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Bankruptcy Law in the backdrop of Pandemic

Siddharth Addy & Aditya Chakraborty

ABSTRACT

The times are turbulent and the tide is apparently in a perpetual vigour. Whilst the planet drags itself from the dark clutches of a virus, the economy slithers with a dead pace. Nationwide lockdown has put a halt to a greater chunk of commercial activities and most business houses are barely clinging on the verge of bankruptcy. MSMEs are a special victim of this pandemic. The researches have endeavoured to shed light on the national as well as the international challenges posed by Covid-19 in the backdrop of recent amendments brought to the Insolvency and Bankruptcy Code. With a brief introduction to the origin of the new-born Code and its current state in recent times, the researchers have analysed the regulations brought by the government and portray the consequences of the same on the market. Additionally, the international development with regards to Bankruptcy Code, has been dealt with. The paper further explores with force majeure, layoff and furlough in view of bankruptcy and insolvency.

Keywords: The Insolvency and Bankruptcy Code, Force Majeure, Layoff, Furlough, MSME

INTRODUCTION (BRIEF HISTORY OF IBC)

The Insolvency and Bankruptcy Code, 2016 (IBC) is the bankruptcy law of India which endeavours to consolidate the existing framework by creating a law, singular in nature, for insolvency and bankruptcy. It is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.[1]

The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It was passed by Lok Sabha on 5 May 2016 and by Rajya Sabha on 11 May 2016.[2]The assent of the President of India was received on 28 May 2016. Certain provisions of the Act have come into force from 5 August and 19 August 2016. The bankruptcy code is deemed to be a singular solution for resolving issues related to insolvencies which previously was a long and tedious process lacking economically viable arrangement. The code aims to protect the interests of small investors and on the larger perspective increases ease of doing business.

Replacing an ordinance, on 13th March after having received the assent of the president, the Code sought an amendment i.e. The Insolvency and Bankruptcy Code (Amendment) Act, 2020to the Insolvency and Bankruptcy Code, 2016 and was deemed to have come in force on the 28th day of December, 2019.[3]

Finance Minister, Smt. Nirmalara Sitharaman said the government was taking care of the interest of home buyers and the requirement of minimum number of home buyers in the IBC has been included to avoid "frivolous litigations".

CHALLENGES POSED BY PANDEMIC

The Covid-19 pandemic is not only the most serious global health crisis since the 1918 Great Influenza (Spanish flu), but is set to become one of the most economically costly pandemics in recent history.[4] Experience with past epidemics provides some insights into the various avenues through which economic costs could arise, both in the short term and the longer term. Having

[1]The Insolvency and Bankruptcy Code, 2016
[2]"LokSabha passes bill to fast track debt recovery", *The Economic Times*, 2 August 2016
[3] The Insolvency and Bankruptcy Code (Amendment) Act, 2020
[4] Frederic Boissay and PhurichaiRungcharoenkitkul, Macroeconomic effects of Covid-19: an early review, BIS Bulletin No. 7, 17 April 2020

said that, Covid-19 differs from previous episodes in several important ways. The seemingly globally synchronised lockdowns and trauma of financial markets reinforce one another into one unprecedented economic halt. Indubitably, Covid-19 global recession is unique

NATIONAL ECONOMIC SLOWDOWN

The coronavirus pandemic occurred at a time when the world was already sailing through troubled waters – rising crude prices, slowing economies, depreciating currencies, increasing trade tensions, loss of employment, work visas, and so on. It is now widely acknowledged that the scale of the economic damage caused by the Covid-19 pandemic will be far greater than that caused by the 2008 global financial crisis, globally as well as for India.[5]

The pandemic has led to colossal supply chain inefficiencies, decreased consumer demand, stunted economic and industrial activity,crashed global stock markets and brought about drastic changes in lifestyles and social behaviour. As the country was already undergoing its longest spell of GDP decline in almost three decades, now stands far from flattening the curve. The nationwide lockdown is estimated to have wiped off Rs 7-8 lakh crore from the Indian economy, according to Centrum Research.Asian Development Bank (ADB) sees India's economic growth slipping to 4% in FY21[6], while Fitch Ratings puts its estimate for India's growth at 2 per cent in FY21, further Moody's Investors Service has slashed its estimate of India's GDP growth during 2020 calendar year to 2.5 per cent, from an earlier estimate of 5.3 per cent.[7]The UN slashed India's projected growth rate to 1.2 per cent in 2020 and forecast that the global economy will contract sharply by 3.2 per cent as the COVID-19 pandemic paralyses the world, sharply restricting economic activities, increasing uncertainties and unleashing a recession unseen since the Great Depression of the 1930s.[8]

Air of considerable uncertainty looms around about the duration and depth of the crisis but clearly dealing with the aftermath of Covid-19 will be a major economic policy challenge over the next few years.

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[5]Harsh Vardhan and RajeswariSengupta, Covid-19: Policy Challenges And Traps In Restarting The Economy, BloombergQuint, https://www.bloombergquint.com/coronavirus-outbreak/covid-19-policy-challenges-and-traps-in-restarting-indias-economy

[6]Asian Development Bank triples covid19 response package to $20 billion, Deccan Chronicle, Apr 13, 2020, https://www.deccanchronicle.com/business/economy/130420/asian-development-bank-triples-covid19-response-package-to-20-billion.html

[7]GautamAdani says Indian economy will bounce back from lows inflicted by COVID-19, Financial Express, April 15, 2020, https://www.financialexpress.com/economy/gautam-adani-says-indian-economy-will-bounce-back-from-lows-inflicted-by-covid-19/1929369/

[8] India's growth rate projected to slow to 1.2% in 2020: UN report, Financial Express, May 13, https://www.financialexpress.com/economy/coronavirus-covid19-pandemic-indias-growth-rate-projected-to-slow-to-1-2-in-2020-un-report/1958261/

As an interim measure to support the slaking economy, PM Modi announced aRs 20 lakh crore package while addressing the nation on the coronavirus situation. Emphasis on self-reliance and further clarification by the Finance Minister reveals the criticaljuncture, in terms of economy and commerce, the country finds herself in.

In essence, business is nevertheless bound to suffer. With stunted daily operations and lack of labour, in association to efficient supply line and dip in demand, it is highly likely that many enterprises will receive a fatal blow so much so to handicap it. The same will include aspiring start-ups.

INTERNATIONAL ECONOMIC REPERCUSSION

Since the COVID-19 outbreak was first diagnosed, it has spread to over 190 .The pandemic is having an inescapable impact on global economic growth. Estimates so far indicate the virus could trim global economic growth by as much as 2.0% per month if current conditions persist. Global trade could also fall by 13% to 32%, depending on the depth and extent of the global economic downturn.[9] The full impact will not be known until the effects of the pandemic peak. This report provides an overview of the global economic costs to date and the response by governments and international institutions to address these effects.

The International Monetary Fund (IMF) estimated that government spending and revenue measures to sustain economic activity adopted through mid-April 2020 amounted to $3.3 trillion and that loans, equity injections and guarantees totalled an additional $4.5 trillion.[10]While the level of economic effects will eventually become clearer, the response to the pandemic could have a significant and enduring impact on the way businesses organize their work forces, global supply chains, and how governments respond to a global health crisis.[11]

In response to growing concerns over the global economic impact of the pandemic, G-7 finance ministers and central bankers released a statement on March 3, 2020, indicating they will "use all appropriate policy tools" to sustain economic growth.[12] The Finance Ministers also pledged fiscal support to ensure health systems can sustain efforts to fight the outbreak.

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[9] Global Economic Effects of COVID-19, Congressional Research Service, May 1, 2020,

[10] Global Financial Stability Report, International Monetary Fund, April 14, 2020. P. 2;

[11] Rowland, Christopher and Peter Whoriskey, "U.S. Health System is Showing Why It's Not Ready for a COVID-19 Pandemic," Washington Post, March 4, 2020. https://www.washingtonpost.com/business/economy/the-us-healthsystem-is-showing-why-its-not-ready-for-a-COVID-19-pandemic/2020/03/04/7c307bb4-5d61-11ea-b29b9db42f7803a7_story.html

[12] Statement of G-7 Finance Ministers and Central Bank Governors, March 3, 2020. https://home.treasury.gov/news/ press-releases/sm927. Long, Heather, "G-7 Leaders Promise to Help Economy as COVID-19 Spreads, But They Don't Announce Any New Action," Washington Post, March 3, 2020. https://www.washingtonpost.com/business/2020/03/ 03/economy-COVID-19-rate-cuts/.

The international havoc has stirred up the policy think tanks. France, Italy, Spain and six other Eurozone countries have argued for creating a "coronabond," a joint common European debt instrument. Similar attempts to create a common Eurozone-wide debt instrument have been opposed by Germany and the Netherland, among other Eurozone members.COVID-19 could trigger a wave of defaults around the world. In Q3 2019—before the outbreak of COVID-19—global debt levels reached an all-time high of nearly $253 trillion, about 320% of global GDP.[13]
The decline in industrial activity has reduced demand for energy products such as crude oil, causing prices to drop sharply, which negatively affects energy producers, renewable energy producers, and electric vehicle manufacturers, but generally is positive for consumers and businesses.
Possibilities of foreign companies receding from the Indian market, in the wake of virus addled lacklustre economy, remain high. Insolvency and Bankruptcy Code (IBC) was enacted at break-neck speed, and probably because of the urgency, does not include anything substantial on international insolvency. This generates a dark arena of confusion and legal efficacy for the future. The discourse over cross border or international insolvency framework has significantly gained traction with the turmoil at Jet Airways.[14] Similarly any business having international operations will naturally have assets jurisdictions. Questions will ordinarily arise on the event of bankruptcy. Essentially jurisdiction of Indian Courts and cooperation and coordination among adjudicating authorities among different countries, like the NCLT cooperating with US Bankruptcy Court, will become the problem of the hour.
This immensely difficult to implement and has never been done in India, let alone in a time like this. It's difficult to imagine an Indian court, especially the higher judiciary, coordinating and cooperating with a foreign court and recognising it, in the same litigation.[15] Therefore, exhaustive changes in laws with respect to the jurisdictional rules in clearly worded terms is needed, along with commiserate changes in the attitude of the courts.

FORCA MAJEURE AS AN ACTIVE BACKDROP IN PANDEMIC

A frustrated contract is one which is incapable of being performed, without fault of either party, due to an unforeseen event (or events). This results in the obligations under the contract being radically different from those contemplated by the parties to the contract initially. In the absence

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[13]EmreTiftik, Khadija Mahmood, JadrankaPoljak, and Sonja Gibbs, "Global Debt Monitor: Sustainability Matters," Institute for International Finance, January 13, 2020.This includes debt held by governments, financial institutions, nonfinancial institutions, and households.
[14]Raghav Pandey, International insolvency in India has a long way to go, Money Control, May 11, 2020, https://www.moneycontrol.com/news/economy/policy/international-insolvency-in-india-has-a-long-way-to-go-4184921.html
[15] Ibid

force majeure clause specified in a contract, the parties normally resort to the doctrine of frustration which is embodied in Section 56 of the Indian Contract Act, 1872.

Section 56 is based on the maxim "les non cogit ad impossibilia" which means that the law will not compel a man to do what he cannot possibly perform.

"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".[16]

An applicant may be able to invoke rights of termination or suspension under Force Majeure provided the force majeure clause allows such suspension/termination, if the clause specifies disease, epidemics, pandemics, quarantines or government intervention/declaration as force majeure events. Additionally, presence of terminology such as 'extraordinary circumstances beyond control of the applicant' or similar may also be examined to trigger the clause for outbreak of Covid-19. In ***SatyabrataGhose v. MugneeramBangur and Co. and Energy Watchdog v. CERC***[17], the apex court had applied the following test to determine validity of Force Majeure events:

- Whether the event qualifies as force majeure under the contract?
- Whether the risk of non-performance was foreseeable and able to be mitigated?
- Whether performance is truly impossible?[18]

Force Majeure can be invoked in Insolvency and Bankruptcy Code. In that case, by invoking force majeure, companies can be prevented from moving against corporate debtor companies under the Code. Evidently this can potentially support the business and prevent them going into an abyss of insolvency during these turbulent times.

The Government prior to raising the threshold under the Code, had already issued an Office Memorandum dated 19.02.2020 with a clarificatory Office Memorandum dated 20.03.2020 covering the current situation of the country wide lockdown due to the pandemic under the "*force majeure*" clause (act of God) of the subsisting contracts.[19]

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[16]Section 56 of the Indian Contract Act, 1872.
[17]1954 AIR 44, 1954 SCR 310
[18]https://indiankanoon.org/doc/1214064/
[19]OM No. 283/18/2020 and OM No. F/18/4/2020-PPD, Ministry of Finance, Department of Expenditure.

LAYOFF AND FURLOUGH AS A POTENTIAL HINDRANCE

A furlough is a mandatory temporary leave of absence whereby the employee is expected to return to work or to be restored from a reduced work schedule. Furloughed employees may be required to take a certain number of unpaid hours off over a number of weeks, take a specified number of unpaid days or hours throughout the year, or take a single block of unpaid time off.

A layoff is detachment from employment due to a lack of work available. It apparently describes a condition where the employee is not at fault. The employer may have reason to believe to be able to recall workers back to work from a layoff such as a restaurant during the pandemic, and, for that reason, may call the layoff "temporary," although it may end up being a permanent situation.

Covid-19 has forced many such businesses and organisations to either furlough or layoffemployees. With ease brought to the IBC, by revising the threshold amount for initiating corporate insolvency procedure from One lakh to One crore,[20], it has, to a certain extent, enabled corporate to diminish layoff and furlough, thereby protecting some from unemployment.

RECENT DEVLOPMENT IN BANKRUPTCY CODE TO FIGHT PANDEMIC

With the introduction of Covid – 19, Humanity have largely been endangered by the unknown virus and as an measure to contain the spread of the virus, government around the globe has introduced lockdown, more than 96% of the world has come to a standstill halt.[21] This has severely impacted various business organization around the world specially those who were new to the industry and were trying to settle their establishments.

As the spread of contamination increased, the operational activities were impacted to great extent even though the overhead cost of the organization remain the same, this therein created a great catastrophic situation in the organization as it lead to insolvency of various corporate organization. This is when the government came to the rescue of the business organization by making certain major amendments in the *Insolvency and Bankruptcy Code.*

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[20] Insolvency and Bankruptcy Code 2016, Section – 4,(2020), https://ibbi.gov.in//uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf

[21] This is how the Coronovirus is going to affect the travel and tourism industry, World Economic Forum(9th may,2020),https://www.weforum.org/agenda/2020/03/world-travel-coronavirus-covid19-jobs-pandemic-tourism-aviation

DEVLOPMENTS IN INDIAN INSOLVENCY AND BANKRUPTCY CODE

The 1st amendment in Insolvency and Bankruptcy Code was wef 24.03.2020 the notification revised the threshold amount for initiating corporate insolvency procedure from One lakh to One crore,[22] however for non-corporate firm the minimum threshold i.e. One thousand remain the same. With this in mind, the companies can now focus on stabilizing the business operations rather than being under the constant fear of inevitable insolvency.This amendment may shift the burden of payment from corporate debtor to Personal Guarantor; however it will provide a sight of reliefs for MSME's (the limitation period for filing the application for insolvency process in three years from the date of default)[23]. With this amendment of *"revised threshold amount"* in order to initiate the Corporate Resolution Process the Financial creditors may be able to file on behalf of the other aggrieved financial Creditor[24] to meet the requirement of the threshold value, however the operational creditors has to file on behalf of the individual capacity and combined debt cannot be filed by the operational creditor.

The 2nd amendment in Insolvency and Bankruptcy Code was via Ordinance which stated temporary suspension of IBC provisions which triggers fresh insolvency provisions[25] i.e. section 7, 9 and 10. These provisions will remain suspended for six months and may increase upto one year based on the economic outlook of the nation. This move would act as a step towards providing relief to the business organization in the pandemic.

The 3rd amendment in Insolvency and Bankruptcy Code was w.e.f 29.03.2020; this notification amended the regulation and inserted regulation 40(C)[26] which provides relaxation in timeline for initiating Corporate Insolvency Resolution Process, therein 180/270 days would get extended by virtue of the exclusion of lockdown period, this amendment would provide a great relaxation to business activity and will also maintain the spirit of the court, the main intention *was to rule out frivolous application.* For the existing cases which are at hand those cases which were less than one crore will not hold good therein a demand notice will be served and the application will not be filed, those application which have been filed and are pending for admission a window time of

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22 Insolvency and Bankruptcy Code 2016, Section – 4,(2020), https://ibbi.gov.in//uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf

23 Indian Insolvency Law respond to covid 19 pandemic, Cyril AmarchandMangalas(9th may,2020), https://corporate.cyrilamarchandblogs.com/2020/03/indian-insolvency-law-responds-to-the-covid-19-pandemic/

24 Insolvency and Bankruptcy Code 2016, Section – 7(1) (2020)

25 Govt decided to suspend upto 1 year IBC provision triggering Fresh cases: Report, The Economic Times(9th may2020),https://economictimes.indiatimes.com/news/economy/policy/govt-decides-to-suspend-up-to-1-year-ibc-provisions-that-trigger-fresh-insolvency-proceedings/articleshow/75323344.cms?from=mdr

26 Period of Lockdown to be extended under IBC if activity in relation to be CIPR not completed in lockdown, Bar and Bench (9th may,2020), https://www.barandbench.com/news/litigation/period-of-lockdown-to-be-excluded-from-timeline-under-ibc-if-activity-in-relation-to-cirp-could-not-be-completed-due-to-the-lockdown

thirty days shall be provided for ratification to meet the revised threshold amount, lastly those application which were filed and admitted will remain unaffected. [27]

The 4th amendment in Insolvency and Bankruptcy Code was it extended payment of fees of Insolvency Professionals till 30.06.2020; this step was to ease out the business activity and to provide a little relief to insolvent business venture starving to live in the market.

The Hon'ble Supreme Court passed a *suomoto* order extending the limitation period for all matter from 15th March 2020 till further order; it will act as a relief to the litigant for whom the limitation period was to shut down in the lockdown period.[28]

The summary of changes in Insolvency and Bankruptcy are listed below with a help of a table, this amendment are made by government as a step towards tackling the Pandemic.

Summary of Timeline: -

Numbering	Particular	Definition	Timeline	Relaxation provided (Yes/No)
1.	Section 16(1)	Public Announcement for intention to start Corporate insolvency resolution process	T + 3	Yes
2.	Section 12 &Reg 40	CIRP period extension	T+180 (+90)<330	No
3.	Section 15(2)(C)/ Reg6(2)(C) & Section 12(1)	Submission of Claims	T + 14(allowed till T + 90 by the virtue of Reg 12 (2)	Yes
4.	Reg 13(1)	Verification of Claims	T + 21	Yes
5.	Section 21 (6A)(B)/Reg 16 A	Application for Appointment of AR	T + 23	Yes
6.	Reg 17(1)	Report verifying Committee of Creditor(COC)	T + 23	Yes

[27]Covid 19 Relaxation in IBC, Mondaq (10th May 2020), https://www.mondaq.com/india/financing/911538/covid-19-relaxations-in-the-ibc

[28]*Order dated March 23, 2020 in Suo Moto Writ Petition (Civil) Nos. 3/2020*

7.	Reg 22(1)	1st meeting of COC	T + 30	Yes
8.	Reg 36(A)	Submission of proof of claim in respect to liquidation under IBC(FORM G)	T + 75	Yes
9.	Reg 36(B)	Evaluation of member	T + 105	Yes
10.	Reg 39(4)	Submission of COC (approved Plan)	T + 105	Yes

DEVLOPMENT IN BANKRUPTCY LAW AROUND THE GLOBE

There have been several developments in Insolvency Laws across the nations to fight the Covid 19 pandemic and various nations have made significant development to fight the crises posed by the Covid 19. [29]

In *Australia,* government has enacted new legislation which has brought significant changes in insolvency laws relevant to all business activities as a response to the challenge posed to Covid 19 pandemic. The following development has been made in insolvency law i.e. Safety Harbor for Insolvent Trading, Increased in Dollar Threshold and extension of timeline for filing the application, enactment of new regulations and guideline, Statutory Lodgment and reporting Obligations. [30]

In *Belgium*, government has introduced Moratorium.

In *China,* there have been no significant changes in the Insolvency laws to deal with the pandemic however several laws and regulations have been initiated by the government authority and guideline initiated by PCR to ease out the business activities and helps to survive the economic downturn.

In *France*, The goverment instituted state health emergency, which takes all the measures to authorize the government to fight the covid 19 pandemic it involved various amendment in Insolvency laws i.e. Fixation of date of cessation of payment, Extension of Conciliation period, suspension of two months deadline period and prioritizing electronic mode of communication to carry out official activities.

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[29] Impact of Covid 19 on Insolvency Law, Squire Patton Boggs(9th May,2020), https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/04/global-impact-of-covid19-on-insolvency-laws/global-impact-of-covid19-on-insolvency-laws.pdf

[30] Indian Insolvency Law Respond to Covid 19 Pandemic, Amarchand and Mangaldas Blogs(10th may,2020), https://corporate.cyrilamarchandblogs.com/2020/03/indian-insolvency-law-responds-to-the-covid-19-pandemic/

In *Italy*, The government being in state of health emergency has made significant changes in the Insolvency law to fight the pandemic. It involved all application filed between March 9 and June 20, 2020 will be dismissed, No new Insolvency proceeding will be allowed, Interim measure concerning Capital restructure, concerning accounting standard and Company financing are taken.
In *Spain*, the obligation to file Bankruptcy has been suspended.
In *United Kingdom's*, The measures announced in the UK include a temporary relaxation of the laws around wrongful trading for a period of three months and a temporary ban on winding up petitions, but also permanent changes to the UK's insolvency regime, including a new moratorium, protection of supplies and a new restructuring plan.

CONCLUSION

With the changes introduced in Insolvency and Bankruptcy Code timely amendment made by the government came as a swift response towards fighting covid 19 pandemic, It is assumed that this changes backed by the government would come as an relaxation stimulus for industries and will provide easing out of business activities.

However, a more holistic approach needs to be adopted to overcome the crises. We note below following changes which could be adopted by the government to deal with the crises efficiently.

1. ***Restructuring of Companies:*** Those cases which are considered for restructuring under the guideline of Reserve Bank of India subject to which inter – Creditor agreement to agree on the restructuring term. The guideline states implementation of restructuring within 180 days. Therefore, the Indian government needs to look for extension of time for cases where restructuring have been agreed upon and is pending implementation.
2. ***Super Priority Financing:*** Recently there has been an amendment in the Insolvency and Bankruptcy code which would provide the government the ability to identify certain debts of a company which would qualify a "Super Priority Loan"[31]. Also certain banks[32] are offering Covid – 19 emergency funds to borrower to tide over the crises. The Indian government should consider super priority financing status to provide emergency line of credit.
3. ***Relaxation in Insolvency Resolution Process:*** Relaxation of IRP By Insolvency and Bankruptcy Board of India could play as a key role to fight the Covid 19, Every activity in Corporate Insolvency Resolution process is time bound, however in an unprecedented situation it may not be possible for Insolvency Professional to continue to conduct process, therein providing relaxation in the conduct of Insolvency Resolution Process will play as a pivotal role.

The unprecedented tough times have posed various challenges in frontline which have impacted the business industry and also significantly impacted the insolvency regime therein in tough times solidarity, unity and integrated efforts by various institution would help to overcome the crises and in this tough times flexibility in conducting the resolution process in required in parlance with maintaining the spirit of the court.

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[31] Insolvency and Bankruptcy Code 2016, Section- 5(15),(2020)

[32]Covid 19 Specific Personal Loan, Financial Express(10th may,2020), https://www.financialexpress.com/money/loans-check-out-covid-19-specific-personal-loans/1944822/