

LEVELLING UP: FUNCTIONAL EQUIVALENCE AND THE REGULATORY TREATMENT OF ONLINE GAMING IN INDIA

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The global online gaming industry has shown a staggering year-on-year growth rate, and is projected to have a market size of USD 41 billion by the end of 2015¹. The online gaming industry encompasses online casinos, with online variants of games of chance such as slots, as well as games involving participant skills like blackjack or fantasy sports.

Online fantasy sports games alone are expected to generate USD 2 billion in revenue² and are currently offered by upwards of 300 operators globally³. A favourable regulatory regime has resulted in greater growth in North America, with online fantasy sports expected to have 57 million participants in North America by the end of 2015⁴.

¹ *Size of the online gaming market from 2003 to 2015 (in billion U.S. dollars)*, Statista, available at <http://www.statista.com/statistics/270728/market-volume-of-online-gaming-worldwide/>, last seen on 23/10/2015.

² *IBISWorld's Fantasy Sports Services market research report*, Ibis World, available at <http://www.ibisworld.com/industry/fantasy-sports-services.html>, last seen on 30/10/2015.

³ *Member Search Result*, Fantasy Sports Trade Association, available at <http://goo.gl/K0kdjG>, last seen on 30/10/2015.

⁴ Kate O'Keefe, *Daily Fantasy-Sports Operators Await Reality Check*, The Wall Street Journal, available at <http://www.wsj.com/articles/daily-fantasy-sports-operators-await-reality-check-1441835630>, last seen on 23/10/2015.

While the online gaming industry is in its nascent stage in India, with a handful of game operators engaged in providing online games of skill such as fantasy cricket and rummy, with greater access to online resources expected in the coming years and wide recreational engagement in games such as rummy in the offline space, the industry can be expected to grow substantially in India.

However, while the prospects of the online gaming industry (with respect to games predominantly involving skill) appear to be favourable, we have found that there is a degree of hesitancy on the part of developers, operators and supporting service providers (such as payment gateway providers and hosting service providers) to participate in the paid online games of skill industry due to a lack of legal clarity on the regulatory treatment of online games.

In light of such vagueness, this article seeks to assess the degree to which the principle of “functional equivalence” may be applied to subject online game formats to the regulatory scheme applied to offline games, with particular emphasis on the equivalence of the game of skill criterion in online variants of offline games. The objective is to arrive at a clear understanding of what is and is not legal and to help put in place bright line rules that facilitate the growth of the online gaming industry in India.

In this respect, this article commences with a summary of the principle of functional equivalence and of the factors that limit its adoption in a particular context. Thereafter, we examine the elements and constituents of online formats of games to enable recognition of skill elements and account for intrinsic limitations of the online equivalent.

1. PRINCIPLE OF FUNCTIONAL EQUIVALENCE

The principle of functional equivalence is an aspect of the regulatory approach of technology-neutral policy and regulation formulation. In the case of online regulation, it is employed to enable application of general legal frameworks online just as they are applied offline⁵. The principle stems from the conception of regulation as a means of recognising conduct and influencing behaviour immaterial of the means⁶, i.e., the medium through which or the platform on which such conduct or behaviour is exhibited.

In effect, the principle seeks to recognise jural relations⁷ created online by analogy to a similar or equivalent transaction offline. This approach has been adopted in order to recognise online click-wrap contracts⁸ and extend the application of norms and statutes such as the Indian Penal Code, 1860 to online content, particularly in the context of defamation⁹ and obscenity¹⁰.

Aside from substantive legal subjects, this approach has been adopted in the case of procedural law as well, with the Information Technology Act, 2000 equating electronic records

⁵ Recommendation 22, *Global Information Networks: Realising Potential*, European Ministerial Conference, Switzerland, July 6-8, 1997, page 10; Bert-JaapKoops, *Should ICT Regulation by Technology Neutral*, 77, 84 in *Starting Points for ICT Regulation. Deconstructing Prevalent Policy One-Liners (IT & Law Series)* (ed. 9, 2006).

⁶ *Ibid*, Bert-JaapKoops at 83.

⁷ Juralrelations is used herein in its Hohfeldian sense to refer to formal rights and obligations created between transacting persons pursuant to their conduct in the course of the transaction, see: Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 (8) *Yale Law Journal* 710 (1917).

⁸ *Specht v. Netscape Communications Corp*, 306 F.3d 17 (2002, 2nd Circuit Court of Appeals of United States); *Register.com v. Verio*, 356 F.3d 393 (2004, 2nd Circuit Court of Appeals of United States); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (1996, 7th Circuit Court of Appeals United States).

⁹ *Tata Sons Limited v. Greenpeace, I.A. No.9089/2010 in CS (OS) 1407/2010* (Delhi High Court, 28/01/2011); *Khawar Butt v. Asif Nazir Mir, CS(OS) No. 290 of 2010* (Delhi High Court, 07/11/2013).

¹⁰ *Avnish Bajaj v. State of Delhi*, (2005) 3 CompLJ 364 Del.

with documentary records¹¹ and the Supreme Court permitting the service of notices and summons through electronic means in commercial cases and matters concerned with urgent interim relief¹².

¹¹ S. 4, Information Technology Act, 2000; see also Indian Evidence Act, 1872 as amended by the Information Technology Act, 2000.

¹² Central Electricity Regulatory Commission v. National Hydroelectric Power Corporation Limited, (2010) 10 SCC 280.

2. LIMITS OF THE PRINCIPLE

While the principle finds wide acceptance and application to online transactions and conduct, it is not axiomatic. This is because the nature of the online medium may require accounting of unforeseen factors, i.e., factors that do not exist in the offline medium (like the ability to unscramble an electronic signature).

Where an analogous offline transaction exists, the principle's application may be limited in case the online form creates certain limiting factors. In such cases, the principle's application may be limited to balance the interests of the transacting parties, with transactions or conduct outside the limited application set rendered unrecognised and moot. For example, on account of the lack of identity authentication with email, the permissibility of service of summons through email is limited to instances where expediency requires overriding of the certification of service procedural norm¹³ or where the identity and email linkage is reasonably established¹⁴, with other instances of service of summons by email rendered as inadequate service.

¹³ Such as in matters requiring urgent relief or in commercial cases, where timely resolution is a key concern. See *Central Electricity Regulatory Commission v. National Hydroelectric Power Corporation Limited*, (2010) 10 SCC 280.

¹⁴ Such as service to an advocate-on-record's registered email account, see *Order LIII, Rule 2, Supreme Court Rules, 2013*.

In case the entire online transaction is itself something that has not be envisioned by the law and a reasonably analogous offline transaction does not exist, the exclusion of the application of the principle of functional equivalence would require the formulation and implementation of fresh regulations to govern the online transaction. For example, on account of the inadequacy of existing law to regulate digital certification and penalise de-encryption, the Information Technology Act, 2000 and attendant rules provide for measures for recognition of electronic signatures¹⁵ and specify control processes to maintain the security and integrity of the signature¹⁶.

Practice indicates that where an analogous offline format exists, the principle of functional equivalence must be employed as the starting point of regulating conduct over the online variant, unless the online medium creates circumstances that enable subversion of a material factor or legal norm in the transaction or leads to absurd or unreasonable consequences.

3. SUMMARY OF GAMING REGULATION IN INDIA

Gaming in India is governed by the Public Gambling Act, 1867 (hereinafter "PGA") and other state-specific statutes, such as the Andhra Pradesh Gaming Act, 1974 and Delhi Public Gambling Act 1955. The PGA criminalises (i) the act of gambling in a public forum in India¹⁷ and (ii) the maintenance of a 'common gaming house'¹⁸. State specific statutes largely mirror the provisions of the PGA, and accordingly have similar provisions prohibiting gambling in public and the maintenance of a 'common gaming house'.

¹⁵ S. 5, Information Technology Act, 2000 and Information Technology (Use of Electronic Records and Digital Signatures) Rules, 2004.

¹⁶ See Information Technology Act (Certifying Authorities) Rules, 2000.

¹⁷ S. 4 and S. 13, Public Gambling Act, 1867.

¹⁸ S. 3, Public Gambling Act, 1867. A 'common gaming house' comprises of any place or premises where instruments of gaming are kept or used for the profit or gain of the occupier of the premises

However, the PGA and a majority of state specific statutes¹⁹ create an important exception in favour of games of skill and render the prohibition on gambling inapplicable to games of skill, wherever played²⁰. In determining whether a game is a 'game of skill', courts have acknowledged that the element of chance cannot be entirely discounted in games, and thus rely on the dominant factor test, holding that a game of skill is a game where the elements of skill in a game predominate over the elements of chance in the determination of the winning outcome of the game²¹.

Accordingly, in *Satyanarayana's*²² case, the game of rummy was found to be a game of skill as it required players to memorise the fall of the cards and exercise skill in holding onto and discarding cards²³. Similarly, wagering on horse-racing²⁴ and variants of poker²⁵ have been found to constitute games of skill, as the participant's knowledge and skill in the game were found to outweigh the role of chance in determining outcomes.

It should be noted that the PGA prescribes the governing principles for the permissibility of playing games with stakes. At a principle level, its norms on the illegality of games of chance, when played for stakes and exemption for games of skill would stand extended to online games as well.

¹⁹ Except for the Assam Game and Betting Act, 1970 and the Orissa Prevention of Gambling Act, 1955.

²⁰ S. 12, Public Gambling Act, 1867: "*Act not to apply to certain games. — Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.*"

²¹ See *State of Andhra Pradesh v. K. Satyanarayana*, 1968 SCR (2) 387; *K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153. This is commonly known as the 'dominant factor test'.

²² *State of Andhra Pradesh v. K. Satyanarayana*, 1968 SCR (2) 387.

²³ *Ibid.*, at 394.

²⁴ *K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153.

²⁵ *Indian Poker Association v. State of Karnataka*, WP Nos. 39167 to 39169 of 2013 (Karnataka High Court, 08/10/2013).

4. RECOGNITION OF SKILL ELEMENTS IN ONLINE GAMES

The principal determinant of whether a game constitutes a game of chance or a game of skill is the degree to which the player's skill determines the outcome of the game relative to the role played by chance. Such skill is not confined to physical skill alone, and includes the participant's knowledge of the game and skill in choosing when to act, and in assessing and responding to other participants' behaviour and actions.

The inclusion of non-physical elements within the ambit of 'skill', as the term is used in judicial precedents, in effect supports recognition of exhibitions of knowledge, attention and experience in the context of online gaming and merits their evaluation against the element of chance for the purpose of application of the dominant factor test to online gaming.

However, in *Gaussian Networks v. State of NCT*²⁶, the Additional District Judge opined against such recognition of skill elements in the online context, and ruled that all online variants of offline games constitute games of chance as (i) the degree of skills required in the physical form cannot be equated with games played online; and (ii) the online format enables manipulation of game dynamics. It should be noted that this is a ruling of a district judge, and its effect is thus limited to the parties to the case. It should also be noted that the equation of skill with physical skill alone, as suggested by the *Gaussian Networks* order conflicts with the higher judiciary's rulings in *Satyanarayana's case*²⁷ and *Lakshmanan's*²⁸ case, as non-physical factors such knowledge and strategy were accepted as elements of skill in the application of the dominant factor test.

That said, there has also been a marked hesitancy on the part of the executive and higher judicial authorities to discuss the

²⁶ Suit No. 32/12, (Additional District Judge-I Patiala House Courts, 17/09/2012).

²⁷ *State of Andhra Pradesh v. K. Satyanarayana*, 1968 SCR (2) 387.

²⁸ *K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153.

nature and legality of online variants of games of skill. In this respect, in an appeal filed against a Madras High Court order ruling that playing rummy with stakes constitutes a gambling activity, the Supreme Court limited the order to physical rummy alone and expressly acknowledged that the respondent - executive authority (Director, Inspector General of Police) had not taken a position on the legality of online rummy²⁹.

The resulting vagueness on the regulation of online gaming and extension of the safeguard provided for offline games of skill to online formats has an adverse effect on the risk perception of participation in the industry either directly as a game developer, game operator or a user or indirectly as a service provider or supporting infrastructure provider, which in effect acts as a barrier to entry. An ancillary effect of this lack of clarity is that existing participants take a more cautionary approach to innovating and altering the game format as there is a conspicuous lack of direction on the recognition of skills exhibited online. This has a putative 'chilling effect' on the growth of the industry.

An argument in favour of functionally equivalent regulatory treatment of online game formats stems from the existence of significant regulatory direction and practice in the offline gaming space. An online game comprises of participants competing against each through control of virtual playing pieces, and is operationally equivalent to an offline game give that the offline game operates on the same principle with the addition of the requirement of each participant's physical presence. Thus, as the starting point of regulation, the offline format ought to be considered an analogous form of the online game format.

However, in assessing and arguing for equivalence, it becomes necessary to examine the equivalence of the element of skill in

²⁹ See: Mahalakshmi Cultural Association v. Director, Inspector General of Police, SLA (C) No. 15371/2012 (Supreme Court, 13/08/2015).

the online context. The key inquiry is whether the online medium offers the means to subvert the element of skill or in effect discounts material elements of skill.

5. ONLINE EQUIVALENCE AND THE PHYSICAL ENVIRONMENT

The inquiry into whether an online reflection of an offline game of skill is functionally equivalent to such offline game must be directed at the new or different factors or elements introduced by the online medium or the factors or elements which arise out of a particular online implementation.

The principal new factors introduced by the online format of the game are the removal of the physical environment and the possible ability to alter the online game's physics/architecture. The effect of the first factor, i.e., the removal of the physical environment, would have an effect on games that involve physical effort or rely on monitoring physical attributes of other players.

For example, the game of Snooker or Tennis requires skills linked to physical effort and endurance, and thus the outcome of the game requires superior physical skill and ability to manage fatigue. An online equivalent of such a game would lack replication of these elements of skill, and thus a pure reflection of the game would rely solely on user's instance of clicking a button to trigger the desired response. In such cases, material elements of physical skill and endurance would stand excluded and the remaining elements of skill in the game, such as selecting the angle of impact of the online ball, will have to be evaluated against the elements of chance inherent in the game and game's architecture and design to determine whether the elements of skill or the elements of chance influence the outcome of the online game.

The first factor would not materially affect an online reflection of a game where the physical effort is incidental to the mental skills utilised by a participant. Games such as Chess or Puzzle Games (such as Crossword) rely on a participant's superior knowledge or ability with strategy, which skills continue to be relevant in the online equivalent of the game. Thus, pure online reflections of such games would undoubtedly continue to exhibit the traits of games of skill.

However, games such as poker or bluff, where the monitoring of physical attributes or reactions and attempts to influence them are relevant elements of skill present an interesting problem. An online reflection of such game would necessitate the discounting of this element of skill, and an assessment of the materiality of the element to the determination of the outcome, that is, if the element is key to the determination of the outcome of the game or the remaining skill elements (such as superior knowledge or strategy) involved in the game would outweigh the inherent element of chance in the game.

With respect to the second factor, that is, the ability to alter the game physics/attributes, this factor assumes relevance in games that rely on the interaction or monitoring of physical playing pieces. For example, the game of rummy requires participants to monitor the fall of cards while assessing which cards to hold on to and which to drop. Such monitoring serves to enhance the chances of success in the game as the nature of cards in the playing deck is known. However, in the online format, in case the online deck randomises the issue of cards without accounting for cards in play and the ordinary composition of a deck of playing cards, such an attribute of the game design would operate to discount the skill element and enhance the level of chance involved in the game.

Similarly, a game format with limited protections to prevent the hacking or altering of the game environment and dynamics would operate to subvert the elements of skill involved in the

game itself, as it would enable discretionary application of the game physics and attributes to the game play. While such subversion itself would require a user to be skilled in coding in the game design language, the effect of the exercise of such skill would be the subversion of skills required by the game. Such subversion would operate to render the exhibition of skill in the game as redundant, and thereby discount the relative skills of the participating players in the game as a determinative factor of the outcome of the game.

The incidence of this factor as an enhancer of the element of chance is influenced by the game design and the coding of the game. The incorporation of definite and predictable game rules and environmental rules to govern the interaction of objects in the game and the application of such rules to each interaction in the game would create a predictable environment. While such rules may not perfectly replicate the physical (offline) environment, their definite character would serve to minimise randomness in game interactions and thereby reduce the instance of chance as a determinative factor of the game outcome. The implementation and uniform application of game rules and environmental rules would also create avenues for skill exhibition, as a participant's knowledge of, training in and mastering of these rules, and the ability to account for game rules in the participant's game strategy, would represent elements of skill.

Conversely, the presence of bugs in the game design and coding may operate to enhance the element of chance by enabling the subversion of the element of skill. Thus, for example, if a particular game bug results in the user obtaining a favourable result in each instance of game play, once the bug has been found, then the game outcome is likely to be materially influenced by the user's discovery of the bug (an event primarily of chance) rather than the relative skill level of the participant in the game.

Thus, in games involving the interaction of the playing pieces, such as carrom, pool or snooker, the uniform application of game dynamics, particularly of the angles of interaction of the game playing pieces, would serve to preserve the element of skill. Any variation in the game dynamics from one instance to another, either on account of the game design, presence of bugs or due to easy access to game code, could in effect render the interaction of the playing pieces as a matter of chance.

6. BUILDING IN THE ELEMENT OF SKILL

The game architecture and design have a significant part to play in determining the nature of the game, and offer the means of creating avenues for skill exhibition. In case a developer consciously designs the online game format with reductions in binary triggers and elements of randomisation and an increase of the available player reaction options, the likelihood of the game being construed as a game of skill rather than chance is enhanced.

The factoring of game design is of particular relevance in the Indian gaming environment due to the strict prohibition of wagering on games of chance, and the provision of a narrow exception for games predominantly of skill. Thus, for engagement in a legitimate online gaming business in India, where participants pay to play and receive rewards for winning outcomes, the building-in of features that serve to enhance the elements of skill is a necessity.

For example, a multiple answer quiz which requires users to pick the answer from two options is less likely to test the knowledge (skill) of a participant than a quiz that provides four options. Similarly, an online game of snooker with the strike direction limited to four quadrants would involve less skill than an online game of snooker with 30 radial variations of the

shooting angle, as in the latter case the user's adroitness in assessing the appropriate shooting angle for the desired result is exhibited to a greater degree.

In the course of such design, while it would not be possible or desirable to entirely eliminate the element of chance in the game, the intent of conscious design is the enhancement of the element of skill or reduction of the elements of chance. Such design serves to ensure that the element of participant skill has a greater influence on the game outcome than the elements of chance in the game, and thus render the game as a game of skill, as understood under the PGA and related enactments

7. ONLINE EQUIVALENCE AND THE 'COMMON GAMING HOUSES' PROHIBITION

The element of equivalence also arises with respect to the prohibition on the operation of a 'common gaming house' for profit. The prohibition has been read to apply to places that offer games of skill as well³⁰. Whether such reading of the provision is appropriate in light of the exemption of games of skill from the purview of the PGA and its allied enactments is a legitimate concern in interpretation. However, as it stands currently, the regulation bars the operators of such premises from charging a fee in excess of a basic maintenance fee necessary for the operation of the premises and provision of services to users, or linking the fee amount to the stakes involved in the game of skill³¹.

A 'common gaming house' is defined under the PGA as a house or similar place in which instruments of gaming are stored or used for the profit of the owner of the premises, by way of charge for the use of the instruments of gaming, for

³⁰ State of Andhra Pradesh v. K. Satyanarayana, 1968 SCR (2) 387, 392-393.

³¹ *Ibid.*

accessing the premises or in any other way³². While the definition envisions a physical space or premises, its usage of the broader term 'place' enables its extension to online platforms or servers which host or enable operation of an online game, as it is arguable that these spaces mimic the real world and have a definite (by reason of fixation in a medium) and persistent (non-degrading) character³³. These characteristics militate in favour of the construction of online spaces as operational equivalents of physical premises.

In assessing the viability of the extension of the prohibition, regard must be given to the underlying intent of the provision. The provision does not bar the operation and maintenance of a gaming house and is limited to a prohibition on the use of any cards, dice or other instruments of gaming kept in the gaming house for the profit of the owner/operator of such premises. Thereafter, the penalising provisions of the PGA create a rebuttable presumption whereby the presence of instruments of gaming in a gaming house is deemed sufficient for a finding that the premises are a 'common gaming house' (operated for profit)³⁴, and expressly exempt the requirement of proving engagement in a game for stakes for a finding of guilt³⁵. From a conjoint reading of these provisions, it appears that the restriction on the operation of a 'common gaming house' for profit stems from the possibility of dual use of gaming instruments, such as cards and game boards.

While these instruments can be legitimately used for recognised games of skill (like rummy or poker), they can just as easily be employed for games of chance (like flush or brag) at the instance of the game participants. Thus, the underlying intent of the restriction on operation for a profit appears to be a

³² S. 1, Public Gambling Act 1867.

³³ Joshua A.T. Fairfield, *Virtual Property*, 85(4) Boston University Law Review 1047, 1053-54 (2005).

³⁴ S. 6, Public Gambling Act, 1867.

³⁵ S. 9, Public Gambling Act, 1867.

regulatory measure to deal with potential dual use by removing the incentive for the establishment of gaming houses and limiting the growth of such gaming houses. At its root, this regulatory measure arises out of the dual use potential of gaming instruments. When considering the online medium, the game design and architecture is rigidly designed to align with the rules of a specific game. Thus, an online rummy game is only capable of offering rummy and cannot offer another game like brag or flush at the instance of a user. Such a change would require a revision of the game architecture as the rules of flush are materially different from the rules of rummy. The effect of this inherent limitation of the online game is that the possibility of dual use of the single game format is practically eliminated. Thus, the underlying principle and reason for the prohibition of operation of a 'common gaming house' for profit is rendered moot. In such circumstances, it would be illogical to automatically extend the prohibition from the offline to the online world as the offline and online gaming 'premises' are not analogous and functionally equivalent.

However, while such an argument for limiting the extension of the prohibition may be made, the regulator may disagree with such construction of the PGA and rely on the implication of the order in *Satyanarayana's* case that playing games for stakes (even games of skill) is itself a vice and must not offer an opportunity of profit to any third person (such as a gaming house operator) not directly involved in the game. Such a position would militate in favour of the extension of the prohibition to online gaming 'premises' and its effect would be a limitation on the ability of the game operator to profit from offering the online game, and would restrict the fees chargeable by it to a basic fee for the maintenance of the game's operational premises, i.e., the server and web-domain, and for the provision of services to the user in respect of the game. In particular, the game operator would be restricted from

charging a percentage of the stakes played by the user in the online game.

As a means of resisting such extension, it is arguable that 'instruments of gaming' as envisaged in the Act, such as cards, dice and game-boards³⁶, are not relatable or functionally equivalent to the 'instruments' involved in offering online games (like the website domain, host or server) as these instruments are not functionally similar to the contemplated offline instruments and are capable of a number of other unrelated uses.

Thus, it is arguable that the extension of the common gaming house regulation through functional equivalence to online resources will lead to an absurd consequence as resources that are capable of substantially differing uses and which can legitimately be used for profit would have their usage restricted solely on the ground of their potential use of online gaming. However, while this argument may be employed to resist the extension of the regulation to background infrastructure (such as servers and terminals), it would have little effect on the extension of the regulation to the webpage itself, as the principal purpose of the webpage (albeit a digital instrument of gaming) would be the offer of online games.

8. CONCLUSION

The principle of functional equivalence requires application of the same governing norms in offline transactions to their analogous online variants. In the context of online gaming, it would imply the recognition of exhibitions of skill and application of the dominant factor test to online games, and may operate to extend the regulation of 'common gaming houses' to web pages concerned with gaming.

³⁶ S. 6, Public Gambling Act, 1867.

In this respect, the recognition of non-physical skill elements in the application of the dominant factor test to offline games is vital to the proposition that exhibitions of skill in online game format merit recognition.

Such recognition also serves to rebut the claim in the *Gaussian Networks*³⁷ order that online game formats lack elements of skill as they are imperfect replications of skills exhibited in physical form. However, such recognition by itself is not sufficient to render an online game format as a game of skill, but serves as the starting point for the evaluation of the game dynamics of the online game for the purpose of application of the dominant factor test.

While the intrinsic nature of the online medium does necessitate the exclusion of the physical environment and limits the ability of replication of the offline game dynamic, such limiting factors do not exclude the application of the dominant factor test as the game design and in-game environmental rules would require the participant to exhibit knowledge, adroitness and strategy in the course of engagement in the game, and would operate to enhance or reduce the element of randomness (chance) in the online game.

While the application of the principle to the evaluation of online games would enable favourable regulatory treatment of online games of skill, its application could bite both ways, by demanding of developers and operators sophistication in game play that at least replicates the offline equivalent of the game.

We believe that a clearer understanding and the acknowledgement of these various factors by regulators and game developers alike can lay the legal foundation for a thriving online gaming industry in India.

³⁷ *Gaussian Networks v. State of NCT*, Suit No.32/12, (Additional District Judge-I Patiala House Courts, 17/09/ 2012).