

POKER:

A PASSAGE TO INDIA?

As gambling advocates wait with bated breath for legislators to decide on the potential regulation of sports betting in India, **Joanne Christie** investigates how foreign operators can legally dip their toes into the subcontinent now

From a sheer numbers perspective, there is no doubt that India is one of the most attractive markets for igaming operators looking to expand their geographical reach. Its population of 1.3 billion is growing faster than any other country in the world and is forecast to soon overtake China. Economic growth stands at about 7%, and the World Bank expects India to be the fastest-growing global economy this year. Mobile connectivity is ranked 14th in OpenSignal's survey of 77 countries'

likely to move slowly and a regulatory framework is some way away. In the meantime, foreign operators are increasingly focusing their attention on the one vertical that is – debatably – open to them: poker. Indian law differentiates between games of chance and games of skill, with the former mostly outlawed by the states and the latter mostly permitted.

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Ranjana Adhikari, Nishith Desai Associates

4G coverage, with 86.26% of the country being able to access 4G. When you add to these numbers India's sport- and gambling-mad culture, the potential market is eye-watering.

There is, though, a rather large problem: most forms of gambling are as illegal in India as they are ubiquitous, ruling out any kind of entry into the market for most large foreign igaming operators. But signs of a softening of legislators' anti-gambling stance are coming thick and fast of late, and the Law Commission of India is imminently expected to report on whether or not sports betting should be legalised, having been asked to consider the matter by India's Supreme Court in 2016.

Even if, as is hoped by advocates of licensed gambling, the news from the commission is positive, the wheels of progress are

betting framework, subsequently that is still a work in progress," says Roland Landers, CEO of the All India Gaming Federation (AIGF).

It is no secret that PokerStars has been looking at an Indian market entry for some time, with Amaya CEO Rafi Ashkenazi repeatedly outlining during shareholder updates a desire to launch in the country. The company's initially stated timeline has been delayed more than once, however, so it's unclear when we might see such a launch. According to Ranjana Adhikari, co-head of the media, entertainment and gaming practice at law firm Nishith Desai Associates, it isn't the only foreign company with an interest in India.

"In the past two years, we've seen burgeoning interest in online poker," she says. "Domestically there have been some players that have done extremely well. I think looking at the sheer size and potential of the market, foreign operators would want a piece of the pie in some capacity or the other, whether through software licensing or some sort of incorporated or unincorporated venture. If you follow the statements made by a lot of global companies in recent times, you

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Gaurav Gaggar, Gaggar & Partners

will find a notable mention of India being a part of their future plans.”

One reason foreign operators may be taking their time to launch, says Adhikari, is because a number of laws need to be considered in India, not just gaming laws. “It is regulated very differently compared with other regulated markets. There is no one central body of laws that one needs to look at,” she explains. “In fact, it is not just the body of gaming laws that you have to look at, but also the consumer-protection laws, the foreign-exchange laws, the tax laws, to understand and structure any deal in this space. My assumption is that if a foreign player looks at working out a deal with an Indian partner, or even if they decide to enter organically on their own, structuring and putting things in place is going to take these companies time.”

Dot.com versus licence

Foreign operators looking to launch in India have two main options: they can either simply set up a dot.com site on the presumption that poker is a skill game and therefore legal in any state that hasn't specifically banned skill games, or they can obtain a licence from one of the two states that offer them in India for skill games: Nagaland and Sikkim.

The problem with going down the former route is that even if one assumes they are allowed to operate on that basis, they could be tripped up by the Foreign Exchange Management (Current Account Transactions) Rules, which regulate remittances from India to foreign entities. These prohibit remittances abroad for winnings and participation in any form of hobby, irrespective of the skill element.

While Adhikari says banks may not always be scrutinising all transactions and blocking them, it's not a sustainable business plan to hope this situation continues. “There are a lot of foreign dot.com operators that have been reporting that they have some sort of Indian player presence, but they are not sizeable. The reason for this is some transactions do go through – the authorised banks may not have questioned them, but there's a greater likelihood and risk that it would be disallowed sooner or later, which means the business may not be sustainable and viable,” he says.

One way around this is for the operator to set up shop inside India via a wholly owned subsidiary. But it would also have to restrict player pools to Indian players to meet the Foreign Exchange Management Rules.

There is also the possibility of a challenge under the country's foreign direct investment policy, which prohibits investments in gambling. Although skill games fall outside the scope of gambling, Adhikari says that as there have been no federal court rulings in India on whether or not poker is legally considered to be a skill game, the situation is not entirely clear cut. This is the reason why, so far, foreign operators have preferred to invest in rummy rather than to be a skill game.

“Rummy was a game that at least had some sort of judicial interpretation by the Supreme Court of India; poker, until about early December, didn't have a single case law in India where they commented on the game-play formats of poker. Because of this, there was no Indian precedent to rely on to say that poker is a game of skill. The operators would rely on legal opinions from a law firm like ours or maybe expert reports on the game play,” says Adhikari.

Unfortunately, the development in December wasn't a positive one – a Gujarat High Court was approached by land-based poker clubs seeking recognition of poker as a game of skill. The ruling went against the clubs, although it has since been appealed.

While on the face of it this wasn't a positive development, if the appeal also goes against the clubs, the matter is eventually likely to be heard by the Supreme Court and a positive decision there could legitimise poker and take the uncertainty out of the matter in the same way it did for rummy. “Once it goes to the Supreme Court and the Supreme Court decides, it will be a definitive hearing on the issue and will be applicable pretty much everywhere in India,” says Jay Sayta, corporate lawyer and founder of GLaws.in, a website that covers developments in gambling law in India.

As it stands, the Gujarat case is only applicable in that state and other states have taken the opposite view, says Gaurav Gaggar, senior director at law firm Gaggar & Partners. “The fact of the matter is that India is very much like the US,” he says. “It is such a large and diverse country – we are 29 states and each state comes up with its own thought process, so in one odd state there will be a negative ruling, but in many others it will be the opposite. Skill-based gaming is fast gaining acceptance in many states and is an indicator of things to come.”

Of the two states in India with established licensing regimes for online poker – Sikkim and Nagaland – experts are pretty much agreed that the former has little potential for foreign operators. As Gaggar puts it: “Sikkim is not a possibility at all because a Sikkim licence allows you to operate only in the state of Sikkim and not outside the state of Sikkim.”

On the value of a Nagaland licence – a relatively new option made possible by the Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act 2016 – there’s less consensus.

“A Nagaland licence does not have much value outside the state of Nagaland and Nagaland itself is a very small state that does not have much significance as far as the poker market is concerned,” says Sayta.

Gaggar, however, takes a different view: “India is a federal country. The idea is that the laws of one state are applicable in another state as frequently as possible. If I do something that is legal in one state, I can pretty much do it in any state unless a particular state disallows me to do so in that particular state. So as long as you have a Nagaland licence, it allows you to operate anywhere in India except if a particular state comes out with a law that says ‘this law is not applicable in our state for XYZ reasons.’”

Challenges framework

Adhikari believes a Nagaland licence does not “completely derisk” operators offering poker throughout the country, but says it does provide a framework for dealing with any challenges from other states. “That’s the selling point that Nagaland has,” she explains. “Nagaland says you can offer it to whichever state you want. However, if a government of another state has a reservation or has an issue with you offering it under the Nagaland laws, there is a process by which the government of Nagaland would consider the case and then disallow the licensee to offer the website in the relevant state in question.”

There are also benefits in terms of the reassurance value of the licence to consumers, and more importantly, service providers. “Practically, what has been happening

is that platforms such as Google, Facebook and payment gateway operators have been more comfortable giving their services and allowing their platforms for digital marketing if someone has a Nagaland licence because that is the closest you have to something in terms of a licensing regime,” says Adhikari.

First movers to find favour

In terms of federal developments or regulation of gambling beyond skill games, much will depend on whether or not India’s Bharatiya Janata Party-led government wins another term at next year’s elections. But Adhikari says foreign operators should be looking now at skill games as a way to establish their brand in anticipation of the wider gambling market opening up. “The current government has performed fairly well,” she says. “I think the business community is a bit optimistic that hopefully they will get another term and maybe if this government gets another term, you may see a greater push to put in play legislation to regulate online gaming, including sports betting.

Having a prime minister with a progressive outlook in terms of business is helpful and we hope that they acknowledge the potential revenue they can make off this. Optimistically speaking, maybe in five or 10 years, we could have an established regime. Therefore, the foreign operators need to start looking at the Indian market now, at least for skill games, to have the first-mover advantage.”

And AIGF’s Landers says this is exactly what many operators are doing. “We have international operators who are looking at the industry and investing now in advance of that because these things take time and obviously the international companies we have as members either have some business here currently, like Microgaming, or are already looking at this market now so that they are in early, and when legislation happens it becomes easier for them.”

Poker certainly hasn’t been the star performer of the igaming verticals in recent years, but in India, it may serve an important purpose for foreign operators to get their brand front and centre in what could one day be a huge market.

Partner power

The interplay of the various Indian laws means that, at present, it would be tricky – though not impossible – for a foreign operator to set up in India on its own; the need to source suitable partnerships is perhaps one reason why we have not yet seen any foreign poker sites following the domestic sites down the Nagaland licensing route.

“PokerStars and 888 were very actively looking for partners, but I don’t know what happened with the discussions. Both of them were talking to a lot of people to explore the opportunities,” says Sayta.

Adhikari says one of the main reasons foreign operators need a domestic partner is to satisfy the banks, and Gaggar further adds: “A foreign operator would need to have to have an Indian partner because there are a lot of things that happen on the ground over here, both from a legal structuring as well as a tax perspective.”

Secondly, he says, while foreign operators may be operating in mature markets, India “is just opening up”. Gaggar says: “There are very many nuances of the Indian culture that require them to have the skill of an Indian partner.”