

Licensing opportunities in India: Sikkim and beyond

The Indian State of Sikkim passed regulations that govern online gambling activities back in 2008 and is about to begin issuing licences, prompting speculation that the Indian market is about to open up. Stuart Hoegner, a Lawyer with Gaming Counsel P.C., examines the licensing conditions and whether the scope of a Sikkim licence will extend to the whole of India, one of the fastest growing economies in the world and potentially a hugely lucrative market. Hoegner also analyses those issues within the Regulations that could potentially cause problems for operators.

Emerging markets have assumed increased importance in the gaming and betting sector in recent years. Factors such as accelerating and accessible technology, increased prosperity and market saturation in the first world have all contributed to more focus on emerging gaming markets.

India is a big part of this picture. The internet gaming and betting market in India is immense, as befits a country of 1.2 billion souls. India is the second-most populous country on earth and - according to some - is projected to become the largest in terms of population within the next 15 years¹. The gaming and betting market in India has been estimated to be worth US\$60 billion², which if true, means this one country alone could represent almost 18% of the entire world's gaming market across all offerings and channels³. The prospects for infrastructure growth in internet and mobile gaming offerings are equally tantalising for entrants. India is expected to see its number of internet users rocket from 81 million in 2009 to 237 million in 2015⁴. In addition, India has almost

600 million active mobile-phone subscribers, with a third of subscribers in rural areas⁵. Technology, connectivity, increased wealth and active regulation are all expected to play a big role in the growth of the Indian mobile and internet gaming markets in the coming years.

Constitutional & gaming framework

Gaming and betting in India is effectively an area of concurrent jurisdiction as between the federal government and the States⁶. The Public Gambling Act, 1867⁷ is a national law that generally prohibits owning, keeping, or being found in a 'gaming-house'⁸ in India, but it does not apply to games of 'mere skill'⁹. However, the States have the specific authority to regulate and tax gaming and betting under sections 34 and 62 of the State List in the Constitution's Seventh Schedule, when and if they choose to allow it within their borders.

Several States promote or operate lotteries in India¹⁰. In addition, three States (Goa, Sikkim, and Jammu and Kashmir) and one Union Territory (Daman and Diu) have legislation permitting 'bricks and mortar' casinos. Of the four, only Goa and Sikkim have any actual, regulated, land-based casinos, though Daman has plans to open the first one in that territory by 2013.

Sikkim

Sikkim is a remote northern State in the Himalayas connected to India in the south and surrounded on its other sides by China, Nepal, and Bhutan. Its population is slightly more than 600,000 people. Sikkim's capital, Gangtok, is not accessible by plane - the closest airport is outside of Sikkim, from where one must drive or fly by helicopter to reach Gangtok.

In 2008, in an effort to further develop its gaming industry, encourage economic activity and generate revenues for the State, the Sikkim Government passed the Sikkim Online Gaming (Regulation) Act, 2008¹¹ (the 'Act'). The Act came into force on 1 July 2009 and provides a general framework for licensing, regulating and taxing internet gaming in Sikkim. Prescribed games set out under the Sikkim Online Gaming (Regulation) Rules¹² (the 'Regulations') originally were limited to poker and casino games (e.g., roulette, blackjack, and baccarat). However, they were subsequently amended to include - *inter alia* - sporting contests like football (soccer), cricket, and such other sport games which involve prediction of the results of the sporting events and placing a bet on the outcome¹³. Interestingly, of the several types of games prescribed by the Regulations, at the time of writing, online slot machines don't appear to be among them. This is a highly lucrative part of many international online gaming offerings that Sikkim licensees may not offer, at least not under the current Act and Regulations.

By notification dated 30 March 2010¹⁴ (the 'Amendment'), the Sikkim Government set out a procedure for obtaining provisional licences in a form attached to the Amendment. A provisional licence is designed 'to enable the licensee to set up the necessary infrastructure and other requirements so as to be in a position to commence operation'¹⁵ once the government is satisfied that the terms of the Act, the Regulations, and the provisional licence have been met. Under the terms of the form of provisional licence attached to the Amendment, licensees are to commence gaming operations

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within 120 days of the provisional licence date. The cost of applying for a provisional licence is Rs.100,000 (approximately US\$1,900 at the current exchange rate). At the time of writing, observers believe that there have been four provisional licences granted by the Sikkim authorities.

Pursuant to subsection 1(2) of the Act, the legislation 'extends to the whole of Sikkim'¹⁶. Whether this means that the licence is valid in other jurisdictions is unknown. Form 2 to the Regulations also provides that the licensee is to operate online games 'from Sikkim only' - not 'in Sikkim only'. Both of these latter provisions suggest that some extra-territoriality is intended by the Sikkim authorities.

Pursuant to the Regulations, certain disclosures must be made on each licensee's website. These include statements that persons under 18 may not play on the site¹⁷, instructions on how to play each game¹⁸, odds tables¹⁹ and hyperlinks to the Sikkim Government's websites and to 'players Anonymous'²⁰.

Advertisements pursuant to the Regulations are also not to have any 'sexual content'²¹, not to be directed at persons under 18²² and not to contain any material that violates applicable copyright laws²³.

The tax structure is such that licensing and operating a site will not be cheap. The online gaming levy, which was originally 1% of the licensee's gross gaming yield, was subsequently increased to 10% of gross gaming yield or Rs.50,000,000 (approximately US\$957,000 at the current exchange rate) per year, whichever is greater²⁴. Players are also subject to a service tax of 10.3% on winnings.

Selected issues

While prospective operators appear to be planning to accept wagers

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from throughout India - and perhaps internationally - based upon a Sikkim gaming licence, it's by no means clear whether or how the licence will be valid outside of the State. Can a player in Uttar Pradesh play on a website regulated by Sikkim without the operator violating a local or national law? As Francois Peglau has noted, 'given the stated position of the Indian Government on online gambling is that it is prohibited under the Public Gambling Act this may make accepting bets from other States unlawful'²⁵. Peglau goes on to say that the lack of an explicit provision in federal legislation outlawing internet gaming and the fact that gambling and betting are in List II of the Seventh Schedule may mean that specific State legislation is required to prohibit internet gaming²⁶, i.e., that another Indian State needs to expressly prohibit internet gaming in order to invalidate the application of a Sikkim licence in that State.

This is a critical point. What if one of the other States passes legislation outlawing internet gaming, or what if it specifically enacts a measure invalidating the operation of a Sikkim licence in its own territory? Certainly that would throw the legality of any Sikkim licence in that State into doubt, and it's not clear how such an impasse between the States, or among the States and various operators, would be resolved. It may be that India will eventually become a patchwork of licensing jurisdictions when it comes to internet gaming and betting, just as it is now with respect to bricks and mortar casinos and lotteries.

Information Technology Act

Other federal measures potentially affect the Sikkim licensing structure and operations. Perhaps the most notable law is the Information Technology Act,

200027 (the 'ITA'). Among other things, section 67 of the ITA effectively prohibits publishing or transmitting anything 'if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it'. The obvious concern here is that the section could impugn licensed internet gaming advertising and wagering transactions.

The bigger problem might be caused by regulations promulgated this past spring under the ITA²⁸ (the 'ITA Regulations'). The ITA Regulations state that all intermediaries are to 'inform' the users of all computer resources not to host, display, upload, modify, publish, transmit, update or share any information relating to or encouraging gambling²⁹ and that the intermediary is prohibited from hosting such information³⁰. An intermediary is defined by the ITA as being any person who on behalf of another person, receives, stores, or transmits an electronic message or provides any service with respect to that message³¹. Users include persons accessing any computer resource of an intermediary for the purpose of hosting, publishing, sharing, transacting, displaying, or uploading information or views³².

Accordingly, even with a Sikkim licence, it may be a violation of federal law to host information online that advertises, encourages, or solicits bets or wagers. In fact, according to the ITA Regulations, licensed gaming operators might also have to warn their own players not to upload or share any gambling information on operator websites. With respect to games that are predominantly chance-based, it's not yet clear how this is to be addressed by the government of Sikkim or its licensees, either on

a conceptual or a practical level.

While each licensee is supposed to broadcast to its customers that online gaming debts are enforceable in Sikkim³³, the general position under the Indian Contract Act, 1872³⁴ is that all wagering contracts are void. If there is a conflict between the two laws - irrespective of the right of the States to regulate gambling and betting - it's not clear how or where it is to be resolved.

Another practical issue is the technical infrastructure that must be present in Sikkim in order to operate a gaming website. According to the Act, 'Online Gaming Server means any main frame computer or set of computers, installed or maintained by the Licensee, at a central location in the State [Sikkim] that accepts, processes, stores and validates a lottery, wager and otherwise manages, monitors and controls the entire system'³⁵. Also, as stated above, Form 2 to the Regulations stipulates that 'the licensee shall operate the Online games from Sikkim only'. This seems extensive, but what exactly needs to be located in Sikkim to operate the enterprise from a technical perspective? Must it be all of the game servers that are present in the State? Or is it sufficient to have (for example), the primary DNS servers in Sikkim, with nothing further? In a remote area, these issues matter.

One final issue for foreign operators seeking admittance into the Indian marketplace through Sikkim licensure is the foreign direct investment (FDI) restrictions in India. The FDI rules are exceedingly involved. Unlike other sectors of the economy - which allow foreign participation up to varying limits - FDI in gaming and betting enterprises is not permitted, so these rules loom large for non-Indian firms and

individuals wanting inside. Internet gaming concerns outside of India therefore need to find local partners with whom to work in order to be licensed and to operate, and they will need creative means of structuring their relationships.

The size of the Indian gaming and betting market is very enticing for those seeking to enter this emerging market. Licensure in Sikkim may prove to be an interesting and very useful way of initiating a regulated internet gaming business in India. However, there are some conceptual and practical questions that remain outstanding for anyone accepting Indian online wagers. Consultation with qualified local gaming counsel can address these issues and is always recommended. While the profits are potentially large, entering the Indian online gaming market will be expensive and won't be for the faint of heart.

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1. Dean Nelson, 'India to overtake China as world's biggest country by 2026, says report', The Telegraph, 12 July 2010, www.telegraph.co.uk/news/worldnews/asia/india/7885896/India-to-overtake-China-as-worlds-biggest-country-by-2026-says-report.html (accessed 24 November 2011).
2. Mark Summerfield & Wade Loo, 'Online Gaming: A Gamble or a Sure Bet?', KPMG International: 2010, at 12, www.kpmg.com/EU/en/Documents/Online-Gaming.pdf (accessed 24 November 2011).
3. The Economist, 'Shuffle up and deal: A special report on gambling', 10 July 2010, at 4, www.economist.com/node/16507670 (accessed 25 November 2011).
4. Marcos Aguiar et al, 'The Internet's New Billion: Digital Consumers in Brazil, Russia, Russia, India, China, and Indonesia', The Boston Consulting Group: 2010, at 7, www.bcg.com/documents/file58645.pdf

- (accessed 25 November 2011), cited in Francois Peglau, India, Gambling Compliance, at 3, 17 December 2010.
5. The Economist, 'Happy customers, no profits', 18 June 2011, at 71, www.economist.com/node/18836120 (accessed 25 November 2011).
 6. This is not to be confused with the Concurrent List (List III) in the Seventh Schedule of the Constitution; the gaming powers that are intra vires the States are in List II (the State List) in the Seventh Schedule.
 7. No. 3 of 1867.
 8. Id. at ss. 3-4.
 9. Id. at s. 12. 'Mere skill' has been held by the Supreme Court of India - albeit in the context of State legislation but using the same phrase ('mere skill') as the Public Gambling Act, 1867 - to be a 'dominant element' test, i.e., if a game is predominantly one of skill, it is a game of 'mere skill' and not a game of chance: K.R. Lakshmanan v. State of Tamil Nadu et al (1996) 2 S.C.C. 226 at 243.
 10. See generally Peglau, supra note 5 at 13-20 for excellent further background materials on sundry Indian State lotteries.
 11. No. 23 of 2008.
 12. 2009, No. 54 (No 10/Fin/Adm).
 13. Id. at s. 4.
 14. The Sikkim On-line Gaming (Regulation) Amendment Rules, 2010, No. 114 (No 337/FIN/DSSL/963).
 15. Id. at s. 3.
 16. Sikkim Online Gambling Regulation Act, 2008, supra note 12 at s. 1(2).
 17. The Sikkim On-line Gaming (Regulation) Rules, 2009, supra note 13 at s. 7(f)(ii).
 18. Id., The Schedule at s. 6(c).
 19. Id., The Schedule at s. 6(f).
 20. Id. at s. 7(e).
 21. Id. at s. 8(3)(c).
 22. Id. at s. 8(3)(d).
 23. Id. at s. 8(3)(e).
 24. Notification, 2010, No. 115 (No 337/FIN/DSSL/972).
 25. Peglau, supra note 5 at 25.
 26. Id. at 26.
 27. No. 21 of 2000.
 28. The Information Technology (Intermediaries guidelines) Rules, 2011, Gen. S.R. 314E.
 29. Id. at s. 3(2)(b).
 30. Id. at s. 3(3).
 31. Information Technology Act, 2000, supra note 29 at s. 2(1)(w).
 32. The Information Technology (Intermediaries guidelines) Rules, 2011, supra note 30 at s. 2(1)(j).
 33. The Sikkim Online Gaming (Regulation) Rules, 2009, supra note 13 at s. 7(f)(iii).
 34. No. 9 of 1872, s. 30.
 35. Sikkim Online Gambling Regulation Act, 2008, supra note 12 at s. 2(l).