴⁵ However, the Meghalaya Act is likely to be repealed soon.

36 Dominance Games Pvt. Ltd. vs State of Gujarat & 2 Ors. LPA/193/2018.

37 Indian Poker Association v State of Karnataka & Ors Writ Petition Nos.39167 To 39169 Of 2013 and

38 Kizhakke Naduvath Suresh v. State of West Bengal & Others

39 Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors WP Nos.18022, 18029, 18044, 19374, 19380 of 2020

40 Paragraph 114, Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors.

41 Section 2(1)(b), West Bengal Gambling and Prize Competitions Act, 1957, specifically carves out an exception for poker from the definition of gambling

42 Poker has specifically been enlisted under the Schedule to the Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act, 2015 as a game of skill

43 Schedule B (vi) and (vii) read with Section 2(k) of the Meghalaya Act, classifies Poker and Poker Dice as games of skill.

44 WP (C) No, 000287/2017

45 Schedule B, Meghalaya Act

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

VI. Casino Games

Casinos typically offer games of chance such as Blackjack, roulette, Slots, etc. Casino games are therefore treated as gambling activities and prohibited under most Gaming Enactments. The States of Sikkim and Meghalaya have introduced a licensing regime for certain Casino games to be played through the State-wide intranet in these States.

- The Meghalaya Act introduces a licensing regime for certain online casino games, such as roulette, slots and baccarat.
- The Sikkim Online Gaming (Regulation) Act, 2008 (the “**Sikkim Online Act**”) covers certain casino games – such as roulette, casino brag and blackjack within the licensing regime.

However, the Meghalaya Act is likely to be repealed soon, as discussed more particularly in 7 (*Licenses for Gaming under the Gaming Enactments*) below.

The Gaming Enactments of Goa, Daman & Diu and Sikkim allow casino gambling to a limited extent, under a license, in five star hotels. In Goa, Daman and Diu, the law also permits casinos on board an offshore vessel.

VII. Licenses for Gaming under the Gaming Enactments

Certain state legislations have regulated some gaming activities through a licensing regime. It is important to note that these licenses are only applicable within the State, i.e., a license from the issuing State does not entitle a licensed operator from offering their games in other States. The Indian States with licenses available are:

- **West Bengal:** The West Bengal Gambling & Prize Competition Act, 1957 (“**WB Act**”) specifically excludes ‘games of cards like Bridge, Poker, Rummy or Nap’ from the definition of “gaming and gambling”. The WB Act further exempts games of skill from its ambit, however provides that where such games are played in public markets, fairs, carnivals, streets or any other place to which the public have access, a permit is required from the Commissioner of Police in Calcutta or the District Magistrate or the Sub-divisional magistrate.
- **Sikkim:** Under the Sikkim Act, an interested person can obtain a “license” for the purpose of conducting 1) ‘online games’ such as Roulette, Black-jack, Pontoon, Puntobanco, Bingo, Casino Brag, Poker, Poker dice, Baccarat, Chemin- de-for, Backgammon, Keno and Super Pan 9 and 2) sports betting, through the State-wide intranet. A licensee can take the prior approval of the state government to offer any other /addition online games under the license.
- **Nagaland:** The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 (“**Nagaland Act**”) introduces a licensing regime for online skill- based games. Licenses allow operators to offer online games of skill. The Nagaland Act defines games of skill as all games where there is a preponderance of skill over chance, and classifies card-based games (such as poker, rummy and solitaire), quiz/strategy-based games (such as chess or sudoku) and action, sports and adventure games (such as fantasy leagues and virtual sports) as games of skill.
 - Under the Nagaland Act, a license can be granted to an individual, a public company or a limited liability company incorporated in India and with a substantial holding and controlling stake in India (that is, the ownership of more than 50% of a company’s voting stock must be Indian).
 - Only entities that have no interest in any online or offline gambling activities in India or overseas can apply for a license.

2. Overview of the Legal Framework Regulating the Indian Gaming Industry

- Applicants must not have any criminal history or have been charged with, or convicted for, any offence under the *Foreign Exchange Management Act 1999* (“**FEMA**”) or for money laundering in India and abroad.
- Firms and companies must ensure that their controlling stake remains in India and that all executive decisions are taken in India.
- The operations of both the companies holding the license and those providing technology support (such as the platform, software, servers and so on) must be controlled, maintained and operated from India.
- **Meghalaya:** In March, 2021, the State of Meghalaya introduced a licensing regime for games of skill such as Poker, Rummy, virtual sport fantasy sport games, among others, as well as games of chance⁴⁶ such as Baccarat, slots, and Roulette, under the State-wide intranet⁴⁷ under the Meghalaya Act and Meghalaya Regulation of Gaming Rules, 2021 (“**Meghalaya Rules**”). However, in October, 2022, the Chief Minister of the State announced⁴⁸ that the State would be repealing Meghalaya Law, following concerns over the social impact of permitting such activities.

3. Charters/Guidelines of Self-Regulatory Bodies

In the absence of ‘regulatory’ legislations, several self-regulatory bodies, such as the All India Gaming Federation (“**AIGF**”), the Federation of Indian Fantasy Sport (“**FIFS**”), the E-Gaming Federation (“**EGF**”), have been formed and introduced regulatory guidelines/charters⁴⁹ for their members.

These bodies’ charters provide for measures aimed to safeguard consumers, including provisions on legality of game formats offered, transparency and disclosure, financial integrity, responsible gaming measures, grievance redressal, and advertising.

Certain bodies such as the AIGF periodically audit members and their platforms to ensure compliance with these provisions. Members may face suspension for failure to remedy breaches.⁵⁰

In a public interest litigation⁵¹ initiated before the High Court of Rajasthan alleging that Dream 11’s fantasy sport game amounted to betting on a cricket team, and was a game of chance, the court held that the game was a game of skill. The court reviewed the provisions of the FIFS’ *Charter for Online Fantasy Sports Platforms*, which set out conditions for a fantasy sport format to be skill-predominant, and observed that these conditions ensure that games offered by members were games of skill, and not gambling. Any format digressing from the FIFS’ approved format was not permitted. The court held that since Dream 11 was a member of the FIFS, and had submitted to its rules and regulations, *no public interest element survived for the online game formats offered by them*. However, the court cautioned that this finding may not apply if the conditions of FIFS’ charters were not followed in letter and spirit.

This ruling indicates that the Indian courts are also approving and endorsing self-regulation by the industry.

46 Section 2(j), read with Schedule A, Meghalaya Act

47 Rule 8(c), Meghalaya Rules

48 <https://www.eastmojo.com/meghalaya/2022/10/13/meghalaya-govt-scraps-act-promoting-casinos-gaming-parlours/>

49 <https://fifs.in/charter/> , <https://www.aigf.in/skillgamescharter/>

50 Section L, AIGF Skill Charter, *ibid*

51 Ravindra Singh Chaudhary v Union of India & Ors., DB Civil Writ Petition No. 20779/2019

Lotteries

Under the Constitution of India, the central Government has the power to enact laws with respect to lotteries. Lotteries have been expressly excluded from the purview of the Gaming Enactments and are governed by the central law – *Lotteries (Regulation) Act, 1998* under which the *Lottery (Regulation) Rules 2010* and state specific rules have been framed (“**Lottery Laws**”). The Central Lottery Laws allow the state governments to organize, conduct or promote a lottery, subject to the conditions specified in the Central Lotteries Laws.

A ‘lottery’ has been defined under Lottery Laws as ‘a scheme, in whatever form and by whatever name called, for distribution of prizes by lot or chance to those persons participating in the chances of a prize by purchasing tickets’¹

The state governments may appoint an individual or a corporate as a “distributor or selling agent” through an agreement to market and sell lotteries on behalf of the organizing State. While some states such as Punjab, have gone to the extent of specifically providing for and approving online lottery systems to be governed by the state Lottery Laws, lottery is banned in certain states in India, for example Madhya Pradesh.

Section 294 A of the Indian Penal Code, 1860 (“**IPC**”) specifically prohibits private lotteries.² Certain States have repealed Section 294 A of the IPC and enacted their own legislations banning lotteries apart from non-profit lotteries (such as the States of Andhra Pradesh, Gujarat, Karnataka, Maharashtra, etc.). Certain other States have introduced legislation expressly banning lotteries in their States (e.g. the State of Bihar vide the Bihar Ban on Lottery Act, 1993).

1 Section 2(b) Lotteries (Regulation) Act, 1998

2 294A. Keeping lottery office.—Whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery or a lottery authorised by the State Government, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both. And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees.

Prize Competitions

Many popular games and contests in India are in the form of crossword puzzle prize competitions, missing-word prize competitions, picture prize competitions, etc., in which monetary or other prizes are offered for the solving of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.

These competitions are regulated under the various laws in India including the *Prize Competition Act, 1955* (“**Prize Competition Act**”) which is a central law.

1. Background to introduction of the Prize Competition Act

As a background, certain states in India had approached the Parliament to enact a law to regulate prize competitions under Article 252¹ of the Constitution of India. Therefore, the Prize Competitions Act was enacted by Parliament, although it falls within the ambit of the State List (i.e., betting and gambling²) under the Constitution of India.

However, only some of the states of India have passed resolutions to give effect to this law, being the states of Andhra Pradesh, Maharashtra, Tamil Nadu, Orissa, Uttar Pradesh, Madhya Pradesh, Punjab and Gujarat. Some states have also enacted separate laws for regulating prize competitions in their respective states, such as West Bengal.³ In Tamil Nadu, the *Tamil Nadu Prize Schemes (Prohibition) Act, 1979* (“**Tamil Nadu Act**”) regulates “prize schemes” in the state of Tamil Nadu. Under this enactment, there is a prohibition on the conduct or promotion of a prize scheme.⁴

However, the definition of ‘prize competition’ in such state enactments is more or less similar to that in the Prize Competition Act.

1 252. Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State (2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State

2 Entry 34, List II, Constitution of India

3 Vide the West Bengal Gambling and Prize Competitions Act, 1957

4 “Prize Schemes” has been defined as follows: “prize scheme means any scheme by whatever name called whereby any prize or gift (whether by way of money or by way of movable or immovable property) is offered, or is proposed to be given or delivered to one or more persons to be determined by lot, draw or in any other manner from among persons who purchase or have purchased goods or other articles from shops, centers or any other place whatsoever specified by the sponsors of the scheme or on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in relation to such purchasers.”

4. Prize Competitions

2. Competitions regulated under the Prize Competition Act

“Prize competition” has been defined by the Prize Competition Act as any competition in which

“prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.”⁵

In the case of *RMD Chamarbaugwala & Anr. v Union of India & Anr.*⁶, the Supreme Court of India held that the Prize Competitions Act only applies to games of chance/ games which were of a gambling character. The Supreme Court looked at, inter alia, the intention of the legislators, the mischief that they sought to address under the legislation, and the history before the legislation was brought into force. Accordingly, it can be argued that games of skill were not intended to be regulated by the Prize Competition Act.

However, due to the types of games specified in the definition of ‘prize competition’ under the Prize Competitions Act, which appear to be games of skill (i.e., crossword prize competitions, etc.), there is an anomaly in the scope of application of this Act, and the nature of games for which a licence is required under the PCA.

In the case of *Bimalendu De v. Union of India & Ors.*⁷, the legality of the popular show *Kaun Banega Crorepati (“KBC”)* was in issue. A public interest litigation was filed before the Calcutta High Court requesting that the game shows *KBC* (a game show based on the format of popular British show ‘Who wants to be a Millionaire’) and *Jackpot Jeeto* be prohibited from being telecast on television on the grounds that the same amounted to gambling, and were hence prohibited under the laws. The court reviewed the provisions of the *West Bengal Gambling and Prize Competition Act, 1957* (which has an analogous provision to the Prize Competitions Act) and held that game show did not fit within the definition of a ‘prize competition.’

Similarly, the Bombay High Court⁸ has also held that ‘prize competition’ has a limited meaning and does not include games of skill and competitions such as *KBC*. As such, the Prize Competition Act only regulates a competition when prizes are offered for the solution of any numerical or alphabetical puzzle.

3. Regulations and Penalties under Prize Competition Act

The Prize Competition Act regulates prize competition(s) in which (a) the total value of the prize or prizes (whether in cash or otherwise) offered in any month exceeds INR 1,000 (approximately between USD 15 to 20), and (b) prize competition(s) where the value of entries exceeds INR 2,000 (approximately between USD 30 to 35). Any person intending on conducting such prize competitions has to obtain a license to engage in such activities, and the details for obtaining such licenses are provided in the rules framed thereunder.

Any person conducting competitions falling within the purview of the Prize Competition Act, that does not obtain a license, is punishable with imprisonment for a term up to 3 months, or with a fine which may extend to INR 1,000 (approximately between USD 15 to 20), or with both.

⁵ Section 2(d) of the Prize Competition Act

⁶ AIR 1957 SC

⁷ AIR 2001 Cal 30

⁸ *News Television India Ltd. and Others v. Ashok D. Waghmare and Another*; 2006 (2) MhLj431

Social and Casual Gaming and E-Sports

'Casual games' typically refers to games such as Candy Crush, Ludo, Temple Run, as well as E-Sports like PUBG, FIFA and DOTA. Publishers of casual games may monetize such games through advertising models, in-app purchases, or subscriptions.

When these games don't involve real stakes nor monetary rewards, then they may not fall within the scope of the Gaming Enactments, as they don't fulfil the criteria of 'betting/wagering', and hence may not amount to 'gaming'.

If casual games involve real money, one would need to ascertain whether the format falls in the prohibited category, as discussed in Chapter I. Depending upon the business model, the same may be prohibited only in some States but not all.

India has the second largest number of online casual gamers in the world, with 420 million in number.¹ Of the online gaming market in India, the casual gaming segment is the most significant one.² A June, 2021 KPMG report³ suggested that the online casual gaming market in India was likely to grow to INR 169 billion in 2025, from a size of INR 60 billion in 2021. Factors such as increased smartphone and internet penetration, young population, scale of Indian studios to develop content, adoption of AR/VR and AI technology, have propelled the growth of India's casual gaming market. The Covid-19 pandemic also significantly increased the consumption of casual gaming in India, as virtual social interactions replaced physical interactions, and has been coined as the 'tipping point' for the market in the same report.

The popularity of 'app stores', have also introduced new possibilities for casual gaming developers in India, which make it possible for individual developers to publish games that could, if they became popular, result in millions of downloads and millions in revenues. Sideload/direct downloading of games is also popular in India, as it enables casual gaming developers to access customers without having to share revenues with the app stores.⁴

The nomenclature "casual" does not do away with the fact that there are laws to regulate casual games. We have discussed some of the key legal issues applicable to casual gaming below:

1. Applicable Regulations depending upon Game Format

Depending upon the game format, certain special laws may apply.

For example, since certain casual games may also be based on building up, arrangement, combination or permutation, of letters, words, or figures, the provisions of the Prize Competition Act may get attracted to such games. We have elaborated the provisions and applicability of the prize competition laws above in Chapter IV (Prize Competitions) of this paper.

1 Beyond the Tipping Point: A primer on online casual gaming in India, June 2021, KPMG, accessible here: <https://assets.kpmg/content/dam/kpmg/in/pdf/2021/06/digital-mobile-casual-gaming-in-india.pdf>

2 ibid

3 ibid

4 Beyond the Tipping Point: A primer on online casual gaming in India, June 2021, KPMG, accessible here: <https://assets.kpmg/content/dam/kpmg/in/pdf/2021/06/digital-mobile-casual-gaming-in-india.pdf>

5. Social and Casual Gaming and E-Sports

There is no definition of 'e-sports' under Indian law. In case of E-Sports game, there are multiple voluntary associations / federations which regulate e-sports in India such as the Esports Federation of India (“ESFI”), the All India Gaming Federation, the National Esports Federation and the Esports Development Association of India. Some of these organisations have introduced rules / regulations which are applicable to the (i) organisation of, and (ii) participation in, esports tournaments organised under their aegis. However, these are not binding on non-members.

In addition, as stated above, in case in-app rewards amount to 'money or money's worth', the Gaming Enactments, or the Gaming Enactments of certain States, may still apply.

2. App/Game Blocking under the Information Technology Act, 2000 (“IT Act”)

If the content of a game is unlawful, a court/authorized Government body may direct an intermediary platform (such as the App store, or the ISP in case of a browser-based app), to block the app, or a specific game. We have elaborated upon this in Chapter VII (*Other Legal, Regulatory and Tax Issues*), Section J (Intermediary Guidelines under the IT Act).

In addition, the Ministry of Electronics and Information Technology (“MeitY”) may also direct⁵ such intermediary platforms to block a game or an app under Section 69 A of the IT Act, if it believes necessary in the interest of the sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to these grounds.

MeiTy ordered blocking of several Chinese apps (which included certain casual gaming apps such as PUBG) in exercise of its power under the IT Act, in the interest of the sovereignty and integrity of India, defence of India, security of State, and public order.⁶ The MeiTy order blocking Chinese apps was issued due to security concerns over Indian user data raised by Ministry of Home Affairs⁷, at a time when there was conflict at the Indo-China border.

In 2016-2017, a game called the Blue Whale Challenge was released. The game consisted of a series of tasks, the last of which was to commit suicide. The game was seen to be linked to a number of children under the age of eighteen committing suicide in India and around the world. A public interest litigation (“PIL”) was filed before the Madras High Court⁸, requesting the Court to devise a proper mechanism to put an end to the game. The Court issued directions to the Central and State Governments to take steps to block access to the game, as well as requiring internet service providers to take due diligence to remove all links and hash tags related to the Blue Whale Challenge. The Supreme Court went on to label the game as a 'national problem',⁹ in a second PIL that was filed against the game in *Sneha Kalita v. Union of India*.¹⁰ This case was ultimately dismissed in November 2017 as the MeiTy, respondents in the matter, submitted that it was not possible for them to block access to the game as there were no downloadable applications of the game, and there was hence very little scope for

5 Section 69 A, IT Act

6 <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1675335>

7 <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1675335>

8 The Registrar (Judicial), Madurai Bench of Madras High Court, Madurai v. The Secretary to Government, Union Ministry of Communications, Government of India, New Delhi & Ors. .Suo Moto W.P. (MD) No. 16668 of 2017.

9 <https://www.moneycontrol.com/news/trends/supreme-court-labels-blue-whale-game-as-a-national-problem-2421941.html>.

10 Writ Petition (Civil) No.943/2017, Supreme Court of India,

5. Social and Casual Gaming and E-Sports

using technical solutions to identify or block the game. It was further noted that MeitY had issued notices¹¹ to platforms such as Facebook, Google and Yahoo to disable access to and block the game. The Court further directed the Ministry of Human Resource Development to issue a circular creating awareness of the harmful effects of the game.

3. Advertising

Since advertising revenue is one of the most popular forms of monetizing casual games, advertising regulations are important for publishers, distributors, advertisers and advertising agencies to consider. The applicable advertising regulations may depend on the product/service being advertised within the game, however gaming platforms must ensure that advertisers comply with relevant advertising laws while onboarding such advertisements. Gaming platforms may seek representations and warranties backed with indemnities from advertisers before onboarding their advertisements. If they are not in compliance with Indian advertising laws, Indian regulators may seek takedown of the advertisements from the platforms.

¹¹ <https://economictimes.indiatimes.com/magazines/panache/it-ministry-asks-google-facebook-whatsapp-and-instagram-to-remove-blue-whale-game-links/articleshow/60070772.cms?from=mdr>

Advertising

Gaming advertisements have been under significant scrutiny by regulators in India in the last few years, due to concerns over misleading claims on winnings, surrogate advertising carried out during sporting events, protection of children, amongst others.

Some of the key regulations applicable to gaming advertisements are summarised below.

1. Advertisements prohibited under the Gaming Enactments

Several Gaming Enactments prohibit the printing, publishing, selling, distribution or in any manner circulating any newspaper, other document or any news or information with the intention of aiding or facilitating gaming.¹

Certain Gaming Enactments also define 'gaming' to include 'any act which is intended to *aid or facilitate* wagering/ betting or the collection, solicitation [of bets], *receipt or distribution* [of winnings or prizes].² In the case of *State of Maharashtra v Kamalji Hemraj Sharma*³ the High Court of Bombay interpreted this term widely⁴ to include shouting or attracting customers to purchase newspapers with the intention of aiding or facilitating gaming. Accordingly, this may be construed to include advertising activities as well.

In addition, the Public Gambling Act (which has been⁵ adopted by several Indian States), prohibits⁵ 'assists in conducting the business of' any common gaming house.⁶ There have been no cases interpreting this term to our knowledge. On a liberal construction, it may be construed to include advertising activities by gaming operators.

If a game qualifies as a game of skill, advertising such games should not fall within the above prohibitions under most Gaming Enactments. However, there may still be exposure in certain states where (1) even advertising games of skill is prohibited, or (2) the exemption for offering games of skill does not extend to advertising such games.

1 For example, Section 12 A of the Bombay Prevention of Gambling Act, 1887 provides that 'A Police-officer may apprehend without warrant any person who prints, publishes, sells, distributes or in any manner circulates any newspaper, news-sheet or other document or any news or information with the intention of aiding or facilitating gaming.

Similar prohibitions also exist in the Gaming Enactments of the states/union territories of Dadra and Nagar Haveli, Daman and Diu, Goa, Gujarat, Karnataka, Maharashtra, Meghalaya, Puducherry and West Bengal.

2 Section 3 – "'Gaming " defined

In this Act "gaming" includes wagering or betting except wagering or betting upon a horse-race, or dog race when such wagering or betting takes place-
The collection or soliciting of bets, receipt or distribution of winnings or prizes in money or otherwise in respect of wagering or betting or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution shall be deemed to be " gaming ".

3 1970MhLJ434

4 The court interpreted the term 'aiding or facilitating gaming' under Section 12 A of the Bombay Prevention of Gambling Act, 1887 and held that 1) evidence of an actual, completed sale was not necessary to attract the provisions of Section 12 A, and 2) shouting or attracting customers to purchase the newspaper with the intention of aiding or facilitating would be sufficient to attract the prohibition. Given the wide interpretation given to the words 'aiding or facilitating' gaming by the court in this case as an example, it could be construed to encompass advertising activities as well.

5 Section 3: "Penalty for owning or keeping, or having charge of a gaming-house

Whoever, being the owner or occupier, or having the use, of any house, walled enclosure, room or place situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and

whoever, being the owner or occupier of any such house, walled enclosure, room or place as aforesaid, knowingly or willfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and

whoever has the care or management of, **or in any manner assists in conducting, the business of any house, walled enclosure, room or place as aforesaid, opened, occupied, used or kept for the purpose aforesaid."**

6 "Common gaming-house.": "'Common gaming-house" means any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming or of the house, enclosure, room or place, or otherwise howsoever."

6. Advertising

2. ASCI Gaming Guidelines

In December, 2020, the Advertising Standards Council of India (“ASCI”), a self-regulatory advertising body, released the ‘ASCI Guidelines for Online Gaming for Real Money Winnings,’ (“ASCI Gaming Guidelines”), which prescribe guidelines for advertisements of real money gaming activity.

MIB subsequently issued a press release⁷ on December 4, 2020, advising all broadcasters to adhere to the ASCI Gaming Guidelines in respect of advertisements on television. The press release advised that it had come to the attention of the Ministry that advertisements of online gaming and fantasy sport appearing on television appeared to be misleading and did not convey the financial risks involved. Accordingly, all broadcasters were advised to comply with the ASCI Gaming Guidelines.

Adherence to ASCI’s Code for Self-Regulation in Advertising has been made mandatory for advertisements on cable television, per the Cable TV Rules,⁸ framed under the Cable TV Act.

Compliance with the ASCI Gaming Guidelines is not mandatory for online advertisements, however is generally followed as industry practice. Self-regulatory gaming bodies such as AIGF also require members to adhere to the prescribed ASCI codes for their platforms.⁹

The ASCI Gaming Guidelines prescribe guidelines for gaming advertising content such as:

- i. Gaming advertisements cannot depict any person under the age of 18 years, or who appears under the age of 18 years, engaged in playing real money games, or suggest that such persons should play these games;
- ii. Gaming advertisements should carry prescribed disclaimers, (as per the specifications prescribed under the ASCI Gaming Guidelines), such as ‘*This game involves an element of financial risk and may be addictive. Please play responsibly and at your own risk.*’
- iii. The gaming advertisements should not present online real money winnings as an income opportunity or as an alternative employment option.
- iv. The gaming advertisement should not suggest that a person engaged in gaming activity is in any way more successful as compared to others.

The ASCI Gaming Guidelines also clarify that it is not within ASCI’s jurisdiction to decide the legality of real money games (i.e., accordingly whether it amounts to a ‘product, the use of which [is] banned under law’) and such issues must be taken up with the concerned regulators. The preamble further prescribes that ASCI will only process complaints relating to the advertising content relating to such games when they violate the ASCI Code.

Surrogate advertisements are also prohibited under the ASCI Code, which states that that ‘*advertisements shall not propagate products, the use of which is banned under law*’ and ‘*advertisements should not contain anything which is in breach of the law, nor omit anything which the law requires.*’¹⁰

There is an exception to the prohibition on surrogate advertisements as follows: “*mere use of a brand name or company name which may also be applied to goods, product or service whose advertising is prohibited or restricted shall not be considered to be surrogate advertisement or indirect advertisement, if such advertisement is not otherwise objectionable as per the provisions set out in these guidelines.*”

⁷ <https://mib.gov.in/sites/default/files/Advisory.pdf>

⁸ Rule 7(9) of the Cable Television Network Rules 1994 states: “No advertisement which violates the Code for self-regulation in advertising, as adopted by the Advertising Standard Council of India (ASCI), Mumbai, for public exhibition in India, from time to time, shall be carried in the cable service.”

⁹ Section I, AIGF Online Games of Skill Charter, available: <https://www.aigf.in/skillgamescharter/>

¹⁰ Guideline 3.4 and 3.5, ASCI Guidelines

6. Advertising

Accordingly, surrogate advertisements for prohibited sports betting websites may fall afoul of the ASCI Code if (1) there is no genuine business under the surrogate brand, and (2) the surrogate brand usage extends beyond mere use of brand/company name.

The ASCI has released *Guidelines for qualification of brand extension – product of service*¹¹, (“**ASCI Qualification Guidelines**”) which lays down objective criteria for determining the genuineness of the ‘unrestricted’ brand extension of the prohibited product. It says that if a brand extension cannot meet the qualification criteria, for the purpose of the ASCI code it would not be considered a genuine brand extension, but rather a surrogate created to advertise a restricted category.

Accordingly, advertisers/publishers may ascertain whether the conditions prescribed under the ASCI Qualifications Guidelines are met to ascertain whether a brand is a valid brand extension or simply a surrogate ad.

As per reports¹², gaming related advertisements emerged as one of the top violative categories of advertisements received by the ASCI between April 2021 – March 2022, on account of making misleading claims, leadership and trust claims, as well as claims around referral programs (i.e., refer a friend and win).¹³ There were several reported violations¹⁴ of the ASCI Gaming Guidelines during sporting events such as the Indian Premier League (IPL) as well.

3. The Consumer Protection Act, 2019 (“CPA”), and the Misleading Ads Guidelines

Although advertising games of skill are permitted in most Indian States, they are regulated under the CPA, and the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (“**Misleading Ads Guidelines**”), introduced by the Central Consumer Protection Authority (“**CCPA**”).

The CPA read with the Misleading Ads Guidelines prohibits (1) misleading advertisements¹⁵ and (2) surrogate advertisements¹⁶, as well as (3) unfair trade practices¹⁷ through certain types of promotional activities.

I. Unfair Trade Practices under the CPA

The CPA defines ‘unfair trade practices’ to include any unfair method or unfair or deceptive practice¹⁸ for the promotion of any good/service, such as:

11 <https://ascionline.in/images/pdf/final%2018.03.2021-%20guidelines%20for%20qualification%20of%20brand%20extension%20rev.pdf>

12 <https://inc42.com/buzz/fantasy-gaming-startups-dominate-advertisement-complaints-received-by-asci-against-gaming-sector/>

13 <https://www.outlookindia.com/business/as-gaming-cryptocurrency-lead-asci-s-six-violative-advertising-categories-the-spotlight-is-on-influencers-once-again--news-211119>

14 https://www.business-standard.com/article/sports/14-gaming-ads-potentially-violated-asci-code-in-first-week-of-ipl-122041200701_1.html#:~:text=secretary%20general%2C%20ASCI.,ASCI's%20guidelines%20require%20real%2Dmoney%20gaming%20advertisements%20to%20not%20be,addictive%20nature%20of%20such%20games.

15 Section 21, CPA

16 Guideline 6, Misleading Ads Guidelines

17 Section 20, CPA

18 Section 2(47)(iii)(a) and (b), CPA

6. Advertising

- the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;
- the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest, except such contest, lottery, game of chance or skill as may be prescribed;

However, the Consumer Protection (General) Rules, 2020 clarify that the following are not covered under the ambit of unfair trade practices:

- lotteries permitted under the Lotteries (Regulation) Act, 1998, and
- games of chance or skill not prohibited under the Public Gambling Act, 1867, which are not gambling, and wherein success depends to a substantial degree upon skill, and not chance.

Accordingly, conducting of games of skill in States in which it is permitted should not fall afoul of the above provision.

Under the CPA, a complaint can be filed if an unfair trade practice has been adopted. The CCPA may cause an inquiry/investigation to be made by itself, or upon receipt of such complaint. Upon the basis of the investigation, if the CCPA is convinced that an unfair trade practice has occurred, it may pass an order for (1) withdrawal of services, (2) reimbursement of prices for services, and (3) discontinuation of services. Failure to comply with the CCPA's orders may result in imprisonment which may extend to six months, or a fine which may extend to INR 20,00,000 (Rupees Twenty Lakhs, approx. 25,000 USD), or both.¹⁹

II. Misleading Advertisements

The Misleading Ads Guidelines set out conditions for advertisements to be valid and not misleading, including that such advertisements must contain **'truthful and honest representations.'**²⁰

The Misleading Ads Guidelines apply to all advertisements regardless of form, format or medium. Further, they are made applicable on all manufacturers, service providers or traders of goods, products or services being advertised, advertising agencies and endorsers.

The CCPA is empowered to impose penalties of upto 10 lakhs on publishers of misleading advertisements.²¹ The CCPA may also order discontinuation or modification of the advertisement.²²

Further, the Misleading Ads Guidelines set out certain duties for service providers and advertisers, including the requirement not to abuse trust of consumers²³, nor exploit their lack of experience or knowledge. In case of advertisements to take part in lotteries, prize competitions or holding out prospects of gifts, the advertisements must 'set out all pertinent material terms and conditions so as to enable consumers to obtain a true and fair view of their prospects in such activities.'²⁴

¹⁹ Section 88, CPA

²⁰ Guideline 4(1)(a), Misleading Ads Guidelines

²¹ Section 21(4), CPA

²² Section 21(1), CPA

²³ Guideline 12(1)(e), Misleading Ads Guidelines

²⁴ Guidelines 12(1)(e)(ii), Misleading Ads Guidelines

6. Advertising

Depending upon the nature of claims made by operators in their advertisements, such advertisements may be misleading in nature. For instance, claims that playing games of skill on the platform could enable users to earn exorbitant amounts, when only certain players may win such amounts, over several games and over a long period of time. Such claims may not fulfil the criteria of setting out material terms and conditions for consumers to obtain a true and fair view of prospects in such activities.

III. Surrogate Advertisements

Surrogate advertisements are advertisements for goods, products or services whose advertising is otherwise prohibited regardless of the form, format and medium of such advertisements.²⁵

They also provide that advertisements would be considered as prohibited surrogate advertisements if the advertisement:

- a. indicates or suggests, directly or indirectly, that it is an advertisement for the goods, products or services whose advertising is prohibited or restricted by law; or
- b. uses any brand name, logo, colour, layout and presentation associated with such goods, product or services whose advertisement is prohibited or restricted,

The Misleading Ads Guidelines clarify that 'mere use' of the brand name or company name, which may also be applied to goods, product or services whose advertising is prohibited or restricted will not be considered to be surrogate advertisements, if the advertisement is not otherwise objectionable under the Misleading Ads Guidelines.

During the Parliament Monsoon Session, it was reported that 13 ministers of the Parliament had requested a written response from MIB on illegal betting and gambling through media and online intermediaries. One of the specific queries raised was, "*whether it is true that there are surrogate advertisements in all kinds of media and if so, the steps taken by the Government to stop such advertisements in future.*"

In its written response, the MIB stated that most Indian States have enacted their own laws to deal with betting and gambling within their jurisdiction. With respect to surrogate advertisements, the MIB reiterated the legal requirements to be adhered under the Misleading Ads Guidelines which expressly prohibit surrogate advertisements.

The MIB also issued an Advisory on Advertisements of Online Betting Platforms²⁶ on June 13th, 2022 ("**MIB Advisory**"). In the MIB's advisory, it has noted that a number of advertisements of online betting websites / platforms are appearing in '*print, electronic, social and online media,*' and that such advertisements are prohibited in most parts of India. It has also stated that such advertisements are misleading and don't appear to be in conformity with the Consumer Protection Act, 2019 ("**CPA**"). The advisory advises 'online and social media, including the online advertisement intermediaries and publishers', to not display or target betting and gambling related advertisements towards the Indian audience. It is addressed to newspapers, TV channels, publishers of news and current affairs content, and is copied to social media intermediaries.

²⁵ Section 2(h): "surrogate advertisement" means an advertisement for goods, product or service, whose advertising is otherwise prohibited or restricted by law, by circumventing such prohibition or restriction and portraying it to be an advertisement for other goods, product or service, the advertising of which is not prohibited or restricted by law.

²⁶ <https://mib.gov.in/sites/default/files/Advisory%20on%20online%20betting%20advertisements%2013.06.2022%282%29.pdf>

6. Advertising

Despite the MIB Advisory, surrogate advertisements of offshore sports betting operators, purporting to be news websites, continued to be made available on television and online.

The news websites would, among others, contain links to the sports betting platforms, have the same appearance, logos, etc. as the betting platform, and also carry direct advertisements of the sports betting platform. The news platforms would also use catchphrases native to betting.

On October 3rd, 2022, the MIB in consultation with the Department of Consumer Affairs, issued a second advisory. In this case, separate advisories were issued to (1) TV channels and (2) digital news publishers and OTT platforms, strongly advising them against showing (i) advertisements of online sports betting platforms and (ii) surrogate advertisements for offshore sports betting platforms in the guise of sports news websites, and targeting such advertisements toward Indian audiences.

The advisory contained examples of such online advertisements in the exhibit, specifically capturing advertisements of prominent sports betting operators online and during TV broadcasts of cricket matches.

A. Consequences of MIB's advisory for online platforms

- The advisory issued to digital news platforms and online publishers also mentioned that under the IT Rules, advertisements of betting platforms could not be shown on digital media. No specific provision was pointed out, however under Rule 3(b) of the IT Rules, the MeiTiy is empowered to direct intermediary platforms (such as ISPs, TSPs, domain name registrars, etc.) to take down unlawful content, including content which relates to or encourages money laundering or gambling.' Interestingly, there is no specific advertising related prohibition for online publishers to take down unlawful content under the Code of Ethics appended to the IT Rules.
- The advisory is copied to the Ministry of Consumer Affairs, MeiTiy, self-regulatory bodies formed under the IT Rules, social media intermediaries, and the Advertising Standards Council of India. It does not indicate which bodies would take action in case of such advertisements being published online

B. Consequences of MIB's advisory for TV advertisements

- The advisory issued to private TV channels states that under the Advertising Code under the Cable TV Network (Regulation) Act, 1995, advertisements of betting platforms cannot be shown on TV channels. It states that contravention may invite penal action.
- The advisory is copied to the Ministry of Consumer Affairs, self-regulatory bodies under the Cable Television Network (Amendment) Rules, 2021, and the Advertising Standards Council of India.

6. Advertising

IV. Self-Regulatory Bodies' Measures

Certain self-regulatory gaming bodies also contain stringent measures for their operator members' advertising practices. For instance:

- The E-Gaming Federation's ("EGF") Code of Conduct requires that operators' marketing promotions comply with general advertising rules, are not misleading, should not target minors, and are socially responsible about protecting children and vulnerable people from being harmed or exploited.²⁷
- The All India Gaming Federation's ("AIGF") Skill Charter requires members to adhere to the ASCI Gaming Guidelines while advertising and ensure that advertisements don't target minors.²⁸ It also requires that games of chance are not advertised along with games of skill.²⁹

²⁷ Pg 16 of Code of Conduct

²⁸ Part VII (Advertising), AIGF Skill Charter, available here: <https://www.aigf.in/skillgamescharter/>

²⁹ ibid

Other Legal, Regulatory and Tax Issues

1. Laws affecting the Content of Games

I. Pornographic / Obscene Games

Many games and gaming websites in India include content which may be considered objectionable under the pornographic and obscenity laws of India. For instance, some of the popular websites offer games which have animated caricatures of human beings, including women, depicted in a manner which may be construed as offensive as per the moral standards of India.

A. Indian Penal Code, 1860 and the Information Technology Act, 2008

The Indian Penal Code (“IPC”) and the IT Act penalize publication of obscene content.¹

The IT Act inter alia penalizes the transmission of any obscene content² or sexually explicit material in electronic form³, including child pornographic content.⁴

As per the IPC and the IT Act⁵, any material which is lascivious or appeals to the prurient interest or which may deprave and corrupt persons, is considered obscene.

In determining whether or not the games and the images depicted in the games are lascivious or appeal to the prurient interest, the court takes into consideration factors such as – (a) whether the work taken as a whole appeals to the prurient interest; (b) whether the work is patently offensive; (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.⁶

B. Indecent Representation of Women

The Indecent Representation of Women (Prohibition) Act, 1986 prohibits any indecent representation of women i.e. the depiction in any manner of the figure of a woman, her form or body in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or that likely to deprave, corrupt or injure the public morality or morals.⁷

1 Section 292 and 294 of the IPC, Section 67 A of the IT Act

2 Section 67 of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall on first conviction be punished with imprisonment for a term which may extend to 3 years and with fine which may extend to INR 500,000 and in the event of a second or subsequent conviction with imprisonment or a term which may extend to 5 years and also with fine which may extend to INR 1,000,000.

3 28. Section 67A of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to 5 years and with fine which may extend to INR 1,000,000 and in the event of second or subsequent conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to INR 1,000,000.

4 29. Section 67B of the IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to 5 years and with fine which may extend to INR 1,000,000 and in the event of second or subsequent conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to INR 1,000,000.

5 Under both these legislations, liability could be in the form of imprisonment, ranging from three to seven years, or a fine in the range of INR 0.5 million (approximately USD 7500) to INR 1 million (approximately USD 15000), or both, which may increase in case of repeat offenders. Further liability could be attracted under the IPC when obscene material is made available to young persons, (that is, below the age of 20 years).

6 Director General, Directorate General of Doordarshan & Ors vs Anand Patwardhan & Anr, Appeal (Civil) 613/2005; Supreme Court of India

7 Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986.

7. Other Legal, Regulatory and Tax Issues

The statute prohibits and penalizes⁸ any such depiction, whether through advertisements or in publications, writings, paintings, figures or in any other manner and provides for penalty in connection with the same. This legislation also penalizes the circulation of any material (including a film, any writing or drawing) containing any indecent representation of women, and may get attracted if the casual games represent women in the manner stated hereinabove.

II. Action based and Violent Games

Many popular casual games, such as Grand Theft Auto, PUBG, Call of Duty, etc., are action based games which specifically appeal to young gamers. While the linkage between exposure of certain forms of games to teenagers and violence in society has not been tested in Indian courts, this issue has been subject to enormous interest and controversy in the USA, Europe, and other Asian countries.

Some US states, including California, have previously passed laws to regulate the sale of certain types of videos to children, but the US Supreme Court invalidated the same saying that video games formed part of the constitutional right to free speech and hence could not be regulated.⁹ The Supreme Court of the United States also ruled that there was evidence indicating that these video games cause violence in society.

It is also interesting to note that countries such as USA and Canada have independent self-regulatory bodies such as the Entertainment Software Rating Board (ESRB), which assigns ratings in respect of age and content, and also issues various guidelines to the video and computer games industry.¹⁰

Although 'PlayerUnknown's Battlegrounds', or 'PUBG' has already been blocked over security concerns, prior to such ban, there were concerns over the content of the game.

The Police in Rajkot City, Gujarat have prohibited playing PUBG within the precincts of Rajkot City, and have reportedly arrested people for playing the game.¹¹ The game was banned for a short duration in Ahmedabad as well, however as per reports despite the ban being lifted, the police remained concerned about the effects of the game.¹² While a few of these bans have reportedly now been lifted, the Central Reserve Police Force very recently banned their officers from playing the game, stating that it affected their "operational capabilities".¹³

A PIL was filed before the Bombay High Court¹⁴, by an 11-year-old from Mumbai, Ahad Nizam. The PIL states that PUBG promotes immoral conduct such as violence, murder, aggression, looting, gaming addiction and cyber bullying, thus should be banned. Apart from PUBG, the petitioner also pointed out that there were several other games which affected the psychology of young children. The matter is still pending before the High Court, and it is unclear when it will be listed next.

8 The penalty for violating provisions of the Indecent Representation of Women (Prohibition) Act, 1987 is imprisonment for a term of up to two years and fine of up to INR 2,000 (approximately USD 30-35) with provisions for more severe punishments in case of repeat offences.

9 Supreme Court has Rules; Now Games Have a Duty, New York Times, June 28, 2011, accessible here: <https://www.nytimes.com/2011/06/29/arts/video-games/what-supreme-court-ruling-on-video-games-means.html>

10 <http://www.esrb.org/index-js.jsp>

11 <https://scroll.in/latest/916556/rajkot-at-least-10-arrested-for-playing-banned-mobile-game-pubg-released-on-bail>

12 <https://www.indiatoday.in/technology/news/story/pubg-ban-lifted-from-ahmedabad-police-still-worried-about-side-effects-of-the-game-1491451-2019-04-01>

13 <https://www.news18.com/news/tech/crpf-bans-troops-to-play-pubg-mobile-as-it-affects-their-operational-capabilities-2140193.html>

14 Public Interest Litigation Lodging No. 14 Of 2019, Bombay High Court.

2. Intellectual Property Rights Issues

Games use avatars, pictures, musical notes, figures, characters etc. to add to the appeal of the games. In addition, there is the game format itself, which along with its rules of play, is usually written down as 'literary work'. There is also software /computer programming that is involved in creating a game.

Since all such works are subject to copyright protection in their individual right, the use of such copyrighted material in the games, without taking adequate permissions/licenses from the owner of copyrighted material, can trigger copyright infringement issues under the Copyright Act, 1957 ("**Copyright Act**"). The owner of the copyright can take civil¹⁵ or criminal¹⁶ action against the infringer.

There is increased awareness for protecting the intellectual property in the game format itself, and also safeguarding it. A popular Indian gaming platform 'Winzo' had filed a copyright infringement claim against another game platform in relation to copyright infringement of one of its game formats. However, the dispute was ultimately settled.¹⁷

Popular titles may also be protected under the trademark law of India. More often than not, competitors may try to piggy back on the popularity of game titles or series titles (titles for a series of games). In India, titles can be registered and protected as trademarks under the Trade Marks Act, 1999. Unregistered titles which are popular may be protected under common law if they have acquired a secondary meaning in the judgment of the target customers.

The owner of the trademarks can take civil¹⁸ or criminal action against the infringer.

In India, a user of an unregistered trademark cannot sue another party for infringement of its trademark but may institute only a passing off action against the defaulting party. However, to successfully defend a passing off action, the proprietor of the title will need to prove that the titles of the games (especially popular games), or get-up of the title logos is distinctive, and the public identifies these with the proprietor, which would not be required if the trademark is registered. The proprietor will also need to prove that the defaulting party has been using the marks deceptively and passing off their goods or services as that of the former.

In addition, especially in the case of online / social and casual games, since any software as well as visual content, music, characters etc. that are developed for the purpose of a game are protected by copyright and trademark laws (as applicable), the game developer / owner of such content will have the right to commercially exploit such content. Increasingly, it has been seen that most lucrative facets of casual and social gaming are licensing of intellectual property and merchandising. NFTs, in the form of Avatars, are one such example.

In addition to the rights described above, the software related to certain types of games / functionalities within the games can also be protected by way of a patent right. While software as such is not patentable in India, certain countries such as the US allow the patenting of software. This distinction between the patent regimes is of importance in relation to games that are made available online. A game developed in India, when offered online and made available / downloaded in a country like the US, may be found to be infringing patent rights held over similar functionalities by any person such a country.

¹⁵ Such as injunction, suit for damages or account of profits.

¹⁶ Copyright infringement or abetment of the same is punishable with imprisonment for a term which may vary between 6 months to 3 years and fine which may vary between INR 50,000 to INR 2,00,000.

¹⁷ <https://g2g.news/gaming/mpl-and-winzo-settle-dispute-over-world-war/>

¹⁸ Such as injunction, suit for damages or account of profits.

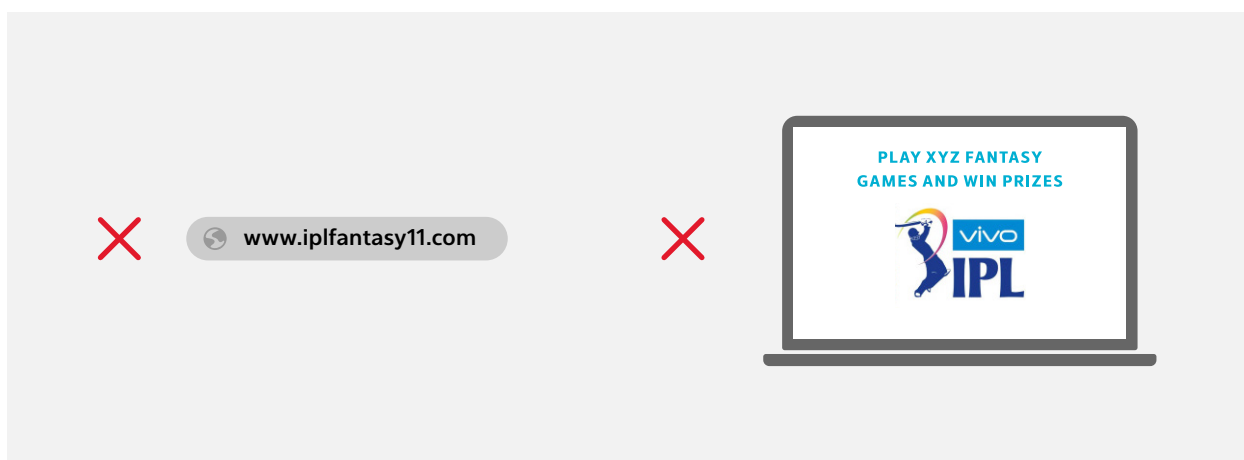
7. Other Legal, Regulatory and Tax Issues

I. Use of series, team and players names, avatars and logos in Fantasy Sport Games

Fantasy sport games may require reference to a cricket series name, or depiction of player names, avatars, jersey numbers, team names, team logos, etc.

While user of such elements, one may need to consider several aspects, such as:

- **Brand and Content Protection Guidelines of Tournament organizers:** Tournament organizers such as the BCCI and the ICC typically release brand and content protection guidelines, which prohibit user of certain tournament – related IP. For instance:
 - The International Cricket Council (ICC) in its Brand and Content Protection Guidelines¹⁹ released in October, 2021, prior to the ICC Men's T20 World Cup 2021, specifically prohibited the 'creation of fantasy leagues or other online competitions or events that use or make reference to the [ICC Men's T-20 World Cup 2021], and use ICC IPR or claim 'official' status without licenses.' ICC IP was defined to include its trademarks, as well as footage of the event.
 - The Vivo Indian Premier League 2021 Brand and Content Protection Guidelines 2021²⁰ contain similar restrictions.²¹



Source: Vivo IPL Brand and Content Protection Guidelines

19 <https://resources.pulse.icc-cricket.com/ICC/document/2021/10/20/b0776a4e-5326-43d4-8fe8-382873962041/ICC-Men-s-T20-World-Cup-2021-Brand-and-Content-Protection-Guidelines-3-.pdf>.

20 <https://bcciplayerimages.s3.ap-south-1.amazonaws.com/bcci/documents/IPL-2021-Brand-Content-Protection-Guidelines.pdf>

21 It prohibits the creation of fantasy leagues or other online competitions or events that use or make reference to the IPL or claim 'official' status without license for use' of such IPL IPR. It also prohibits registration and use of IPL names which infringes their trademarks.

7. Other Legal, Regulatory and Tax Issues

■ Trademark and Copyright Infringement:

- Team names, logos, series names and series logos are protected under the copyright²² and/or trademark²³ law in India. Use of trademarks in relation to similar goods or services, may amount to trademark infringement.
- For example the Board of Control for Cricket in India (“**BCCI**”) has obtained registration of several IPL marks, such as Indian Premier League²⁴, IPL.²⁵ IPL teams such as the Chennai Super Kings²⁶ and Mumbai Indians²⁷ have also been granted registration.
- One may need to examine the manner of use of such marks in Fantasy Sport Games to assess whether it may amount to trademark infringement. One may also explore permissible uses under trademark law, such as if the use is for indicative, non-commercial purposes, it may not amount to infringement.
- Further, the game format itself may be subject to protection under the Copyright Act.

The use of a series name in advertisements came up before the High Court of Delhi (“**Delhi HC**”) in ICC Development (International) vs. Arvee Enterprises & Anr²⁸ (“**Arvee Case**”). In this case, the plaintiff, ICC Development (International) Ltd. (“**ICC**” or “**Plaintiff**”) sought an injunction against the defendants’ sales campaign offering Cricket World Cup tickets as prizes, using slogans such as “Philips: Diwali Manao World Cup Jao” and “Buy a Philips Audio System win a ticket to the World Cup” along with a pictorial representation of a ticket with an imaginative seat and gate number saying “Cricket World Cup 2003.” ICC had filed applications for the registration of the words ‘ICC Cricket World Cup South Africa 2003,’ as well as created distinct logos and mascots. ICC alleged that the defendants were passing off the indicia, mark and identity of the Plaintiff in order to create an identification with the ICC’s Cricket World Cup, 2003 (“**Event**”).

The Delhi HC reasoned that the question which required consideration was whether a sufficient number of purchasers of the defendants’ goods unmistakably were likely to be confused about the source of the defendants’ goods or assume that the defendants had some connection with the sponsors of the event. In this case, the defendants had not used the Plaintiff’s mascot or logo. While they had inserted a pictorial representation of a ticket with an imaginative seat and gate number, this did not show likelihood of confusion that the defendants were sponsors or licensees of the Event. Accordingly, there could be no case of passing off.

The Delhi HC also held that the words ‘World Cup’ were non-exclusive generic words, which were neither brand names nor had any protection by trademark registration. The use of the defendants’ slogans were descriptive, which was fair use of such marks, permissible under law.

22 A copyright is a right given under law, to owners of original works including literary and artistic works. The Copyright Act, 1957, protects these works from unauthorized users.

23 A trademark is a symbol/word/name/logo, etc. which is used in relation to goods and services to distinguish it from other goods and services. Trademarks are registered under the Trade Marks Act, 1999 (“**TM Act**”) in relation to certain goods or services. The TM Act prescribes penalties for infringement of registered trademarks when such trademarks are used by third parties without authorizations in relation to the same goods or services. Unregistered trademarks are also protected under the law of passing off for such marks

24 Application Number 1656213

25 Application Number 1931422

26 Application Number 1698987

27 Application Number 2048797

28 2003 (26) PTC 245 Del

7. Other Legal, Regulatory and Tax Issues

3. Personality Rights Issues

In order to attract gamers, many games such as the FIFA series or the Fallout Franchise, use the caricatures, likeness, voice, reputation or popularity of a celebrity for a commercial benefit without authorization from the celebrity.

In India, celebrities have a common law right known as 'personality rights' through which they may control the use of their name, personality traits, signature, voice, etc for commercial purposes. Since the cricketer's whose names, photos, etc. will be used are also celebrities, it may be argued that the use of their names, photos etc. may violate their personality rights.

A violation of such rights would result in the court passing an order restraining the company or person owning the game from displaying/ exhibiting these games or using the image of the celebrity in such games and/or award damages to the celebrity for harm caused to the reputation of the celebrity.

In the Arvee Case the court recognized that the right of publicity had evolved from the right to privacy and can inhere only in an individual or in any indicia of an individual's personality, such as his name, personality trait, voice, etc. An individual could acquire the right of publicity by virtue of his association with a sport as well. The court, while holding that the right to publicity vested in an individual and he alone was entitled to profit from it, cited the example of the use of Kapil Dev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorization.

In the landmark case of *Justice K.S Puttaswamy (Retd.) v. Union of India*²⁹ the Supreme Court of India recognized that all citizens of India had a fundamental right to privacy. One of the judges even observed that personality rights were an aspect of this right to privacy.³⁰

While the law with respect to publicity rights in India is still evolving, Fantasy Sport platforms may need to be mindful while using aspects of a players persona, such as their name, likeness, signature, voice, etc., to ensure that such use does not amount to unauthorized commercialization of their personality rights.

Any use giving the impression that an athlete has endorsed/affiliated a particular fantasy sport platform may infringe such rights.

29 Writ Petition (Civil) No. 494 of 2012

30 Ibid, paragraphs 58 – 59, Justice Sanjay Kishan Kaul

"Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent

Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the 'self.' The right of publicity implicates a person's interest in autonomous self- The UK Courts granted in super-injunctions to protect privacy of certain celebrities by tabloids which meant that not only could the private information not be published but the very fact of existence of that case & injunction could also not be published"

4. Telecom Laws applicable to Gaming

The advent of high-speed internet and increasing smartphone penetration in India has resulted in, 94% of gaming activity being conducted on mobile phones in the country.³¹ Several games are also marketed through SMS messages. There are certain telecom laws that are particularly important to consider by the gaming companies while offering and advertising these games.

I. SMS Marketing Related Laws

Commercial communications in India over SMS texts and voice/robo/automated calls are regulated under the Telecom Commercial Communications Customer Preference Regulations, 2018 (“TCCCPR”) issued by the Telecom Regulatory Authority of India (“TRAI”). The TCCCPR prohibits unsolicited commercial communications (“UCC”), which are promotional messages / calls made neither as per the registered preference nor as per the consent of the contact.

The TCCCPR applies to ‘Access Providers’ who are telecom service providers licensed by the Department of Telecommunications in India. It mandates Access Providers to ensure that senders and telemarketers do not send communication which are in violation of its provisions and has delegated several functions to Access Providers to combat spam. Access Providers have therefore been empowered to issue Codes of Practice (“CoPs”) which are to be followed by all those who avail of services from such Access Providers. We understand that such CoPs are in the process of being implemented. TRAI periodically issued directions in relation to implementation of the TCCCPR.

Note that, however, the TCCCPR does not apply to marketing and commercial communication made via internet-based / OTT messaging platforms such as email, WhatsApp, etc.

The TCCCPR prescribes certain broad requirements to be followed in relation to commercial communication.³² It mandates Access Providers to establish a customer preference registration and opt-out facility for commercial communication in the following manner:

- Customers can record their preference regarding the type of messages/calls, the time of the day and the day of the week they wish to receive commercial communication.

31 ‘Decoding the essentials in the gaming industry’, dated August 18, 2022. Available at: <https://brandequity.economictimes.indiatimes.com/news/industry/decoding-the-essentials-in-the-gaming-industry/93640231>. Last visited: September 17, 2022.

32 “Commercial Communication” means any voice call or message using telecommunication services, where the primary purpose is to inform about or advertise or solicit business for

- a) goods or services; or
- b) a supplier or prospective supplier of offered goods or services; or
- c) a business or investment opportunity; or
- d) a provider or prospective provider of such an opportunity;

Explanation: For the purposes of this regulation it is immaterial whether the goods, services, land or opportunity referred to in the content of the communication exist(s), is/are lawful, or otherwise. Further, the purpose or intent of the communication may be inferred from:

- a) The content of the communication in the message or voice call
- b) The manner in which the content of message or voice call is presented
- c) The content in the communication during call back to phone numbers presented or referred to in the content of message or voice call; or the content presented at the web links included in such communication.

7. Other Legal, Regulatory and Tax Issues

- Customers can also use the opt-out facility to opt out of receiving commercial communication, either by partially opting out of certain specified categories such as entertainment, or fully blocking all commercial communication. Recipients can opt out of receiving all categories of promotional messages,³³ but not service messages.³⁴

Even when a customer has opted out as described above, a sender may be able to send (a) promotional messages, if such customer has explicitly registered his/her consent, and (b) messages which are transactional or arising out of a prior relationship between the sender and the customer, such as business, commercial or social or an enquiry made by the customer to receiving such commercial communication. However, the sender must ensure that transactional messages do not amount to UCC and may rely on inferred consent of the customer. The TCCCPR also provides for certain operational compliances such as registration of 'headers' by Access Providers based on the nature of communication to be sent by the sender.

II. Activation of Value Added Services

TRAI has issued specific directions to telecom service providers that regulate provision of value added services ("VAS") and prevent unauthorized activation of such services leading to unforeseen charges borne by subscribers. These obligations include:

- Informing the consumer, through SMS, on activation of a VAS, the validity period of such service, the charges for renewal and the procedure for the consumer to unsubscribe from the service;
- Before subscribing to a VAS, the operator must obtain confirmation from the consumer via an SMS or email within 24 hours of activation of the VAS. The consumer must be charged only if such confirmation is received, failing which, the VAS must be discontinued;
- In case a VAS is offered via WAP or mobile internet, explicit consent of the consumer is required via an online consent gateway as is detailed in TRAI's directions.

Though the TRAI has placed all these obligations on telecom operators we have observed that most VAS agreements between the game developers and telecom operators typically involve the telecom operator passing on its obligations to the VAS provider. Further, telecom operators typically also require the VAS provider to comply with all applicable laws and further indemnify the telecom operator in the event of any loss/penalty.

33 Promotional messages/voice call means commercial communication voice call for which the Sender has not taken any explicit consent from the Recipient to make such voice calls to him;

34 **Service message** means a message sent to a recipient or voice call made to recipient either with his consent or using a template registered for the purpose, the primary purpose of which is-

- to facilitate, complete, or confirm a commercial transaction that the recipient has previously consented to enter into with the sender; or
- to provide warranty information, product recall information, safety or security information with respect to a commercial product or service used or purchased by the recipient; to provide—
 - notification concerning a change in the terms or features of; or
 - notification of a change in the recipient's standing or status with respect to; or
 - at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing; or
 - commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; or
 - information directly related to an employment relationship or related benefit plan in which the Recipient is currently involved, participating, or enrolled; or
 - information relating to delivery of goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously consented to enter into with the sender.

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Therefore, in the event that an interactive game is designed to be centered around regular SMSs being activated on a subscriber's handset, the game developer must be mindful of such obligations that may be applicable to such games.

5. The CPA and E-Commerce Rules

The revamped CPA and rules form the bedrock of consumer protection law in India. The CPA imposes stringent measures on all service providers, to ensure greater accountability, and prohibit unfair trade practices (i.e., trade practices making false representations, or misleading the public) and restrictive trade practices³⁵ (i.e., trade practices resulting in price manipulation or affecting delivery of services so as to impose unjustified costs or restrictions on consumers), unfair contracts³⁶ (i.e., certain types of contracts between service providers and consumers which may significantly change the rights of consumers), deficient services (i.e., faults, imperfections, shortcomings or inadequacy in performance of services required to be maintained under law³⁷), and misleading advertisements³⁸ (as discussed in the Advertising chapter above).

In addition, the Consumer Protection (*E-Commerce*) Rules, 2020 ("**E-Commerce Rules**") apply to e-commerce entities, which are defined as follows:

*(b) "e-commerce entity" means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity;*³⁹

This definition will likely cover most real-money online gaming platforms, depending upon their business models. The E-Commerce Rules read with the CPA require e-commerce entities to publish information about the entity⁴⁰ (such as name, address, contact details), provide for grievance redressal mechanisms by appointing

35 (41) "restrictive trade practice" means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

- i) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;
- ii) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent for buying, hiring or availing of other goods or services;

36 (46) "unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:— (i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or (ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or (iii) refusing to accept early repayment of debts on payment of applicable penalty; or (iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or (v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or (vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage;

37 'deficiency' is defined under the CPA as follows: (11) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes— (i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and (ii) deliberate withholding of relevant information by such person to the consumer;

38 (28) "misleading advertisement" in relation to any product or service, means an advertisement, which—

- i) falsely describes such product or service; or (ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or (iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or (iv) deliberately conceals important information;

39 Section 3(b), Consumer Protection (E-Commerce) Rules, 2020

40 Rule 4(2), E-Commerce Rules

7. Other Legal, Regulatory and Tax Issues

a grievance officer⁴¹, record express consumer consents through affirmative/explicit action⁴², and ensure advertisements are truthful/not misleading⁴³, among others.

They also mandate greater transparency from e-commerce entities, by requiring them to provide certain information to consumers such as information on payment methods and security of payment methods, and other information required by consumers to make informed decisions.

The CPA also establishes a Central Consumer Protection Authority (“CCPA”) as the regulator responsible for enforcing consumer rights.⁴⁴ Accordingly, for violations of the CPA or the E-Commerce Rules by gaming operators, a user may make a complaint to the CCPA.⁴⁵ Thus, apart from consumer redressal forums, the CCPA can also initiate proceedings, in certain situations.

6. Data Protection

The present data protection law in India flows from the Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (“**Privacy Rules**”) enacted under the Information Technology Act, 2000 (“**IT Act**”). The Privacy Rules apply to sensitive personal data or information (“**SPDI**”) (which includes passwords, financial information such as bank account, credit card, debit card, or other payment instrument details, information about physical, physiological, and mental health conditions, information about sexual orientation, medical records, and biometric information) that is collected in or subsequently converted into electronic form. The Privacy Rules require companies, enterprise that collect, process and store certain forms of SPDI to comply with certain requirements, including obtaining consent, providing notice, maintaining a privacy policy, appointing a grievance officer, and adopting reasonable security measures to protect the information. Gaming platforms may collect certain SPDI such as passwords or bank account/ payment instrument details.

The IT Act does not provide for specific compliance for collection and handling of personal data (which is not SPDI) but provides a penal provision for unauthorized disclosure of personal data intentionally to cause harm.

A new data protection regime was proposed under the draft *Data Protection Bill, 2021*, however was subsequently withdrawn.

41 Rule 4(4), E-Commerce Rules

42 Rule 4(9), E-Commerce Rules

43 Section 21, Consumer Protection Act, 2019

44 The Consumer Protection Act, 2019 has introduced a new chapter (Chapter III) establishing a Central Consumer Protection Authority (“CCPA”) known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.

45 Section 17, CPA

7. Foreign Direct Investment & Foreign Technology Collaborations in Gaming Industry

Under the Foreign Direct Investment Policy (“**FDI Policy**”) of India issued by the Ministry of Commerce & Industry, Government of India, and as codified into law by the FEMA and the Foreign Exchange Management (*Non-Debt Instruments*) Rules, 2019 (“**Non-Debt Rules**”), Foreign Direct Investment (“**FDI**”) is prohibited in entities involved in:

- lottery, including government, private lottery, online lotteries, etc; and
- gambling and betting including casinos, etc.

The terms “lottery, gambling and betting” have not been defined under the FDI Policy.

Hence, one may rely on the statutes in *pari materia*, judgments (both domestic and foreign), dictionaries, etc. for the meaning of these terms. In case of games of skill, an argument can be made that it does not amount to ‘gambling and betting including casinos, etc,’ and accordingly foreign direct investment may be permitted in such games.

Further, the Non-Debt Rules also prohibits foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract for lottery business and gambling and betting activities. This prohibition should not apply in relation to games of skill.

For violating the Non-Debt Rules, one may have to pay a penalty of up to thrice the sum involved where such amount is quantifiable, or up to INR 2,00,000 (approx. USD 4000) where the amount is not quantifiable, and where the contravention is a continuing one, further penalty which may extend to INR 5,000 (approx. USD 100) for every day after the first day during which the contravention continues.

Several skill gaming companies have in fact received foreign direct investment including Rummy and fantasy sports.

8. Restrictions under Exchange Control Regulations

Under the FEMA read with Foreign Exchange Management (Current Account Transaction) Rules, 2000⁴⁶ (“**Current Account Rules**”), remittance of income from winnings from lottery, racing/ riding or any other hobby is prohibited. Remittance for purchase of lottery tickets, banned/proscribed magazines, football pools, and sweepstakes, etc. is also prohibited.

Remittance for the purpose of betting by a player or any remittance of prizes to any player in foreign currency may potentially contravene these rules and incur penalties which may extend up to three times the amount remitted.

⁴⁶ Schedule 1: Transactions which are prohibited, read with Rule 3

9. Tax

Gaming operators should consider the impact of a number of tax implications that could apply to their India offerings. These largely fall within three buckets (as enumerated below):

I. Income Tax Act

- Non-residents are typically taxable on income sourced in India. Consequently, non-residents may be subject to tax in India if (a) they have more than 300,000 users in India, or (b) income receipts more than INR 20 mn in a financial year. However, if treaty relief is available to the overseas operator, taxes should not apply to such income without the creation of a permanent establishment in India.
- Gaming operators are also subject to a withholding obligations, which requires the person responsible for paying winnings to the players to withhold taxes at the rates in force (if the winnings are in excess of INR 10,000). Relief from the obligation to withhold is offered in certain instances when the winnings are in kind (however, the deductor, i.e., the operator, has further compliance obligations in such situations). The operation of this provision has several nuances based on the specific facts and market practice differs with respect to overseas operators in terms of compliance with this provision due to practical difficulties.

II. Equalization Levy

- In 2020, a new levy was introduced on overseas e-commerce operators that were receiving consideration for e-commerce supply or services made/provided/facilitated by the e-commerce operator to specified persons (including Indian residents). The equalization levy is applicable at the rate of 2%, and overseas operators that are subject to the levy, are offered a corresponding exemption from the application of income taxes under the ITA.

III. Goods and Services Tax

- GST is an indirect tax levied on the supply of goods or services. With respect to the products offered by gaming operators, a number of classification issues exist with respect to the characterization of gaming products as an 'actionable claim'⁴⁷ (included within the definition of 'goods' and taxable only when related to lottery, betting or gambling; and not otherwise), or as a service, both of which imply separate rates and tax bases.
- Another major issue faced by the operators in the gaming industry is with respect to the tax rate and tax base determination. The classification as gambling (i.e., games of chance) vs non-gambling (i.e., games of skill) is relevant here too as gambling is identified as a service chargeable to tax at 28% (along with gambling-related actionable claims that are chargeable to tax at the same rate), whereas non-gambling activities are chargeable to tax at the rate of 18%. Secondly, in the case of actionable claims, the entire stake value/bet value is deemed to be the 'good' and thus, the entire bet value is chargeable to tax. However, for gambling and non-gambling services, on the other hand, the tax base is restricted to the service fee charged by the operator. Thus, classification as an actionable claim (i.e., a good), or as a service continues to be a nuanced and important determination.

47 An actionable claim is defined in Section 3 of the Transfer of Property Act, 1882 as follows (this definition is relied upon under section 2(1) of the CGST Act):
"A claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable 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."

7. Other Legal, Regulatory and Tax Issues

- At the moment, there is also an ongoing deliberation at the level of the Group of Ministers, as to whether (a) GST should be charged at the rate of 28% on both, skill gaming and chance gaming, (b) whether the tax base should be the entire amount which a player deposits for a game. This is currently undecided, and reports suggest that the ministers are seeking legal opinions on the issue.

Depending on the kind of products the operator is offering the implications of the above may change based on the manner in which such products are offered.

10. Intermediary Guidelines Notified under the IT Act

The Information Technology (*Intermediary Guidelines and Digital Media Ethics Code*) Rules, 2021 (“**IT Rules**”) notified under the IT Act, prescribe due diligence obligations for intermediaries like ISPs, App Stores, etc. They must carry out such due diligence in order to preserve their ‘safe harbour’ from liability for content published by third parties on their platform.⁴⁸

The term ‘intermediary’ has been defined under the IT Act⁴⁹ to include

“telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”.

Thus, along with ISPs (internet service providers), even websites which serve as aggregators for third party games, or App Stores on which gaming apps are available, may qualify as intermediaries.

One of the due diligence obligations requires intermediaries required to prominently publish their rules and regulations, privacy policy and user agreement on their websites/mobile applications⁵⁰ (“**User Terms**”).

48 Section 79, IT Act: 79 Exemption from liability of intermediary in certain cases. -

- Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
- The provisions of sub-section (1) shall apply if-
 - the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
 - the intermediary does not-
 - initiate the transmission,
 - select the receiver of the transmission, and
 - select or modify the information contained in the transmission;
 - the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
- The provisions of sub-section (1) shall not apply if-
 - the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;
 - upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation. -For the purpose of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.]

49 Section 2(1)(w) of the IT Act: “intermediary”, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes

50 Rule 3(1)(a), IT Rules

7. Other Legal, Regulatory and Tax Issues

The User Terms are required to inform users not to display, publish, upload, etc. certain categories of information,⁵¹ including information which is *'relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force.'*

It appears that the rule has been included with the purpose of, among other things, discourage online activity of gaming/ gambling that may be unlawful under the Gaming Enactments in the country. The IT Rules clarify that an intermediary will not lose its safe harbour if an intermediary removes or disables access to information voluntarily when users violate the intermediary's User Terms, Accordingly, intermediaries may take down such content by themselves.

An intermediary is also mandatorily required to take down information on certain grounds within 36 hours⁵² upon receiving actual knowledge in the form of a court order, or upon being notified by the 'Appropriate Government or its agency.'⁵³ These grounds include information which is prohibited under any law.

Accordingly, intermediaries (including App Stores, or ISPs in case of browser-based applications) may be directed to take down gambling related content when directed to do so by an appropriate Government or its agency.

In the case of *Avinash Mehrotra v Union of India*,⁵⁴ the petitioner filed a petition before the High Court of Delhi ("**Delhi HC**") seeking inter alia a ban on gambling activities. The petitioner named certain specific websites⁵⁵ in the petition, however, clarified that this was a non- exhaustive list. The petitioner specifically sought directions to MeiTty to exercise its powers under Section 79 of the IT Act, and the IT Rules, to take steps/issue instructions to ban/prevent online gambling websites from operating in the country.

In its submission to the court, MeiTty represented that it would need to be determined whether a game was a game of skill or chance in order to block it.⁵⁶ Vide order passed on November 28, 2019, the High Court of Delhi disposed of both petitions. The court directed that, inter alia the MeiTty was to treat the writ petition as a representation and:

- Take a decision as to whether the websites named by the petitioner in *Avinash Mehrotra* were to be banned or not, and whether any such similarly situated websites which encouraged gambling activities were to be banned or not.
- Such a decision was to be taken in accordance with the law, rules, regulations and Government policy.

51 Information which:

- i) belongs to another person and to which the user does not have any right;
- ii) is defamatory, obscene, pornographic, paedophilic, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force;
- iii) is harmful to child;
- iv) infringes any patent, trademark, copyright or other proprietary rights;
- v) violates any law for the time being in force;
- vi) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;
- vii) impersonates another person;
- viii) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting other nation;
- ix) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;
- x) is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person;

52 Second Proviso to Rule 3(1)(d)

53 Rule 3(1)(d)

54 WP (C) 5661/2019

55 (i) <https://betway.com/in/>; (ii) <https://22bet.com/>; (iii) <https://www.leovegas.com/en-in/>; (iv) <https://www.rooyalpanda.com/india/>; (v) <https://www.unibet.com/>; (vi) <https://www.betrallyindia.com/>; (vii) <https://www.dafabet.com/in/>; (viii) <https://in.1xbet.com/en/>; (ix) <https://www.888sport.com/>; (x) <https://www.adda52.in/>; (xi) <https://www.khelo365.games/>; (xii) <https://www.pokerstars.in> (xiii) <http://diamondexch.in/>

56 <https://www.deccanherald.com/national/national-politics/difficult-to-block-gaming-sites-centre-tells-hc-780688.html>

7. Other Legal, Regulatory and Tax Issues

Subsequently, MeiTty submitted to the High Court that it could not regulate online gaming websites, as the issue fell within the ambit of the State list.⁵⁷

However, a blocking order under the IT Rules may be issued by an 'Appropriate Government or its agency', which has been defined to include State Governments.⁵⁸ Accordingly, States may seek blocking of gambling related content under these provisions if they believe it violates the relevant State's Gaming Enactment.

This was confirmed⁵⁹ by Meity in response to a letter by the Chief Minister of Andhra Pradesh seeking blocking of gambling websites in the State, wherein MeiTty stated that State Governments can directly issue take down requests to the concerned intermediary to block/take down content if it violated the Gaming Enactment of the relevant State, under Section 79/IT Rules.

11. Anti-Money Laundering Laws and KYC Requirements

In India, the Prevention of *Money Laundering Act, 2002 ("PMLA")* imposes an obligation on certain entities termed 'reporting entities' to verify identity of clients and maintain records, report suspicious transactions, etc. The PML Act also requires such 'reporting entities' to inter alia furnish information to the Director of Financial Intelligence Unit (FIU), as and when required.

Reporting entities are defined⁶⁰ under the PMLA to include a banking company, financial institution, intermediary or a "person carrying on a designated business or profession". A 'person carrying on a designated business or profession' is defined⁶¹ to include 'a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino.'⁶²

Skill gaming operators may not fall under this provision, as they do not offer games of chance. In April, 2022, certain news reports suggested⁶³ KYC obligations were likely to be introduced for online skill gaming operators to curb money laundering. These reports appear to confirm the view that skill gaming operators are not currently covered under the PMLA.

57 <https://www.livelaw.in/news-updates/delhi-high-court-told-regulation-of-online-gambling-lotteries-not-in-it-ministry-domain-180289>

58 (e) "appropriate Government" means as respects any matter,-- (i) enumerated in List II of the Seventh Schedule to the Constitution;

(ii) relating to any State law enacted under List III of the Seventh Schedule to the Constitution, the State Government and in any other case, the Central Government;

INFORMATION TECHNOLOGY ACT, 2000 Section 2 – Definitions

59 <https://www.medianama.com/2021/08/223-rti-government-online-gambling-regulation/>

60 Section 2(wa), PMLA

61 Section 2(sa), PMLA.

62 Section 2(sa)(i), PMLA

63 https://www.business-standard.com/article/economy-policy/kyc-norms-likely-for-online-skill-gamers-to-curb-money-laundering-122041100006_1.html

Ongoing Policy Efforts

With the constitution of several bodies such as (a) the IM Panel and (b) the AVGC Task Force, as well as the (c) GoM, the industry awaits regulatory certainty in terms of (1) a central safe harbor for skill games to reduce state-wise uncertainties, manner of determination of skill, appointment of a central regulator, and applicable goods and service tax (GST) leviable on skill gaming transactions.

2022-2023 will likely shape the future of the industry, as these bodies ponder key regulations within which they will operate.

The first instance in which a central law for the online gaming industry was contemplated was by the Law Commission in 2018, in report on legalizing betting and gambling in India¹ (“**Report**”) in July, 2018. We have summarised the genesis of the Report, and recommendations in the report, in **Annexure C**.

As per latest reports² the report of the IM Panel is ready, and has recommended the creation of a regulatory body under MeiTy, to classify online games into (1) games of chance and (2) games of skill, as well as introduce rules to block prohibited games and websites from being offered in India. These reports also suggest that a federal online gaming law will be introduced, which will include penal provisions, and will vest regulators with powers to block prohibited websites. The contemplated Digital India Act, which has not been introduced as yet, will reportedly include prohibited games of chance in the list of prohibited user harms. The report also notes that State Governments find it difficult to control and monitor games being offered within the State.

News reports suggest that the IM Panel's report³ will next be sent to the Cabinet secretariat for approval, prior to its release.

While at the Central level, the new federal law is contemplated, there are several ongoing developments at a State level as well:

- Telangana – the state of Telangana may soon introduce⁴ a self-regulatory framework for online and fantasy gaming, to encourage self-regulation and the development of the online gaming sector in the state.
- Rajasthan – the state government of Rajasthan has published a draft of the Rajasthan Virtual Online Sports (Regulation) Bill, seeking stakeholder comments. Our analysis of this bill may be found here.⁵
- Tamil Nadu –
 - In August, 2021, the High Court of Madras struck down⁶ certain amendments introduced to the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021, holding that the complete prohibitions on for-money online games of skill under the Amendment Act were unreasonable, excessive, and manifestly arbitrary, thereby falling afoul of Article 19(1)(g) of the Constitution.

1 <http://lawcommissionofindia.nic.in/reports/Report276.pdf> Report No. 276, Law Commission of India, 'Legal Framework: Gambling and Sports Betting,' July 2018

2 <https://www.reuters.com/world/india/exclusive-skill-or-chance-india-panel-calls-regulatory-body-new-law-online-2022-09-15/>

3 <https://www.reuters.com/world/india/exclusive-skill-or-chance-india-panel-calls-regulatory-body-new-law-online-2022-09-15/>

4 <https://www.livemint.com/sports/news/telangana-to-implement-new-norms-for-self-regulation-of-fantasy-gaming-11629905232908.html>

5 <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/45/NDAHOTLINE/6144/1.html>

6 *Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors* WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021

8. Ongoing Policy Efforts

- A SLP was filed against this order before the Supreme Court by the Government of Tamil Nadu⁷ and is currently pending. Notice has been issued to the to the parties, and the matter is listed next on November 7, 2022.
- In parallel, the Governor of Tamil Nadu has provided his assent to the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games, Ordinance, 2022 (**“Tamil Nadu Ordinance”**) on October 1st, 2022. The Tamil Nadu Ordinance is not currently in effect and will come into force upon being notified in the State Gazette. However, several Poker and Rummy operators have commenced geoblocking users from Tamil Nadu from accessing their games.
- While the Tamil Nadu Ordinance is a very recent legislation, and is still being mulled over by the industry, some key features and observations are:
 - The Tamil Nadu Ordinance seeks to (1) prohibit online gambling and (2) regulate online gaming.
 - Games which (1) are preponderantly of chance, (2) which require superlative skill to dominate chance, (3) are ‘presented’ as involving an element of chance or (4) involves any element of random event generation such as cards, dice, wheel, are treated as ‘games of chance,’/‘gambling’ and are prohibited⁸. Poker and Rummy are specifically called out as games of chance.⁹ This definition appears to contravene Supreme Court orders interpreting the meaning of skill as preponderantly of skill, and holding Rummy as a game of skill, discussed above.
 - Service providers to gaming companies such as banks, financial institutions or payment gateway providers are also prohibited from processing transactions and authorizing funds towards online gambling activities.¹⁰
 - The Tamil Nadu Ordinance also regulates online games (defined as any games except for games of chance) and has introduced a registration requirement for online games providers.
 - Only local operators¹¹ whose (1) central management and control of the service is in Tamil Nadu, or (2) whose servers are hosted in the State, are eligible for a license.
 - There is a provision¹² for the constitution of an online gaming authority, which may make recommendations to the Central Government (presumably, MeiTty), to block access non-local websites. However, in the case of Abbas Shaikh v Union Govt. & Ors¹³, the Government of Maharashtra requested the Computer Emergency Response Team (**“CERT”**) to block transmission of a gambling website from all ISPs based in India. The CERT committee observed in that case that no details suggesting the impact of the website on public order had been made available by the State Government, and keeping in view the directions of the High Court to act strictly as per law, the committee did not find that a violation of Section 69 – A had been established.

7 SLP (C) No. 19981-19988/2021 The State of Tamil Nadu & Ors v Junglee Games India Pvt. Ltd. & Anr.

8 Section 2(1): “online game of chance” includes any online game which,—

- (i) involves both an element of chance and an element of skill and the element of chance dominates over the element of skill; or
- (ii) involves an element of chance that can be eliminated only by superlative skill; or
- (iii) is a game that is presented as involving an element of chance; or
- (iv) involves cards, dice, wheel or such other device, which works on random or event generator;

9 Schedule to Tamil Nadu Ordinance

10 Section 9. No bank, financial institution or payment gateway provider shall engage in any transaction or authorization of funds towards payment for any online gamblings or any online game of chance specified in the Schedule

11 (f)“local online games provider” means an online games provider,—

- (i) whose central management and control of the service is in this State; or
- (ii) whose service that is available for access by the customers, is hosted in this State;

12 Section 15(2), Tamil Nadu Ordinance

13 PIL Petition No. 40 of 2009

8. Ongoing Policy Efforts

- Accordingly, it is unclear whether MeiTy will take action to block websites under Section 69 A upon receipt of such request from the Tamil Nadu Government.
- Prior to the introduction of the Tamil Nadu Ordinance, the Government had constituted a committee (headed by a retired High Court judge) to assess risks of online Rummy (such as financial loss and suicide, exploring the dangers of these games with relevant data, and impact of advertising games and measures to restrain such advertisements)¹⁴. The Committee presented its report to the Government¹⁵ in June 2022, recommending (1) a ban on online games, and (2) a law against online games at a national level¹⁶. Subsequently, it was reported that the Tamil Nadu Cabinet had considered the report and a majority of cabinet members were in favour of banning online rummy by way of introducing an ordinance¹⁷.
- Pondicherry: Following Tamil Nadu, it was reported that Puducherry too was considering a ban on online Rummy¹⁸. A stakeholder consultation was held in August 2022, pursuant to which it was reported that a draft legislation banning all online games was prepared and considered by the Cabinet. Accordingly, there may be an Ordinance seeking to prohibit online games in Tamil Nadu. It is unclear whether the law would seek to prohibit certain games only (like Rummy), or other games of skill as well.

14 <https://timesofindia.indiatimes.com/city/chennai/online-rummy-panel-submits-report-to-tamil-nadu-govt/articleshow/92487583.cms>

15 https://twitter.com/CMOTamilnadu/status/1541303199927500800?ref_src=twsrc%5Etfw%7Ctwcamp%5Eetweetembed%7Cwterm%5E1541303199927500800%7Ctwtgr%5E027318b81e663844e548f4c9729d6bb4469ae04e%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fd-10257599041032498993.ampproject.net%2F2208242209000%2Fframe.html

16 <https://www.thenewsminute.com/article/online-gambling-ban-tn-government-seeks-inputs-stakeholders-166603>

17 <https://g2g.news/rummy/tamil-nadu-no-decision-yet-on-online-rummy-ban-cabinet-in-favour-of-a-ban/>

18 <https://g2g.news/online-gaming-laws/after-tamil-nadu-puducherry-plans-to-ban-online-rummy-and-gambling/>

Annexure A

Key Provisions and Penalties under the Gaming Enactments

1. Concept of Common Gaming Houses

Under the Gaming Enactments (except states like Assam and Orissa where gambling per se is an offence), most offences and prohibitions are in relation to a “common gaming house”.

Generally, the Gaming Enactments define a “common gaming house”, to include (a) an enclosed physical premise such as a house or a tent; and (b) “instruments of gaming” kept or used in such enclosed physical premises for the purpose of accrual of profit or gain to the person owning, occupying, keeping such enclosed physical premises or using any such instrument of gaming in the enclosed physical premises; and (iii) profit or gain by way of charge for use of the same enclosed premises or “instruments of gaming” or otherwise.

“Instruments of gaming” means ‘any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect to any gaming.’ In today’s context, there is a school of thought that believes that computer terminals used for gambling and servers on which gambling takes place and related e-records are maintained also constitute “instruments of gaming”. Certain States like Nagaland¹ have legislatively included ‘computers’ and ‘servers’ within the definition of instruments of gaming.

On analysis of the definition of “common gaming house” in general under the Gaming Enactments, it seems that the intention of the legislatures is to impose restrictions on the use of a physically enclosed premises for the purposes of making “profit or gain” from the use of such premises.

Thus, a private house may not ideally constitute a “Common Gaming House”, if there is lack of intent on the part of the owner to derive any profit or gain from the use of his house for gambling purposes. The High Courts of Punjab and Haryana², Madras³ and Kerala⁴ have recognized that gambling in private premises does not amount to a ‘common gaming house.’ Extending the same analogy to the digital world, when a person is accessing online gambling websites from his house, arguably, it may not be a “common gaming house”.

The situation may however be different where such gambling activities are carried out in places such as clubs or cyber cafés, where the cyber cafés derive profits by allowing the use of the computer terminals (which may be caught within the scope of “instruments of gaming”).

1 The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Products of Skill Act, 2015

2 Kanwardeep Singh v Union Territory of Chandigarh, CrI. MP No. 54959 of 2006 dated 24.12.2008.

3 D.Siluvai Venance v State rep by The Inspector of Police CrI.OP(MD) No. 6568 of 2020 and CrI.MP(MD) No. 3340 of 2020

4 Joy alias Itty Abraham & Anr. V State of Kerala & Ors 1991 72 CompCas 57 Ker.

2. Whether the Gaming Enactments apply to Online Gaming

Most of the Gaming Enactments were introduced before the emergence of the internet. Therefore, the provisions of these laws do not expressly refer to online gaming, and prohibit activities in 'common gaming houses' as discussed above. The question of whether these Gaming Enactments apply to the online medium is an interesting but open ended one. There are arguments for and against whether these Gaming Enactments apply to online gaming activities.

On the one hand, it can be argued that penal statutes such as the Gaming Enactments, which refer to physical premises in terms of 'common gaming houses', must be strictly/narrowly construed⁵. Certain High Courts have also held that the relevant Gaming Enactment of the State would need to be expressly amended to include online gaming:

- The High Court of Kerala has held that online gambling does not fall within the purview of the Kerala Gaming Act, 1960, and the inclusion of the same within the Act would be a legislative function⁶.
- The High Court of Gujarat has held in the case of *Amit M. Nair v. State of Gujarat*⁷ that the Gujarat Prevention of Gambling Act, 1887 ("**Gujarat Act**") does not apply to online gambling, and its provisions would need to be expressly amended to extend online.

Whereas, High Courts of Punjab and Haryana⁸, Rajasthan⁹ and Bombay¹⁰ have considered the legality of online fantasy sports under the Public Gambling Act, 1867, the Rajasthan Public Gambling Ordinance, 1949 and the Bombay Prevention of Gambling Act, 1887, respectively, without dealing with the issue whether they even apply to an online medium.

In recent times, certain states such as Sikkim, Meghalaya, Andhra Pradesh, Nagaland and Telangana have amended their laws to expressly cover online/intranet gaming:

- Sikkim: Sikkim Online Gaming (Regulation) Act 2008 ("**Sikkim Act**") and Sikkim Online Gaming (Regulation) Rules, 2009, have introduced a licensing regime for online games and sports game through the State-wise intranet under the Sikkim Act.
- Nagaland: The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act 2015 and the Nagaland Prohibition of Gaming and Promotion and Regulation of Online Games of Skill Rules 2016 ("**Nagaland Gaming Law**"), have introduced a licensing regime for online games of skill.
- Telangana: The Telangana Gaming Act, 1974 ("**Telangana Act**") was amended in 2017 to expressly cover online gaming, by amending the definitions of 'gaming' to include 'online gaming' and 'common gaming house' to cover cyber space. The prohibitions under the Telangana Act were also amended to prohibit all online gaming (including on games of skill) for stakes in the State.
- Andhra Pradesh: The Andhra Pradesh Gaming Act, 1974 ("**AP Act**") was amended on similar lines to the Telangana Act.

5 D. Krishna Kumar And Anr. vs State Of A.P., 2003 CriLJ143, PN Krishna Lal v Govt of Kerala 1995 Supp 2 SCC 187

6 Pauly Vadakkan v. State of Kerala, WP(C). 2096/2021

7 Writ Petition (PIL) No. 146 of 2020.

8 Shri Varun Gumber v. Union Territory of Chandigarh and others, CWP No. 7559 of 2017.

9 Handresh Sankhla v. State of Rajasthan & Ors, D B Civil Writ Petition No. 6653/2019.

10 Gurdeep Singh Sachar v. Union of India Criminal Public Interest Litigation Stamp No.22 Of 2019.)

Annexure A

- Meghalaya: The State of Meghalaya has introduced the Meghalaya Regulation of Gaming Act, 2021 (“**Meghalaya Act**”) and Meghalaya Regulation of Gaming Rules (“**Meghalaya Rules**”) (collectively, “**Meghalaya Law**”), through which it has introduced a licensing regime for games of skill and chance through the State-wide intranet.¹¹ The Meghalaya Law has not been notified as yet. As per latest reports, it is likely to be repealed soon¹².

3. Offences, Offenders and Penalties under the Gaming Enactments

Most Gaming Enactments prohibit the act of:

- Owning, keeping, occupying or having care and management of a Gaming House
- Advancing or furnishing money for the purposes of gambling to persons frequenting any such Gaming House;
- Gambling in Common Gaming House or present for the purpose of gambling/gaming in Common Gaming House;
- Gambling or suspected gambling in any public street, place or thoroughfare;
- Printing, publishing, selling, distributing or in any manner circulating anything with the intention of aiding or facilitating gambling/gaming; and
- Activity of Gambling/Gaming per se (This is not applicable to every State. Only the Gaming Enactments of States like Orissa and Assam prohibit the activity of gambling/gaming itself, agnostic to the medium through which the gaming is offered).

The liability for offences under the Gaming Enactments usually vests with:

- The owner of the gaming/common gaming house;
- The person keeping or having charge of the gaming/common gaming house;
- The person gambling or possessing instruments or records of betting or suspected of gambling or possessing such instruments

All Gaming Enactments prescribe penalties which are more or less similar. For example, the Bombay Prevention of Gambling Act, 1887 imposes a fine and imprisonment for offenders. A first offence is punishable with a fine of at least INR 500 (approximately USD 8) and 3 months' imprisonment, a second offence is punishable with a fine of at least INR 1,000 (approximately USD 15-20) and imprisonment for 6 months, and a third or subsequent offence entails a fine of at least INR 2,000 (approximately USD 30-35) and imprisonment for one year.

¹¹ Rule 8(c), Meghalaya Rules

¹² <https://www.eastmojo.com/meghalaya/2022/10/13/meghalaya-govt-scraps-act-promoting-casinos-gaming-parlours/>

Annexure B

Summary of High Court Rulings: Fantasy Sport

High Court	High Court of Punjab and Haryana	High Court of Bombay
Case Name	Varun Gumber v. Union of India & Ors. ¹	Gurdeep Singh Sachar v Union of India & Ors ²
Subject Matter of Order	Only skill aspect dealt with	Skill and GST aspects dealt with
Nature of proceeding	Civil writ petition	Criminal writ petition
Ground on which the proceeding was filed	Petitioner was a player on Dream 11's platform and filed a petition before the High Court seeking directions to initiate criminal prosecution and investigation against Dream 11 under the provisions of the Public Gambling Act, 1867.	Petitioner was a public-spirited advocate who sought directions from the High Court to initiate criminal prosecution against Dream 11 for conducting illegal gambling in the guise of fantasy sport gaming, which was prohibited under the Public Gambling Act, 1867. The petitioner further alleged that Dream 11 was evading GST payable under the Goods and Service Tax Act, 2017, as tax was only being charged on the platform fees and not the entire pooled amounts by the player.
Date of the order	April 18, 2017	April 30, 2019
Supreme Court challenge details	By a non-speaking order, a special leave petition was filed against the order of the PH Court and was dismissed by a two-judge bench of the Supreme Court on September 15, 2017. Thus, the petition did not get converted into appeal before the SC.	Four special leave petitions were filed against this order by (1) advocate Varun Gumber, (2) the original petitioner, Gurdeep Singh Sachar, (3) the Union of India and (4) the State of Maharashtra. The special leave petitions filed by (1) – (3) were dismissed by a two judge bench of the Supreme Court by a non-speaking order. The special leave petition filed by the State of Maharashtra came before a three-judge bench of the Supreme Court of India on March 6, 2020, when the Bench has imposed a stay on this Bombay High Court judgment.
High Court	High Court of Rajasthan	High Court of Rajasthan
Case Name	Chandresh Sankhla v State of Rajasthan & Ors. ³	Ravindra Singh Chaudhary v Union of India & Ors ⁴
Subject Matter of Order	Only skill aspect dealt with	Skill and GST aspects dealt with
Nature of proceeding	Civil writ petition	Public interest litigation

1 Special Leave Petition (Criminal) No. 35191/2019

2 Special Leave Petition (Criminal) Diary No. 43346/2019

3 DB Civil Writ Petition No. 6653/2019 High Court of Rajasthan, Bench at Jaipur

4 D.B. Civil Writ Petition (PIL) No. 20779/2019

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High Court	High Court of Rajasthan	High Court of Rajasthan
Ground on which the proceeding was filed	The petitioner filed a public interest litigation alleging that the fantasy sports games offered by Dream 11 amounted to gambling. The petitioner prayed for orders from the court to the State of Rajasthan to stop the gambling activities organized by Dream 11, and to initiate criminal proceedings against Dream 11.	The petitioner filed a civil public interest litigation before the High Court of Rajasthan, impleading Dream 11, alleging that (1) it was carrying on betting and gambling activities and (2) was required to pay 28% GST instead of 18% GST and was accordingly evading tax.
Date of the order	February 14, 2020	October 16, 2020
Supreme Court challenge details	A SLP was filed against this order of dismissal before the Supreme Court by Avinash Mehrotra. ⁵ Subsequently, on July 30, 2021, the Supreme Court noted the earlier dismissals of the special leave petitions against the Varun Gumber Case and the Gurdeep Order, and dismissed the SLP. ⁶ The court observed that the question of whether fantasy sports are a game of skill in India is no longer pending judicial determination. However, the SC caveated this observation by acknowledging that the Supreme Court was still considering the matter arising from the Gurdeep Singh Case.	A SLP was filed against this order. A division bench of the Supreme Court dismissed the SLP on September 9, 2022.

High Court	High Court of Rajasthan	High Court of Rajasthan
Case Name	Mohan Lal Nama W/o Late Shri Murlidhar Nama v Union of India & Ors ⁷	Saahil Nalwaya v. State of Rajasthan ⁸
Subject Matter of Order	Skill and GST aspects dealt with	Dealt with question of prohibition of all online games involving stakes including online fantasy sport
Nature of proceeding	Civil writ petition	Civil Writ Petition
Ground on which the proceeding was filed	The petitioner filed a writ petition alleging that (1) the Company was carrying out gambling activities, and (2) was required to pay GST at the rate of 28%.	Petitioner filed a writ petition seeking directions to the state government, to regulate/prohibit offering and playing fantasy sport games and other games of skill for stakes in Rajasthan.
Date of the order	October 22, 2020	July 22, 2021
Supreme Court challenge details	To our knowledge, no appeal has been filed against this order.	To our knowledge, no appeal has been filed against this order.

5 Special Leave Petition (Civil) Diary No. 18478/2020

6 A dismissal of a SLP does not mean the Supreme Court has dismissed the appeal, but has dismissed the special leave petition (i.e., has not granted the petitioner the special leave to file the appeal). In other words, the Supreme Court has not permitted the petitioner to enter the appellate arena. Accordingly, the Supreme Court's order of dismissal would not attract the doctrine of merger, i.e., the order passed by the Supreme Court would not 'merge' with the High Court, thereby putting an end to the proceedings. The High Court order therefore continues to be operational, without any modification by the SC.

7 DB Civil Writ Petition No. 11122/2020

8 DB Civil Writ Petition No. 2026/2021

Annexure C

Summary of Law Commission Report

The Law Commission's Report

The first instance when the Law Commission of India ("**Law Commission**") was entrusted with the task of simplifying and streamlining the Gaming Enactments was in 2014.

This culminated in the 20th Law Commission issuing a report titled "Obsolete Laws: Warranting Immediate Repeal" – An Interim Report" ("**2014 Report**").¹ In the 2014 Report, the Law Commission observed that the Public Gambling Act, 1867 was an obsolete law in need of immediate repeal. Most of the State Enactments are based on the provisions of the Public Gambling Act. Thus, it construed that the Law Commission acknowledged the need to overhaul the outdated Gaming Legislations governing the industry in India.

Thereafter, following the developments in some highly-reported match fixing matters in India, the Supreme Court 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.²

Following this, the Law Commission headed by Justice B. S. Chauhan, a former judge of the Supreme Court was mandated by the Government of India to make recommendations on the possibilities of legalization of sports betting in India and the review of Gaming Enactments with a view to provide for a Central licensing regime. The Law Commission had already taken comments and held active discussions with all stakeholders. In the appeal of the Law Commission dated May 30, 2017, they invited recommendations for legalizing betting and gambling. They set out specific queries for the stakeholders to respond to.

Strong legal and business cases were submitted in support of a regime to legalise the already burgeoning gaming industry in India.

The Law Commission of India ("**the Commission**") finally released the highly anticipated report on legalizing betting and gambling in India³ ("**Report**") in July, 2018. However, following apprehensions after the release of the Report, the Commission released a press note to emphasize that its primary recommendation was to ban betting and gambling in India. However, in the event that the Central and State Governments did consider regulating it, certain measures to combat player fraud, enhancement and curbing problem gambling had been enlisted in the Report.

The Report alluded to factors which make India unsuitable for legalizing betting and gambling activities, such as the fact that one-third of the population is below the poverty line, and that these activities are considered immoral by the Indian society. The Report has also cautioned that extreme financial losses and loan-sharking would result from legalizing these activities.

1 Law Commission of India, "Obsolete Laws: Warranting Immediate Repeal" – An Interim Report, September 12, 2014, available at: <http://lawcommissionofindia.nic.in/reports/Report248.pdf>

2 <http://www.firstpost.com/sports/ipl-betting-full-text-of-lodhapanel-verdict-on-rajasthan-royals-and-csk-2342310.html>

3 <http://lawcommissionofindia.nic.in/reports/Report276.pdf> Report No. 276, Law Commission of India, 'Legal Framework: Gambling and Sports Betting,' July 2018

Annexure C

However, the Report also nods towards the benefits of legalizing gambling, such as the possibility of generating revenue, and employment, as well as boosting supporting industries such as tourism and IT. The Report also underscored that a regulated industry would curb issues of money laundering and fraud.

The Report finally provided the following recommendations for the introduction of a regulatory framework for betting and gambling in India:

- i. **Constitutional Framework:** The Report suggests that central Government derive the legislative competence to legislate on betting and gambling activities (which are presently on the State list, as discussed above), through an alternate entry governing 'Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication,' which falls under the Central list of the Constitution. Alternatively, the report proposes that Parliament may enact a model law which could then be adopted by individual States, or Parliament legislate on these subjects in exercise of its powers under Article 249 or Article 252 of the Constitution of India.
- ii. **Eligibility of a license:** The report has cautioned that gambling and betting should only be permitted to be offered by Indian licensed operators 'operating from within India'.
- iii. **Authority:** While the report suggests that licenses should be awarded by a 'game licensing authority,' it does not provide any recommendations on who such an authority shall comprise of, or how it shall operate.
- iv. **Foreign Direct Investment:** The Commission also recommends that the Foreign Direct Investment Policy under the Foreign Exchange Management Act, 1999 should be relaxed to allow investment in the industry. Currently, foreign direct investment is prohibited in gambling and betting, including in casinos.
- v. **User Restrictions:** The Report introduces a number of measures to protect players from gambling, particularly vulnerable sections of society, such as:
 - A bifurcation between gambling into 'proper gambling' (denoting higher-stakes gambling) and 'small gambling' (denoting lower stakes gambling). Only individuals belonging to higher income groups would be permitted to indulge in the former
 - Linkage of all gambling transactions to operator and players' Aadhar cards (the Indian equivalent of a social security number)/permanent Account Number cards, as well as ensuring all transactions are through electronic means to ensure transparency
 - Age gating provisions for minors, as well as the establishment of a council to study and prevent problem gambling and gambling by minors
 - Prohibitions on gambling for those who avail of Government social welfare schemes, or below the tax bracket
 - Regulation of online advertising content, and displaying risks associated with gambling on all operator websites
- vi. **Taxation:** While the Report did recommend that any income derived from betting and gambling be taxed under the Income Tax Act, 1961 and the Goods and Services Tax Act, 2017, this aspect is already covered under the prevailing tax laws. The Report remains conspicuously silent on any detailed recommendations in tune with the industry representations. This was a key concern for the Indian gaming industry, which the Report has failed to address.

Annexure C

vii. Amendments to existing laws: The report has recommended that certain other laws would need to be amended to bring the gambling industry within a regulatory framework. These laws are enlisted below:

- Amendment to the existing Information Technology (Intermediary Guidelines) Rules, 2011 to bar intermediaries from transmitting only illegal gambling, allowing licensed operators to host gambling related content on platforms, as well as advertise their products
- Introduction of an exception for licensed betting and gambling activities within the National Sports Development Code of India, 2011, introduced by the Ministry of Youth Affairs and Sports. The Code aims to prevent betting and gambling in sports.
- Section 30 of the Indian Contract Act, 1872, renders wagering contracts void and unenforceable. The Report proposes that Section 30 be amended to exempt transactions over licensed operators' portals, or casinos, from the definition of 'wagering agreements.'
- Match fixing and other sporting fraud be made criminal offences with severe punishments

No specific steps were taken in pursuance of the Law Commission Report.

However, in view of tremendous growth in the industry, in the last couple of years, there appear to be promising indications that there may be a Central law for online gaming. In August 2021, the Minister of Electronics and Information Technology, in response to a letter through which the blocking of gambling/betting websites was sought by the Chief Minister of Andhra Pradesh, indicated that the central government is considering a single central law to regulate online gaming.

In addition, the NITI Aayog, a policy think tank of the government of India, released the Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India (the "**Draft Guidelines**") in December 2020. The Draft Guidelines were issued pursuant to a consultation conducted by the NITI Aayog with relevant stakeholders of the gaming industry. During these consultations, a consensus was reached on:

- providing a national-level safe harbour for fantasy sports, as a game of skill; and
- the creation of a single self-regulatory organisation to govern the industry, recognised by the government of India.

In addition, the Draft Guidelines provide some guiding principles to be implemented by the recognised self-regulatory body. After the release of the Draft Guidelines, the Niti Aayog sought comments from stakeholders.

The Prime Minister's Office is reportedly evaluating the way forward for the online gaming industry, and has reached out to the Niti Aayog for information in this regard.

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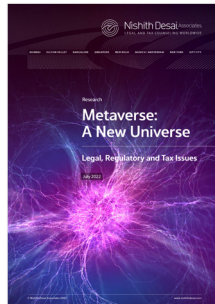
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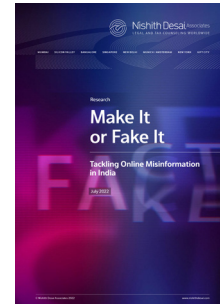
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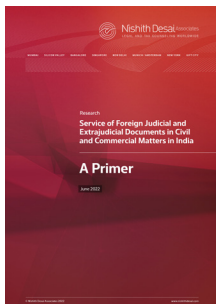
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