

AU COURANT

A Monthly Newsletter by
RFMLR

**NOVEMBER & DECEMBER
2020**




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PREFACE

It gives us great pleasure to introduce our monthly newsletter “Au Courant”.

In this edition, the current on-goings in various fields of law have been analyzed succinctly in the ‘Highlights’ section to provide readers some food for thought.

The ‘timeline’ section of the newsletter discusses briefly the events that have transpired in the Devas Multimedia-Antrix Corporation deal and India’s dilemma in honoring International arbitration awards.

Through the recommended Articles and Podcasts an attempt has been made to foster curiosity and pique the interest of readers.

Major happenings in various fields of laws such as aviation, arbitration, competition, International Trade Law, securities, taxation, intellectual property, and technology, media & telecommunication have been recorded to keep the readers abreast of latest legal developments.

Further, the section ‘Call for comments’ encourages readers to signal their interest and express their views and concerns on the measures under development and provide critical suggestions related to Consultation Papers.

HIGHLIGHTS

EUROPEAN UNION TO KEEP A TIGHT REIN ON TECH GIANTS

The likes of Google, Amazon, Apple, and Facebook undoubtedly deserve the title of the tech giants. They control or otherwise underpin more or less every single aspect of our digital lives. But now it has become increasingly common for these tech giants to experience choppy waters over their security policies. The issue is two-pronged; for some the sheer power they have is far too much to sit idly by and for some the fact they have their finger in so many interlinked pies means that action must be taken, something the European Union (EU) agrees with.

The Digital Services Act (DSA) and Digital Markets Act (DMA) target the provisions services and the wider market for those services respectively. The DSA seeks to bolster up protections when it comes to taking down illegal content or counterfeit goods while explicitly drawing the line where responsibility lies for platforms. Only the likes of Germany have an explicit requirement and obligation placed on the tech giants to take down illegal content rapidly. For the vast majority of other EU member states, the platforms are only typically advised or encouraged to do so only on a voluntary basis. Leading to a threat of a fragmented rule, set throughout the EU. Although the EU is not seeking to remove the limited liability that companies have for content published on their platforms, something that the US is discussing surrounding section 230 of the Communications Decency Act, 1996.

The DSA and DMA, according to an early draft, are expected to force big tech companies to share data with the potential competitors and that they shall not use data collected on the platform for their own commercial activities, unless they make it accessible to business users in the same commercial activities. The immense control in the hands of the big tech giants potentially and severely disadvantages smaller competitors and may also be quite profoundly impairing innovation.

The concentration of market power is creating an artificial monopoly with huge barriers to entry. These acts taken together are designed to set out a list of rules to remove the arbitrary nature of proceedings. It specifies a clear set of rules if broken would activate a sliding scale of penalties.

HIGHLIGHTS

TELANGANA GOVERNMENT LAND REGISTRATION PORTAL LANDS IN LEGAL SOUP

Telangana Government's recent attempt at creating a one-stop solution for land-related transactions has come under scrutiny for having the potential for misuse of personal data. The integrated land records management system- "Dharani Portal" requires the submission of Aadhaar Card number and caste details from all agricultural and non-agricultural property owners. The portal is intended to curb corruption and settle innumerable land disputes, however the efficiency and motive of the portal is questionable.

Section 7 of the Aadhaar Act, 2016 states that such demands could only be made by the state governments for the purpose of granting a "subsidy, benefit or service". Therefore, the demand for mandatory Aadhaar details for the purpose of property registration is not justified.

For the sake of data security, Telangana government has proposed to store the land records and personal data of property owners using blockchain technology. However, an important caveat to bear in mind is that lack of clarifications on the use of technology by the state government and inadequate technology might cause irreversible loss of property records and sensitive personal information.

It is likely that connecting Aadhaar to property data would not serve any purpose other than the profiling of people and their properties. If this is not the case, the government should declare under which statute it has the authority to carry out the current exercise. The apparent loophole in the whole procedure is that the exercise has no legal backing and is in violation of Article 13 and Article 21 of the Indian Constitution.

With the Data Protection Bill, 2019 still pending in the Parliament, it is safe to assume that allowing such government schemes which put personal data of citizens at risk without adequate legal framework could open up a Pandora's Box.

HIGHLIGHTS

INTERNAL WORKING GROUP REPORT: THE CONUNDRUM BEFORE RBI

The Internal Working Group (IWG) report published by the Reserve Bank of India (RBI) has recently reviewed the present system of licensing and regulatory guidelines for the ownership, control and corporate structure of private sector banks in India. The IWG examined existing guidelines, for fostering greater competition in the domestic banking sector through the entry of new players.

The recommendations were:

- To permit large corporate and industrial houses to permit and operate banks in India.
- A minimum of 3 years of experience as a Payments Bank may be considered as sufficient for Payments Banks planning to convert to a Small Finance Bank (SFB),
- Awarding banking licenses with assets of INR 50,000 crore and more than 10 years of operations in banks to "well-managed" NBFCs, including those operated by corporate houses.
- The panel also recommended raising the minimum initial capital threshold for the licensing of new banks from the current ₹ 500 crores to ₹ 1000 crore for universal banks and from the current ₹ 200 crores to ₹ 300 crores for small finance banks.

These guidelines from the IWG pose a range of questions at a time when our economy is in a turmoil and financial institutions are facing a severe capital crisis. At present there is no adequate evidence to justify the entry of large corporate and industrial houses into the Indian banking sector. The possible benefits such as a faster rate of economic growth do not outweigh any potential risks inherent in the ownership of banks by companies. It is a concept that is inherently risky and premature.

TIMELINE

DEVAS MULTIMEDIA PVT. LTD.

v.

ANTRIX CORPORATION LTD.

SLP No.28434/2018

January 2005

Antrix (ISRO's commercial arm) signed a spectrum deal with telecommunications firm Devas to provide satellite-based mobile services. As per the agreement, Antrix was to provide Devas with 70 MHz of the scarce S-Band space segment for its digital multimedia services.

February 2011

ISRO terminated its contract with Devas citing it as a force majeure event. It was alleged that ISRO reserved the spectrum for Devas without seeking prior approval of the Department of Telecommunications and the Wireless Planning and Coordination Wing hinting towards a quid pro quo arrangement.

June 2011

Devas began arbitration proceedings in the International Chamber of Commerce ("ICC") and the Permanent Court of Arbitration (PCA) tribunal. Both ruled against Antrix Corporation. for unilateral termination of contract by Antrix. Irregularities such as financial mismanagement and non-compliance of standard operating procedures were also recorded.

September 2015

Devas moved to Delhi High Court (*Antrix Corporation Ltd. v Devas Multimedia Pvt. Ltd.*) for implementation of the ICC arbitral award of USD 672 million under S. 9 of the Arbitration and Conciliation Act, 1996 ("The Act") before the Civil Court of Bangalore seeking damages from Antrix.

November 2015

Antrix challenged the ICC arbitral award before the Civil Court of Bangalore (S. 34 of the Act) and chose to approach the Supreme Court to start a separate arbitration process against Devas. It contended that Civil Court of Bangalore didn't possess competent jurisdiction over the dispute (S.9 of the Act). The plea eventually failed.

November 2018

The Supreme Court stayed the proceedings that were filed by Antrix under S. 9 and S. 34 of the Act before the Civil Court, Bangalore.

October 2020

Devas approached the U.S. federal court for the Western District of Washington seeking enforcement of the ICC award. The court ordered Antrix Corporation to pay compensation of \$1.2 billion as per the ICC Arbitration Award to Devas for wrongfully terminating the deal.

November 5, 2020

Supreme Court of India stayed the execution of the International Arbitration Award that asked Antrix Corporation to pay compensation to Devas Multimedia. The court further directed that the award shall be kept in abeyance till the Delhi high court decides the application for stay under S. 34 of the Act.

Indian government and ISRO have taken the cover of national security concerns to defend the termination of Antrix- Devas deal, hence the recent halt in the proceedings. It remains to be seen whether public policy concerns will outweigh the enforcement of foreign arbitral awards. The case will play a pivotal role in tracking India's progress in aligning itself with international arbitration courts

RECOMMENDATIONS

ARTICLES

1. **“The Possible Regulatory Gap in Future ICO Class Action Litigation”** by Reno Varghese, Columbia Business Law Review.

Gaps in class action law suits, fraud on the market theory and gaps in existing regulations.

“With increased registration and regulation, ICO offerors will become liable for misstatements and omissions in their registration documents, similar to any other organization that places securities in the market.”

[Read More](#)

2. **“Protection of Harmed Investors: The Missing Link in The Disgorgement Orders of the SEBI”** by Dr. S.N. Ghosh, NALSAR Student Law Review- Volume 14, No. 4

The missing link in disgorgement orders of SEBI

“...since disgorgement has to be followed with restitution, specific provisions in the SEBI (Investor Protection and Education Fund) Regulations, 2009 should be provided wherein the disgorged monies credited to the fund should be utilised for compensating the harmed investors, upon identification.”

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PODCASTS

1. [Back to Basics: Insolvency and Bankruptcy](#)

The definition of ‘creditor’ under the Indian insolvency regime

The definition of ‘creditor’ under the Indian insolvency regime and the interpretation of creditor-debtor arrangements.

By Aparna Ravi, Samvaad Partners

2. [The FinReg Pod](#)

Bringing Back Glass-Steagall

History of the American banking system and the structural separation between banks and the capital markets.

By Art Wilmarth

NEWS UPDATES

Aviation Law

- **Banking regulations for International Financial Services Centres: approved:** The International Financial Services Centres Authority (IFSCA) approved draft banking regulations for banking operations at IFSCs. Banking is a crucial aspect, & major focus area of IFSCs, hence the move is seen as an important step in making them reach the desired potential in a long run.

[Read More](#)

Arbitration Law

- **An end to the Conundrum of Arbitrability Of Landlord:** The Hon'ble Supreme Court in the matter of "*Vidya Drolia & others v Durga Trading Corporation*", overruled the ratio laid down in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, and brought an end to long due controversy on arbitrability of tenancy disputes. The court noted that the tenancy disputes are now arbitrable as the Transfer of Property Act, 1882 does not foreclose arbitration, except for in certain circumstances.
- **Arbitration Ordinance'20: A bitter-sweet move:** The Arbitration and Conciliation (Amendment) Ordinance, 2020 promulgated

recently substituted section 43J of the Arbitration and Conciliation Act, 1996 by stating that the "*qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by regulations*", and additionally, omitted the Eighth Schedule of the Act.

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- **SC on the Noy Vallesina Engineering Spa V Jindal Drugs Limited & Ors case:** A bench comprising Justices Indira Banerjee and S. Ravindra Bhat of the Supreme Court, in *Noy Vallesina Engineering Spa V Jindal Drugs Limited & Ors* case, noted that the proceedings under Section 34 of the Arbitration and Conciliation Act is not maintainable to challenge a foreign award. Before this, the petition was also filed in the Bombay HC challenging the partial award.

[Read More](#)

Competition Law

- **Supreme Court Upholds CCI Order Dismissing Complaints Alleging Anti-Competitive Practices by Uber, Ola:** The Supreme Court has upheld the order of Competition Commission of India dismissing the complaints alleging cartelization and anti-competitive practises. CCI had held that prices were fixed by the

algorithm on the basis of personalized information of riders along with other factors. The second allegation regarding minimum resale maintenance was rejected on the ground that there was no 'resale' in the context of app-based cab services.

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Insolvency Law

• **Insolvency Plea Admitted Against**

Digicable: The NCLT has admitted the insolvency plea filed by Axis Bank against the Mumbai-based DigiCable Network (India). Axis Bank had issued a notice on December 13, 2018, to DigiCable to repay its dues of over Rs 156 crore. However, since the company failed to repay its dues, the lender had approached the tribunal under the Insolvency & Bankruptcy Code (IBC) against the company.

[Read more](#)

• **IBBI proposes statutory route for withdrawal of voluntary liquidation process:**

The Insolvency and Bankruptcy Board of India has put out a discussion paper listing out amendments proposed to allow a company to seek the approval of the adjudicating authority for withdrawal with a special resolution from its board or partners. Companies applying for voluntary liquidation will be able to withdraw at any time after the process has started.

• **Indian banks pursue UK bankruptcy order against Vijay Mallya:**

A consortium of Indian banks led by the State Bank of India

(SBI) returned to the High Court in London for a bankruptcy application hearing against Vijay Mallya. At a virtual hearing before Chief Insolvency and Companies Court (ICC) Judge Michael Briggs, both sides deposed retired Indian Supreme Court justices as expert witnesses on Indian law in support of their arguments for and against a bankruptcy order against Mallya in the UK.

IPR Law updates

• **Spotify launches Plagiarism Risk**

Detector: Spotify has developed a Plagiarism Risk Detector to help artists avoid prosecutions by revealing similarities in songs that have already been published. The Detector uses a graphic user interface to detect plagiarized music. Spotify applied for a patent for this technology, which would allow the program to give the user a similarity value when comparing the song to other songs in the Spotify database.

• **EU court ruling on the scope for 'genuine use' for trademark purposes:**

The European Court of Justice (CJEU) recently ruled in *Ferrari SpA v DU* that the resale of vehicles and their replacement parts amounts to genuine use of a trade mark under Article 19 of Directive 2015/2436. It was held that the use of an EU trade mark for sales of second-hand goods or their spare parts can constitute 'genuine use' for the purposes of European trade mark law.

[Read more](#)

- **ICC Intellectual Property Roadmap:** The 14th edition of the Roadmap of the International Chamber of Commerce (ICC) on Intellectual Property (IP) has been published. The publication reports on issues such as artificial intelligence and product piracy. It discusses how IP will serve as a catalyst for sustainable growth. The Roadmap also examines the emerging challenges faced by innovation-driven companies in the light of COVID-19.

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International Trade Law

- **Anti-dumping duty on stainless steel products:** The Central Board of Indirect Taxes and Customs (CBIC) has extended the levy of anti-dumping duty on imports of cold-rolled flat products of stainless steel of width 600 mm to 1250 mm and above 1250 mm of non-bona fide usage, originating in or exported from China, South Korea, European Union, South Africa, Taiwan, Thailand, and the USA, till 31st January, 2021.

[Read more](#)

- **Revocation of ADD on NTCF:** India has revoked the anti-dumping duty on Nylon Tyre Cord Fabric (NTCF) originating in or being exported from the People's Republic of China and imported into India. The duty was first imposed on NTCF, which is used in tyres to give them strength and flexibility, in June 2015. The Central Board of Indirect

Taxes and Customs did not provide any reason in its notification for discontinuing the duty.

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- **Director General of Foreign Trade notifies amendment:** DGFT has notified an amendment in the procedure for import under the Tariff Rate Quota Scheme (TRQS). Now, Para 2.60 of the Handbook of Procedure (2015-20) has been replaced to update the latest Customs Notification governing imports under TRQS. It reads "Imports under the Tariff Rate Quota Scheme are governed as per the Customs Notification No.28/2020-Customs dated 23.06.2020 of Department of Revenue."

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Securities Law

- **Framework for allotment of units by InvITs:** The Securities and Exchange Board of India (SEBI) has amended the guidelines for preferential issue and institutional placement of units by listed Infrastructure Investment Trusts (InvITs). Now, preferential issue of units shall not be made to the sponsor(s) where any person belonging to sponsor(s) has sold or transferred their units of the issuer during the six months preceding the relevant date.

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- **e-Voting facility:** To increase the efficiency of the voting process, SEBI has enabled e-voting to all the demat account holders, by

way of a single login credential through their demat accounts and websites of Depositories/Depository Participants. Demat account holders will be able to cast their vote without having to register again with the e-voting service providers (ESPs). The proposed process will be implemented in a phased manner.

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- **Debt Securities allotment via UPI:** From January 1, SEBI will provide an option to investors to apply in public issues of debt securities directly through the app or web interface of Stock Exchanges with a facility to block funds through Unified Payments Interface (UPI) mechanism for application value of up to Rs. 2 lakhs. The UPI mechanism can also be used to block funds for application value up to Rs 2 lakhs submitted through intermediaries.

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- **Disclosure of Forensic audit information of listed entities:** SEBI has directed listed companies to make disclosures about initiation of forensic audit to stock exchanges. Listed entities will have to make disclosures about the fact of initiation of forensic audit along with the name of the entity initiating such audit and reasons for the same, if available. The companies will be required to disclose about final forensic audit report along with comments of the management.

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Tax Law

- **Anti-profiteering order against Procter and Gamble:** National Anti-profiteering Authority (NAA) has found Procter & Gamble Home Products, P&G Hygiene and Health Care, and Gillette India guilty of profiteering Rs 181 crore, Rs 2 crore, and Rs 58 crore, respectively by not passing on the GST reduction benefits to customers. According to the NAA, the companies increased the base prices of 1,383 goods to negate the GST reduction.
- **Skill Lotto Solutions Pvt. Ltd. v. Union of India & Ors W.P. (C) No. 961 of 2018:** A 3-judge bench of the SC led by Justice Ashok Bhushan dismissed the writ petition filed by Skill Loto Solutions Pvt Ltd. challenging the levy of GST on lotteries and upheld the constitutionality of the imposition of GST on lotteries, betting, and gambling. It held that “while determining the taxable value of supply the prize money is not to be excluded for the purpose of levy of GST.”
- **Madras Bar Association v. Union of India & Anr. W.P. (C) No.804 of 2020:** SC upheld the validity of Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020 with some modifications. It has ordered constitution of National Tribunals Commission to oversee the appointments to and functioning of the tribunals. The petitioner, Madras Bar

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Association, had challenged the 2020 Rules for violating the principle of separation of powers.

TMT Law Updates

- **EU guidance on Cross-Border Data Flows:** The European Data Protection Board issued guidance for navigating transfer of data out of the European Economic Area (EEA) in light of the Schrems II ruling. It discusses the legal transfer tools that companies can employ, to ensure privacy and data protection when data is transferred out of the EEA.

[Read more](#)

- **Increased transparency for Arogya Setu App:** The Ministry of Electronics and IT (MeitY) has released the backend code of Aarogya Setu app in the open domain to help people understand the functioning of the COVID-19 contact-tracing app. The ministry has encouraged the sharing and reuse of the e-governance application source code to clear the doubts regarding privacy and security of user data.

- **Orissa High Court emphasizes on an individual's 'Right to be forgotten':** The Orissa High Court in the matter of *Subbranshu Rout @ Gugul v. the State of Odisha* (BLAPL No. 4592 of 2020) emphasized on the importance of 'right to be forgotten' (RTBF). RTBF is the right to have personal information removed from publicly available sources, including the internet. Notably, the RTBF was discussed by the court in light of

S.27 of the draft Personal Data Protection Bill, 2019.

[Read more](#)

- **Self-Regulation of Fantasy Sports Platforms: NITI Aayog Report** NITI Aayog has proposed a self-regulatory organization for online fantasy sports platforms in a report. The paper proposed the establishment of a single self-regulatory authority to oversee virtual fantasy sports in the country. The organization would serve as a watchdog for fantasy sports platforms. It also suggested that difference between fantasy sports and gambling must be established.

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- **U.S. Supreme Court to review Computer Fraud and Abuse Act:** The U.S. Supreme Court held oral argument in its first case interpreting the "unauthorized access" provision of the Computer Fraud and Abuse Act (CFAA). The CFAA governs hacking -- or unauthorized access to a computer or network. The case would likely provide for a broader application of the act to protect ethical hackers from finding and disclosing security vulnerabilities. [Read more](#)

CALL FOR COMMENTS



- **SEBI Consultation paper on Review of IGP framework under ICDR, 2018**

The Securities and Exchange Board of India has issued consultation paper on review of Innovators Growth platform (IGP) under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018. In 2015, a new segment named as Institutional Trading Platform (ITP) was introduced by SEBI, with a view to facilitate listing of new age start-ups. Nonetheless, the ITP framework did not evince curiosity and therefore in 2019, SEBI attempted to revive the platform by introducing certain amendments to the ITP framework and renamed it as the IGP. Despite many changes, the IGP could not get any traction and no listing by issuers have so far taken place on IGP platform. Considering the implications of the matter on the market participants including issuer companies and investors, public comments are invited on the same.

The comments should be submitted latest by **January 11, 2021** in the prescribed format.

[Read more](#)

- **Engagement of ‘professionals’ in a Corporate Insolvency Resolution Process**

Insolvency and Bankruptcy Board of India (IBBI) released a discussion paper on April 1, 2018 on regulation of fee payable to insolvency professionals (IPs) and other process costs under Corporate Insolvency Resolution Process (CIRP). IBBI has invited suggestions and comments on the issues discussed in the paper, including whether the elements of costs listed in the paper are comprehensive. Another major issue was that whether the elements of costs / fee are classified / grouped appropriately and if any modifications are needed for the same. Comments are also invited on whether the elements of the insolvency resolution process cost (IRPC), including fee payable to IPs and other Professionals, should be regulated.

The comments can be submitted electronically by **8th January, 2021** in the prescribed format.

[Read more](#)

CALL FOR COMMENTS



- **Draft Aircraft Leasing Regulations**

By the end of 2022, India is expected to become the world's third biggest aviation market. In January 2019, a study, 'Project Rupee Raftar,' was released by India's Ministry of Civil Aviation, which offered a blueprint for the establishment of an aircraft financing and leasing industry in India. The report established the International Financial Services Centre (GIFT City) for the country's eco-system growth of aircraft leasing and financing. Aircraft leasing is a relatively young industry in India and regulations related to it are different across various financial centers, in view of this IFSCA has prepared draft regulations for Aircraft Leasing which includes the eligibility criteria, the registration process, the operational requirements among other regulations and to get inputs from stakeholders as well as public comments.

Public comments can be submitted by **January 11, 2021**.

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RECENT ON THE RFMLR BLOG

- **THE GOOGLE/FITBIT ACQUISITION: A WOLF IN SHEEP'S CLOTHING?**



This post is authored by Bodhisattwa Majumder, a 5th-year student of B.A. LL.B. (Hons.) at the Maharashtra National Law University, Mumbai.

- **COMMENTARY ON THE RBI'S REGULATORY SANDBOX FOR FINTECH**



This post is authored by Chinmayanand Chivukula, a fifth-year student of B.A. LL.B. (Hons.) at the Symbiosis Law School, Pune.

- **POTENTIAL LAWSUIT AGAINST GOOGLE: CORRECTING THE ANTITRUST REGIME IN A DATA-DRIVEN INDUSTRY**



This post is authored by Kshitij Sethi, a third-year student of B.A. LL.B. (Hons.) at Dr. Ram Manohar Lohiya National Law University, Lucknow.

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RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

ISSN(O): 2347-3827

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